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I. INTRODUCTION

A romantic view of criminal law suggests that an accused may only be convicted of a crime after a trial before a jury of his peers. In reality, however, the vast majority of criminal cases are resolved by guilty pleas.[1] Therefore, it is not surprising that the plea bargain system is the subject of much debate and controversy.

While practitioners commonly perceive plea bargaining as effectuating justice, numerous commentators have called this proposition into question. Some scholars argue that plea bargaining results in criminals receiving undeserved leniency, while others argue that plea bargaining subjects defendants to unjustifiable pressure to forego their constitutional right to a jury trial. Scholars have also attacked plea bargaining on the ground that prosecutors wield too much power over defendants and coerce them into accepting plea agreements which might be unfair. Some commentators add that these defendants are too often deprived of effective assistance of counsel, as the very nature of plea bargaining invites inadequate representation. Along with prosecutors and defense attorneys, judges are often implicated in the plea bargaining debate as well, with many a scholar insisting either that the court has prescribed insufficient safeguards to ensure guilty pleas are just or that trial judges do not scru-

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1. *See* UNITED STATES DEPT. OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 419,423 (Ann L. Pastore and Kathleen Maguire, eds., 1999).

tinize guilty pleas enough to determine whether they satisfy enunciated constitutional mandates.

Indeed, any discussion about the desirability of the plea bargain system must scrutinize the roles of prosecutors, defense attorneys, and judges. This article will discuss what some commentators have referred to as the "innocence problem" in plea bargaining—the question of whether and why innocent defendants might plead guilty—and do so by discussing the ways in which prosecutors, defense attorneys, and judges might contribute to the problem rather than alleviate it.

Part II will discuss the prosecution's role in plea bargaining. This section will begin with a description of the prosecutor's incentives to plea bargain, followed by the factors influencing the decision to enter into a plea agreement. This part also will argue that the incentives to a plea bargain are powerful enough to blind the prosecutor to the defendant's actual culpability.

Part III will scrutinize the role of the defense counsel, delineating the pressures which lead defense attorneys to plea bargain most cases. Following a description of a defense attorney's career-long indoctrination of presuming to plea bargain most of their cases, the defense's role in contributing to the innocence problem will be considered. Specifically, arguments will be made that even innocent defendants may plead guilty; such inclination to plead guilty derives from a combination of factors including their attorney's aversion to trial and the attractiveness of the prosecution's inducements.

Part IV will analyze the role of the judge in the plea bargain process. This section will include a historical description of the role of the judge and a discussion about the structural incentives that encourage judges to allow plea bargaining. It will be argued that these incentives increase the possibility that the innocent defendant will be incarcerated.

Part V offers several suggestions for reforming the plea bargain system, addressing particular problems discussed in this article. These reforms do not call for a sweeping change of the system; rather they are plausible and manageable modifications that would reduce the opportunity for and likelihood of convicting innocent defendants.

II. THE PROSECUTION'S ROLE

The absence of private law enforcement in the United States has left the prosecutor as the sole figure to enforce the laws. With this singular power comes the heavy burden to keep the streets free of criminals and the innocent out of prison.[2] To err in performing either of these functions

2. *See* Berger v. United States, 295 U.S. 78, 88 (1935) (stating "[the prosecutor] is in a pe-

has potentially disastrous results: the innocent are cast into prison and stripped of their liberties while the guilty remain free, having the opportunity to commit another crime.

To which side should the prosecutor err? If the guilty remain free, they infect society, thwarting the purpose of the justice system. The innocent in prison, however, have their liberties infringed and have been unjustly removed from society, which challenge the justice system's legitimacy. Proclaiming a belief in the presumption of legal innocence, yet maintaining a conviction of factual guilt from the time of the arrest, the prosecutor enjoys various safety procedures, both pretrial and post trial, to sort the innocent from the guilty. The pretrial procedures act as the initial screening phase for the prosecution to determine whether he believes the defendant is innocent or guilty. The formal culmination of these procedures is the arraignment, where the defendant is not required to enter a plea bargain without fear of repercussion (except trial).[3]

In an ideal world, the guilty defendant would realize that accepting a plea bargain would allow him to receive a lesser sentence while the innocent defendant's case would be dismissed or, if going to trial, would be acquitted.[4] Unfortunately, the system has various cogs that impede the plea bargain process. As a trial does not guarantee conviction or acquittal, a guilty defendant may be willing to take a chance at trial, which is his right, while the innocent defendant may decide to enter into a plea bargain, believing the evidence against him is insurmountable.

To encourage the defendant to forego his right to trial, the prosecutor must offer powerful incentives: reduction or dismissal of the charges or a reduction of sentence.[5] The result of our system is that defendants face powerful incentives to plead guilty—even to crimes they did not commit—instead of risking conviction, and potential time in prison.

A. Prosecutorial Incentives to Entering into a Plea Bargain

The prosecutor has many incentives to enter into plea bargains.[6] When a prosecutor enters into plea bargains, he is able to handle more cases; conviction rates soar;[7] and most importantly, more criminals—if

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culiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer").

3. *See* FED. R. CRIM. P. 11(e)(5). Pleas may be entered with good cause after trial commences up until the verdict has been rendered.

4. *See infra* Part II.A .

5. *See* FED. R. CRIM. P. 11(e)(1)(a)-(c).

6. *See generally* Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968);

7. *See* Pastore, *supra* note 1, at 419, 423, Table 5.21, 5.25. Convictions by plea were 91 percent percent and 87 percent in state and federal proceedings, respectively.

they are out on bail or otherwise would not be in jail—are more quickly removed from the streets.[8] The public confidence in the government rises accordingly,[9] and, less altruistically, the prosecutor advances his own career through a higher conviction rate.[10] These incentives, coupled with the near absence of disincentives, lead to the logical result that prosecutors frequently try to enter plea bargain agreements.

1. Efficiency

Plea bargaining's prime incentive to the prosecutor is an increase in the total efficiency of the criminal justice system.[11] Efficiency is achieved through maximal conviction of the guilty and dismissal of charges against the innocent. However, efficiency is not the most important aspect for entering into plea negotiations in a particular case, but efficiency is the overriding cause for entering plea negotiations in general.[12] Hundreds of thousands of criminal cases are processed each year.[13] In 1998, in the federal district courts alone, 69,769 cases were filed, and 60,958 entered into plea agreements.[14] Deprived of the plea bargaining option to dispense with the vast majority of these cases, and without another legislatively permitted alternative to a jury trial, the legal system would crumble under the weight of the cases requiring juries and judges.[15] Furthermore, the prosecutor's failure to enter into plea bargains would be seen as a direct cause of disruption in citizens' lives because an increase in trials would result in increased taxes and more frequent jury duty. Plea bargaining minimizes these consequences by reducing the time a prosecutor spends on a case. Less time spent on each case means that more cases can be handled. For lightening the prosecutor's burden and contributing to overall efficiency, defendants receive reduced sentences when they enter pleas. The law has recognized these reduced sentences as being in accordance with justice.[16]

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8. Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CALIF. L. REV. 1471, 1484 (1993)

9. *See, e.g.*, David B. Kopel and Joseph Olson, *Preventing a Reign of Terror: Civil Liberties Implications of Terrorism Legislation*, 21 OKLA. CITY U. L. REV. 247, 343 (1996). *But see* Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 71 (noting that public trials increase public confidence).

10. Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1988 (1992).

11. *See* Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 308-22 (1983).

12. *See* Alschuler, *supra* note 6, at 52-58; *see also* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 561-64 (4th ed. 1992).

13. *See*, Pastore, *supra* note 1, at 419, Table 5.21.

14. *Id.*

15. *See* Warren E. Burger, *The State of the Judiciary - 1970*, 56 A.B.A. J. 929, 931 (1970).

16. *See* HERBERT M. KRITZER, THE JUSTICE BROKER: LAWYERS AND ORDINARY LITIGATION

2. Convictions

Convictions are guaranteed by a plea bargain. Although trials are essential to our system and protected by the Constitution,[17] the chances for an acquittal, a mistrial, a hung jury, jury nullification, a witness's refusal to testify, and the loss of evidence, all contribute to the prosecutor's hesitation to go to trial. Each one of these possible results indicate that the prosecutor has misallocated his resources and time in deciding to prosecute the case.[18]

3. Assistance

Frequently, the prosecutor will enter into negotiations with a defendant with the hope of gaining information necessary to indict and convict other criminals. The prosecutor must then balance whether it is prudent to offer a deal to the cooperator in exchange for evidence to convict the defendant guilty of a graver crime. The plea bargain struck often provides that the concessions offered to the defendant will reflect the value of the evidence after it has been proffered.[19]

4. Finances

The prosecutor is influenced by financial motives. While supported by government financing, his financial resources are not infinite.[20] Limited financing encourages the prosecutor to offer plea bargains. If the defendant has rejected the offer, the prosecutor must consider whether he is willing to expend resources on a trial.

B. Considerations in Bargaining

The prosecutor bases his decision on whether to proceed to trial or enter into a plea arrangement upon many factors: the gravity of the crime, the defendant's criminal record and characteristics, the victim, and the evidence.[21]

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16 (1990).

17. *See* U.S. CONST. art. III, amend. VI.

18. *See* ROBERT A. CARP & RONALD STIDHAM, JUDICIAL PROCESS IN AMERICA 177 (3d ed. 1996). Even in the case of a conviction, the prosecutor has wasted resources in not securing the conviction through a plea.

19. *See, e.g.*, United States v. Ammidown, 497 F.2d 615 (D.C. Cir. 1973).

20. Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CALIF. L. REV. 1471, 1495 (1993).

21. For a far more comprehensive list of factors, see William F. McDonald, Henry Rossman, & James Cramer, *Plea Bargaining Decisions*, *in* 11 SAGE CRIMINAL JUSTICE SYSTEM ANNUALS, THE PROSECUTOR 170 (William F. McDonald, ed. 1979).

1. The gravity of the crime

The severity of the crime provides the obvious starting point for the prosecutor and the defendant in plea negotiations. The exact nature of the crime contributes to the bargaining power of the prosecutor in negotiations—the more horrible the crime, the longer the sentence, and the greater likelihood of a lesser included offense. All of these elements provide leverage for the prosecutor to use against the defendant.

Furthermore, the more heinous the crime, the greater the public demand for the criminal to be apprehended and convicted. The public may even perceive an acquittal at trial as the prosecutor's failure to present the case competently rather than the actual innocence of the alleged perpetrator. The impetus to bargain is then not only for efficiency but also a way for the hesitant prosecutor to ensure conviction.

2. Adequacy of punishment

To preserve the integrity of the justice system and the separation of powers, it is important that the prosecutor consider the adequacy of punishment when deciding whether to enter into a plea agreement. The prosecutor must not bargain away adequate punishment of a criminal in order to ensure conviction through a plea bargain,[22] nor must he usurp the legislative power in defining what measure of punishment is adequate.

The prosecutor must recognize that an offer of reduced time is not always persuasive; rather it should be compared with the sentence if the defendant were to be convicted by a jury. Since the more heinous crimes have longer sentences imposed upon conviction, a prosecutor faces the dilemma of having to reduce the sentence by a greater amount than he would if the crime did not carry a long sentence to make an offer attractive to a defendant.[23]

When considering whether to enter into a plea bargain, the federal prosecutor is supposed to obtain a bargain for the most serious, readily

22. Especially relevant in this consideration are the two extremes, probation and the death sentence. Both powerfully influence a defendant's decision in assessing the risks of going to trial. *See* Hynes v. Tomei, 706 N.E.2d 1201 (N.Y. 1998) (striking down certain plea provisions of the New York capital punishment statute, which imposed death penalty only on those who asserted innocence and proceeded to trial, as they needlessly encouraged guilty pleas by allowing criminal defendants to avoid the possibility of a death sentence); Douglas A. Smith, *The Plea Bargaining Controversy,* 77 J. CRIM. L. & CRIMINOLOGY 949, 952 (1986) (noting that statistical evidence indicates that "pled cases were 53 percent less likely to result in incarceration than cases where the defendant was convicted by a jury").

23. Taking two years from a five year sentence is much greater than taking two years from a 30 year sentence.

provable offense.[24] The prosecutor compromises by dismissing the additional charges while still retaining public confidence by having the criminal admit to the most serious charge.[25] However, the prosecutor possesses substantial control in determining the most serious charge brought by being able to cast the facts in a particular light or omitting facts that would aggravate the crime.

3. The offender

The unique characteristics of each defendant are also important in the prosecutor's plea bargain decision. If the defendant is uneducated or socially disadvantaged, the prosecutor may wish to show leniency to the defendant.[26] Likewise, if the defendant is particularly young or old, the prosecutor may determine that a plea bargain, or a diversion program, is more appropriate.[27]

The criminal record of the defendant provides the prosecutor with numerous incentives to enter negotiations. First, the prosecutor may assume that the defendant is more likely to have committed the crime because of his prior record.[28] The defendant's previous record may bias the prosecution because his prior record demonstrates the defendant's willingness to break the law. The prosecutor can use this leverage over the defendant to encourage expedited closure through a plea bargain because any repeat offenses many determine the severity of the sentence. Second, were the case to go to the trial, the jury would not necessarily be privy to the information about the prior convictions for the sake of determining the defendant's character.[29]

4. The victim

Although the prosecutor represents the state, he should not discount the wishes of the victim in contemplating the prudence of offering a bargain.[30] Particularly in crimes causing emotional distress to the victim,

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24. U.S. Attorney Manual § 9-27.400 (1999). For federal prosecution, the basic guidelines are set forth in the U.S. Attorney Manual [hereinafter USAM].

25. One could imagine the public outrage if a prosecutor allowed a murderer to plead guilty to assault in exchange for a dismissal of murder charges.

26. This raises equal protection concerns, as the prosecutor discriminates upon the education or social background of the defendant.

27. *See* JAMES E. BOND, PLEA BARGAINING AND GUILTY PLEAS § 5.25(a) (2d ed. 1983).

28. This assumption is well founded. From records of the convictions in 1999, 27,652 of those convicted were repeat criminals and 23,579 were first time offenders. *See* Pastore, *supra* note 1. Given that the defendant has a criminal record, and that the pool of convicted criminals is much smaller than the pool of non-criminals, the probability that a previous offender is guilty of an offense is inordinately higher than if he has no criminal record.

29. *See* Fed. R. Evid. 404.

30. *See* ABRAHAM S. GOLDSTEIN, THE PASSIVE JUDICIARY: PROSECUTORIAL DISCRETION

such as sexual crimes, plea bargaining allows for expedited closure without the victim having to face the accused.[31]

5. Evidence

Evidence the prosecutor has against the defendant is instrumental in his decision whether or not to pursue a prosecution or to enter a plea bargain.[32] The prosecutor's access to evidence is not limited like the jury's. The prosecutor can evaluate inadmissible evidence in considering whether it is likely that the defendant is guilty, whether to pursue the prosecution, and whether to offer a plea bargain.[33] Even if the evidence is inadmissible, the prosecutor can use it as leverage over the defendant in plea bargaining by bluffing that the evidence is actually admissible.[34] Moreover, she can attempt to find other avenues at trial to admit related evidence.[35] The prosecutor, likewise, can threaten to introduce the evidence at sentencing.[36]

The terms of any agreement proffered by the prosecutor will be based on the factors above, along with the amount and quality of the evidence. The defendant's acceptance of the plea depends on his own perception of the probability of being convicted at trial based on the available evidence.

In the case of weak evidence, the prosecutor lacks leverage over the defendant, and the bargains that he can propose will lack appeal, either to the defendant because the chances of conviction are so low, or to the prosecutor because the proffered sentence will be so short. Because of mandatory sentencing minimums, less evidence tends to lead either to dismissals or to trial instead of bargains for negligible sentences or probation. Similarly, the constant weight and pressure of other cases on the prosecutor's docket affect the decision whether to dismiss. Although a

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AND THE GUILTY PLEA 70-75 (1981).

31. *See* Roland Acevedo, Note, *Is a Ban on Plea Bargaining an Ethical Abuse of Discretion? A Bronx County, New York Case Study*, 64 FORDHAM L. REV. 987, 992 (1995); *but see* Rebecca Hollander-Blumoff, Note, *Getting to "Guilty": Plea Bargaining as Negotiation*, 2 HARV. NEGOT. L. REV. 115, 133 (1997) (arguing that victims are not provided with vindication without a trial).

32. *See* McDonald, *supra* note 21, at 172.

33. Debra S. Emmelman, *Gauging the Strength of Evidence Prior to Plea Bargaining: The Interpretive Procedures of Court-Appointed Defense Attorneys*, 22 LAW & SOC. INQUIRY 927, 940 (1997).

34. Jeff Palmer, Note, *Abolishing Plea Bargaining: An End to the Same Old Song and Dance*, 26 AM. J. CRIM. L. 505 524-25 (1999).

35. For example, illegally obtained evidence can be used to impeach a defendant or other witnesses at trial. *See* United States v. Havens, 446 U.S. 620 (1980).

36. *See* Federal Sentencing Guidelines section 6A1.3(a) (permitting the sentencing court to consider otherwise inadmissible evidence as long as it has "sufficient indicia of reliability to support its probable accuracy").

prosecutor may well want to go to trial even though he has a weak case against the defendant—indicating a low probability of large gains versus a certainty of a small gain—efficiency will normally compel the prosecutor to dismiss the case. As the scholar Alschuler noted, "[w]hen the prosecutor. . .entertain[s] serious doubts concerning a defendant's factual guilt, he is likely to decline to prosecute."[37]

In the case of strong evidence against the defendant, the prosecutor need only relate the evidence to the defendant, and the defendant will have every incentive to enter into a plea. The defendant will most likely recognize the damning implications of the evidence, and decide that his best recourse is to plea bargain, minimizing the nearly inevitable punishment. Therefore, the high probability of conviction makes the option of a deal generally more attractive to the defendant as soon as the prosecutor offers any concessions to the penalty.[38]

C. The Innocent Defendant

While the concept of convicting an innocent person is a terrible imperfection of our justice system, an innocent person pleading guilty is inexcusable. Aside from the bad public policy of allowing a system to convict innocent people without a trial, a conviction without a trial exposes the failure to uphold criminal justice standards upon which society is constructed. Our system becomes an assembly line in which defendants are pressured, deprived of due process, and regarded as secondary to efficiency. The retributive and utilitarian goals of the criminal justice system fail when the innocent are punished, and the guilty go free.

Ideally, the process of plea negotiation is exclusively the guilty defendant's gambit. The prosecutor presents a chance to receive a reduced sentence and to end the anxiety and potential public humiliation for the crime in exchange for a guilty plea. The innocent defendant does not fit within this framework; he has not committed a crime so he does not deserve anxiety, humiliation, or a any part of a sentence, reduced or otherwise.

Unfortunately, this is not how the system works in practice. In any given prosecution, the prosecutor cannot know whether the defendant is guilty or innocent. The prosecutor's measure of a case necessarily rests

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37. Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652, 708 (1981); *see also* ABA Standards for Criminal Justice § 3-3.4 and commentary; 7 USAM § 9-2.030.

38. The United States Attorney's Manual prohibits sentence reduction solely on efficiency grounds. Thus, the prosecutor loses his ability to utilize his leverage in cases of near certain guilt at the plea bargaining stage. If evidence is 99 percent likely to result in a conviction of 10 years, the prosecutor would be foolish to propose a deal for 9.9 years. The differential is so small that the defendant would be better off to take his chances at trial.

on the evidence of the crime beyond the claims of the defendant, who, after all, cannot be trusted if he is guilty. However, the prosecutor offers the same deal to the guilty and innocent defendants, without regard to the defendant's factual innocence.[39] Ultimately, information separates the innocent from the guilty. The prosecutor's lack of information puts him in the precarious position of prosecuting those who may be innocent because the prosecutor recognizes his ignorance: he cannot let the guilty escape, and he must depend on the system to vindicate the innocent.

The Supreme Court condoned the idea of an innocent person pleading guilty in *North Carolina v. Alford*,[40] recognizing that a defendant may have weighed the evidence against him and found that his best interest is to enter into a plea agreement.[41] However, the opinion revealed the Court's own struggle with the concept, requiring the judge to scrutinize the evidence closely to find a "strong factual basis" to support the defendant's plea.[42]

Since the *Alford* decision, some courts have remained averse to the idea. The Third,[43] Fourth,[44] Fifth,[45] Sixth,[46] Seventh,[47] Ninth,[48] and Tenth[49] Circuits have upheld the *Alford* plea standard; only thirteen states have applied the standard.[50] The U.S. Attorney's Office permits *Alford* pleas only with permission from a higher authority,[51] and the military tribunals ban it outright.[52]

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39. *See* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1947 (1992).

40. 400 U.S. 25 (1970).

41. *Id.* at 37 ("Here the State had a strong case of first-degree murder against Alford. Whether he realized or disbelieved his guilt, he insisted on his plea because in his view he had absolutely nothing to gain by a trial and much to gain by pleading. Because of the overwhelming evidence against him, a trial was precisely what neither Alford nor his attorney desired. Confronted with the choice between a trial for first-degree murder, on the one hand, and a plea of guilty to second-degree murder, on the other, Alford quite reasonably chose the latter and thereby limited the maximum penalty to a 30-year term.").

42. *See id.* at 37-38. In a normal plea situation, the judge has to find a factual basis for the plea. *See* FED. R. CRIM. P. 11(f).

43. *See* United States v. Hecht, 638 F.2d 651 (3rd Cir. 1981).

44. *See* United States v. Morrow, 914 F.2d 608 (4th Cir. 1990).

45. *See* United States v. Johnson, 546 F.2d 1225 (5th Cir. 1977).

46. *See* United States v. Tunning, 69 F.3d 107 (6th Cir. 1995).

47. *See* United States v. Cox, 923 F.2d 519 (7th Cir. 1991) (granting trial judges discretion to accept or reject *Alford* pleas).

48. *See* United States v. Alber, 56 F.3d 1106 (9th Cir. 1995).

49. *See* United States v. Keiswetter, 860 F.2d 992 (10th Cir. 1988), *modified in part on reh'g en banc*, 866 F.2d 1301 (10th Cir. 1989).

50. Colorado, Georgia, Indiana, Louisiana, Massachusetts, Minnesotta, Mississippi, Missouri, Nevada, New York, North Carolina, Ohio, Tennessee. *See also* Ohio v. Luna, 644 N.E.2d 1056 (Ohio Ct. App. 1994).

51. *See* USAM § 9-16.015 (1999).

52. *See* R. COURTS MARTIAL 910(a).

The prosecutor engages in practices that elicit agreements to plead guilty from the innocent in particular. As stated above, the prosecutor has powerful incentives to ensure convictions. 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.[53]

Unfortunately, entering a plea agreement is contrary to the innocent defendant's interests. The prosecutor will offer increasingly enticing bargains to the defendant because the evidence does not bear out. Eventually there may come a point where, even for the innocent, accepting the prosecutor's offer may seem more attractive than the risk of trial. The most obvious case would be the prosecutor offering time served in exchange for a plea. Nevertheless, such a bargain leaves the defendant with a social stigma of a conviction, affecting his life in diverse ways.

1. The prosecutor's safeguards

As criminal activity outpaces the growth in prosecutorial resources, the need for an efficient criminal justice system becomes increasingly critical. Consequently, the need for plea bargaining grows, and the time spent on evaluating the evidence and negotiating each plea becomes shorter.[54] The prosecutor must increasingly rely on safety procedures prior to arraignment to protect the innocent from conviction.[55]

The safety procedures start as soon as the defendant is apprehended: the police, usually with an arrest warrant, arrest the suspect; the prosecutor's office reviews the evidence; and a preliminary hearing or a grand jury determines the existence of probable cause that the defendant committed the crime. The prosecutor may also depend on his relationship with the defense attorney since both work together often, benefitting by their combined experience. Finally, the judge's questioning of the defendant in open court and the defendant's opportunity to admit or deny the charges serve as the ultimate safeguards.

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53. *See* Scott & Stuntz, *supra* note 39, at 1948 (discussing the problem of not capitalizing on the defendant's knowledge of innocence).

54. *See* Tina M. Olson, *Strike One, Ready for More?: The Consequences of Plea Bargaining "First Strike" Offenders under California's "Three Strikes" Law*, 36 CAL. W. L. REV. 545, 566 n.198 (2000); *see also* Allan Abraham, *25 Percent of Three Strikes Cases go to Trial*, L.A. TIMES, July 2, 1996, at A18.

55. *See* Sam Callan, *An Experience in Justice without Plea Bargaining*, 13 LAW & SOC'Y REV. 327, 327-38 (1979).

2. Procedural safeguards

a. The police. The police perform two functions in assuring the prosecutor of the defendant's guilt. First, prior to an arrest, the police must have probable cause to believe that the defendant engaged in the charged activity. Second, the interrogation of the defendant and the interviewing of the witnesses, particularly the victim, may provide the prosecutor with stronger evidence of the defendant's guilt.

b. The preliminary hearing. The preliminary hearing serves as another check against an overzealous prosecutor. An independent magistrate determines whether there is probable cause that the defendant committed the crime.[56] At this point, the opposing sides also see a limited portion of the evidence in the case.

The innocent defendant has greater incentives to display his case at the hearing. The defendant can tell his theory, call his witnesses, and display his evidence. Based on this information, the magistrate may not find probable cause and dismiss the case, or, alternatively, the prosecutor may decide to dismiss the charges because he sees the defendant's demonstrated innocence.

The normal fears that a defendant has in presenting a strong case at the preliminary hearing are reduced when he is innocent. Since the defendant is innocent, it is logical to conclude that he should have nothing to hide from the prosecution. While the prosecutor gains information about the defense's theory at the preliminary hearing, which allows the prosecutor to prepare his case around that theory, the defendant need not worry if he is actually innocent because his version of the facts should be unassailable.[57]

c. The grand jury. Although the grand jury provides less of a safeguard than the preliminary hearing to the innocent defendant,[58] it still acts as a significant procedural safeguard to the innocent defendant.[59] If the prosecutor was to proceed by securing an indictment and skirting the preliminary hearing, in absence of the grand jury, he may not have an opportunity to hear the defendant's case before attempting to negotiate a

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56. FED R. CRIM. P. 5.

57. There are situations where the defendant is making an affirmative defense and the success of his presentation depends on the prosecutor not knowing the details of the defense.

58. *See* STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY 862-63 (6th ed. 2000).

59. *See* Wood v. Georgia, 370 U.S. 375, 390 (1962) ("Historically, this body [the grand jury] has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused. . . ."); *see also* Saltzburg & Capra, *supra* note 58, at 844 (noting that "[t]he traditional view of the grand jury [is] as a protection against unwarranted prosecution"). *But see* Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260 (1995).

plea. A grand jury hearing at least causes the prosecutor to evaluate his evidence and the plausibility of his case in presenting it to a neutral fact finder.

3. The Defendant

Our system depends on the innocent defendant refusing to enter a plea bargain and the jury exonerating the accused. However, even the innocent sometimes pleads guilty because the probability of conviction is great, fearing that if found guilty, he will face a heavier sentence than what he would have received had he entered a plea.[60]

Our trial system, like all trial systems, is imperfect in its quest for truth. Juries assess evidence and render judgments. Evidence is rarely incontrovertible; is compounded by human error in assessing evidence. As such, jury verdicts are difficult to predict.

The innocent defendant faces pressures to enter a plea bargain by considering the likelihood of acquittal or conviction. He, like the guilty defendant, weighs the risk of being convicted at trial against the certainty of conviction through plea bargaining; however, the innocent defendant may assign a higher value to the risk of being convicted at trial, which makes pleading more attractive.[61] Generally, sentence reduction is the central enticement to a defendant entering into a plea bargain. The guilty defendant knows that he is guilty (generally), and therefore should view the offer for a plea as producing a gain; his sentence will be reduced and the crime he is convicted of may be lowered so that his permanent record does not reflect the actual crime he committed.[62]

On the other hand, an innocent defendant may view a plea bargain as the lesser of two losses. Although one might expect a defendant to go to trial in order to avoid all losses, this conclusion does not consider the psychology of an innocent defendant. The plea offers the same concessions to the innocent as the guilty, but the innocent defendant regards these concessions as having a higher value because of a different evaluation of the risk.

Scholars have posited that the innocent defendant is inherently more risk averse than the criminal because a criminal was willing to risk breaking the law in the first place.[63] Criminals violate the law to get

60. *See* North Carolina v. Alford, 400 U.S. 25, 37-38 (1970).

61. For a discussion of aversion in the face of gain, *see* Richard Birke, *Reconciling Loss Aversion and Guilty Pleas*, 1999 UTAH L. REV. 205, 216-17; *see also* Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 73 (1988).

62. *See* Palmer, *supra* note 34, at 515; ROBERT A. CARP & RONALD STIDHAM, JUDICIAL PROCESS IN AMERICA 174 (3d ed. 1996).

63. Not all defendants even consider risk in pleading, particularly innocent defendants who may be concerned about some externality. Eugene Padgett, who was already serving a sentence for

gains with the understanding that they risk being caught. Criminals also flee crime scenes, resist arrest, and attempt escapes to avoid punishment at the risk of being caught and having their punishments increased. An innocent defendant, however, may mistrust the entire system because of his current predicament, being charged for a crime he did not commit. In such circumstances, the influence of the overzealous prosecutor, and possibly his own attorney, may convince an innocent defendant of his imminent conviction by the jury. Therefore, the innocent defendant may perceive the expected value of a punishment by trial to be higher than a plea bargain. Accordingly, one would expect the innocent defendant to plead because he perceives it to be a greater loss to go to trial and face possible conviction.[64]

Moreover, the innocent defendant may not be prepared to face the other daunting elements of trial. Unlike an actual perpetrator, who can consider the repercussions of his actions and prepare himself to face those repercussions, the innocent defendant has not had an opportunity to prepare himself psychologically for the decisions he will have to make. The monetary burden on the innocent defendant is analogous, as he has not had an opportunity to weigh the benefits of his crime versus the costs of trial and defense.

Although the prosecutor cannot determine guilt or innocence simply by listening to the defendant's claims, he can compare the defendant's attitude, recall, emotional state, and general demeanor against a wide range of other cases in which defendants were ultimately found to be innocent or guilty. In this sense the prosecutor acts as an informed fact finder in each plea bargain with a better perspective, although subject to the inherent biases of his position, on the plausibility and likelihood of the defendant's guilt. Supplementing this comparative evaluation of the defendant's character is the prosecutor's access to evidence that would otherwise be inadmissible at trial.[65] In this capacity, the prosecutor acts as a jury that is privy to information that would otherwise be prohibited.

Furthermore, the prosecutor can rely on plea negotiations to determine the likelihood of the defendant's guilt. Negotiation guidelines are

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burglary in prison, pled guilty to a murder in hopes that he would be moved to a county jail for trial. He believed that escape from the county jail would be easier than escaping from the prison. *See* Hugo A. Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 150 (1987). Another case is that of Robert Williams who pled guilty to a crime to impress his girlfriend. *Id.* at 169.

64. The analysis is not quite so simple. Regardless of sentence length, when an innocent person is convicted, he faces the singular disruption of going to prison, a burden which may cause economic ruin and hardship to his family. Additionally, being attached with a social stigma for conviction may depredate the defendant's life.

65. *See supra* Part II.B.5.

specifically targeted to allow for extensive disclosure about other evidence during the negotiations by forbidding admissibility of the disclosures except in the cases of perjury or when defense counsel addresses the matter on direct questioning.[66]

The natural predisposition of the prosecutor and the defendant is that they are at odds. They are civil enemies in a legal battle, creating an animosity between the defendant and the prosecutor. In the case of the innocent defendant, the tensions between the defendant and prosecutor are likely to be higher. The defendant will not only maintain his innocence while the prosecutor believes in his guilt, but also the defendant will be more emotionally involved because of the false accusations and the perceived impotence in fighting the prosecution on these accusations.[67] The result may well be that prosecutors are willing to concede less to the emotionally involved innocent defendant, making the offered bargains less appealing.

4. The standards for a plea

a. Voluntary. The Supreme Court has decided that the prosecutor may offer strong incentives to the defendant to plead in order to close a case.[68] Since the defendant has allegedly violated the law, the prosecutor may seek the maximum charge and penalty under that law. Any leniency that the prosecutor offers in a bargain constitutes the incentive. The framing of the concession as a gift or a threat is irrelevant.

Negative incentives comprise threats. The strongest form of threat is the death penalty. Defendants who face the death penalty only if they opt for trial often accept bargains offered by the prosecutor.[69] Threats are also manifested when the prosecutor threatens to bring heavier charges against the defendant unless he enters a plea.[70] Similarly, promises, such as dismissing charges or assuring certain sentences act as positive incentives to plea bargain.

In order to protect the innocent defendant from the machinations of zealous prosecutors, the Supreme Court has held the prosecutor to ethical standards in the plea bargaining process that remove some of his leverage: the prosecutor cannot withhold favorable evidence from the defen-

66. *See* United States v. Mezzanatto, 513 U.S. 196 (1995).

67. *See* Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1292 n.310 (1975) (commenting that the defense counsel's main role is to ensure that the defendant does not enter into a plea to end the emotional turmoil of trial).

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

69. *See id.*; *see also* Bedau & Radelet, *supra* note 63, at 103 and 119 for the cases of Jack Allen Carmen and Nelson Green respectively.

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

dant,[71] nor may he fabricate it.[72] Further, the prosecutor cannot act vindictively because the defendant exercised his right to trial.[73]

Particularly pertinent to the innocent defendant is a threat by the prosecutor to seek indictment against third persons if the defendant does not agree to plead. Although the Supreme Court has not yet ruled whether that type of incentive is permissible, the federal appeals courts have held that a defendant is not coerced when the prosecutor threatens prosecution against a defendant's relations or friends.[74]

The innocent defendant, however, may regard the incentives as holding more value because he perceives the system as unreliable. The innocent defendant may doubt his chances of acquittal simply because the prosecutor has not dropped charges against him and the innocent defendant believes that there is a reasonable chance of the prosecutor securing a conviction. Alone, this portrays the criminal justice system in a negative light to the defendant, causing him to doubt his ability to convince a jury if he is unable to convince a practiced prosecutor and a neutral magistrate. This uncertainty enhances the defendant's incentives to enter a plea bargain.

While guilty defendants may be coerced into giving involuntary confessions, innocent defendants are susceptible to coercion to admit false confessions. The *McMann* standard, which holds that to demonstrate coercion the defendant must show that he made (1) an involuntary pretrial statement, (2) a plea based primarily on the statement, and (3) that ineffective counsel suggested the plea, provides no more protection to the false than to the involuntary confession if the defense attorney reasonably suggests the plea.[75]

b. Intelligently. Common sense tells us that the innocent defendant knows better than anyone else that he did not commit the crime.[76] If the innocent defendant then knowingly enters a plea of guilty, he does so falsely. If the defendant voluntarily and intentionally falsifies his plea, then the prosecutor has not contributed to the prevaricated result. On the other hand, the defendant's plea may be entered intelligently but only be-

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71. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963).

72. *See* Waler v Johnston, 316 U.S. 101,101 (1942).

73. *See* Blackledge v. Perry, 417 U.S. 21, 27 (1974).

74. *See, e.g.*, United States v. Nuckols, 606 F.2d 566 (5th Cir. 1979) (involving the threat to prosecute the defendant's wife if he did not plead guilty).

75. McMann v. Richardson, 397 U.S. 759 (1970) (holding that any coercion forced by the prosecutor is removed by the defendant counseling with his attorney prior to entering a plea).

76. *But see* Bedau & Radelet, *supra* note 63, at 116 (describing the case of John Henry Fry who was charged with murder. Mr. Fry, being unable to remember the events of the night in question because he had been intoxicated, pled guilty to the murder in order to avoid the death penalty. Mr. Fry was later exonerated.).

cause the prosecutor has convinced him that he has committed the crime. The problem is analogous to that of false confessions. An overzealous prosecutor repeatedly pounding the innocent defendant, who is already in a vulnerable state because he is being subject to the prosecutor's persistence with the false accusations against him, may convince the defendant that he is in fact guilty.

A defendant's mental condition is another factor contributing to a defendant's knowing admission of guilt. Unconscionable guilty pleas by defendants who claim insanity,[77] are unable to remember events,[78] or are mentally handicapped[79] are attributable in large part to the prosecutor who persists in his prosecution in the face of these obstacles to the defendants.

5. Special concerns with convicting the innocent by plea bargain

When an innocent defendant pleads guilty, the integrity of our entire criminal justice system comes into question. If the public learns that the defendant is innocent, the public loses confidence in the system. An argument can be made that our appellate process, habeas petitions, and pardons, form a bastion against the unjust conviction of the innocent. However, these protections do not remedy the injury the defendant has already suffered in going to prison. Nor do the federal and state systems guarantee compensation to the defendant wrongly convicted by entering a plea. Indeed, some states absolutely deny relief to innocent defendants who enter a plea, and all require at least a prison term to merit a remedy.[80]

The standards for post trial review of guilty pleas are stricter than those for trial convictions. A defendant may appeal a guilty plea so long as the appeal is timely,[81] and is not on a technical matter.[82] Conditional pleas under the Federal Rules of Criminal Procedure allow for subsequent appeals of otherwise denied motions, such as for suppression.[83] In addition, the judge advising the defendant of his rights and questioning him on his voluntary and knowing entry of the plea prevents collateral

77. *See id.* at 146 (using as an example of an unconscionable guilty plea the case of Walter McIntosh who pled guilty by reason of insanity and was confined for life. Only after his death in confinement did his niece confess to the crimes to which Mr. McIntosh had pled guilty.).

78. *See id.*

79. *See id.* at 103 (relating the case of Jack Allen Carmen who, although mentally retarded, was permitted to plead guilty to avoid the death penalty).

80. Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 1999 U. CHI. ROUNDTABLE 73, 101-102.

81. *See* Bousley v. United States, 523 U.S. 614, 614 (1998).

82. *See* FED. R. CRIM. P. 11(h).

83. *See* FED R. CRIM. P. 11(a).

attacks. The high frequency of plea entry followed by attempted appeals indicates that these judicial proceedings are formalistic and artificial.

A reversal of conviction on the grounds of innocence in the appellate court negatively impacts the prosecutor in that one could conclude that the prosecutor has carelessly squandered resources in securing an untenable conviction. Although securing a plea is nearly as efficient as dismissing the case, by convincing or even allowing the innocent defendant to plead, the prosecutor has created an opportunity for an appeal that expends resources at the appellate level.

Another consequence is that the public may perceive the prosecutor as the intrusive arm of the evil government that disrupted an innocent person's life. More specifically, the reversal tarnishes the prosecutor's reputation and may harm the rapport between him and the judge or the defense attorney.

A final consequence is that the prosecutor may be subject to malicious prosecution or abuse of process suits. However, prosecutors may escape liability because the criminal justice system processes so many cases and the prosecutor cannot be expected to always be correct. Nevertheless, the line between zeal and malice is nebulous, and a successful appeal may result in the prosecutor's loss of credibility.

III. THE DEFENSE

The Constitution guarantees defendants the right to be represented by counsel.[84] This right to counsel subsumes a right to effective assistance of counsel,[85] and these rights, taken with the attorney-client privilege, act to ensure that a defendant receives professional advice exclusively from his attorney.[86] In fact, prosecutors must make all plea offers to the defendant's attorney, not to the defendant directly.[87]

Our criminal justice system charges defense counsel with the responsibility of providing his client with effective assistance of counsel. As a result, defense counsel is the only party with access to all the information necessary to assess the case, and to recommend the best course to his client. It is defense counsel who ensures that the client is adequately informed about the consequences of critical pleading and trial decisions. Consistent with this view of defense counsel, defendants place much

84. *See* U.S. CONST. amend. VI.

85. *See* McMann v. Richardson, 397 U.S. 759, 771 (1970) ("[I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel . . . .").

86. *See* Birke, *supra* note 61, at 236.

87. *See id.* at 237.

faith in their attorneys and have little expectation that anyone else in the system will look after their interests.[88]

Given that the vast majority of criminal cases are disposed of by the entering of a guilty plea,[89] with a defendant's dependence on what is supposed to be a right to effective assistance of counsel, a criminal defense attorney's role in persuading his client to plead guilty deserves scrutiny. What must defense counsel do in order to satisfy the constitutional mandate of effective assistance of counsel in the acceptance or rejection of a plea? Considering the pressures faced by criminal defense attorneys to quickly dispose of cases, is plea bargaining a process which squares with constitutional guarantees of effective assistance of counsel? In the following discussion, this section first describes the pressures that too often lead defense attorneys to recommend guilty pleas to their clients. A detail of the considerations that influence a defense attorney's decision to plead his client guilty or take the case to trial then follows. Finally, this section will discuss the right to effective assistance of counsel in the plea bargaining context, and describe how plea bargaining may impair a defense attorney's ability to provide effective representation to his client.

A. Defense Counsel's Incentives to Enter into Plea Agreements

Many commentators who have analyzed the role of defense counsel in the plea bargaining context have argued that all of the information a defendant relies upon to make his guilty plea decision comes from an agent who has a huge interest in seeing the defendant plead.[90] These commentators point to the enormous financial and non-financial pro-plea bargaining incentives perceived by defense attorneys.[91]

1. Financial incentives

Defense attorneys can be described as falling into two main categories: private and public. While private attorneys receive their fees from their clients, public defenders are paid by the state. Both of these attorneys, nevertheless, have financial incentives to plead their clients guilty.

a. Privately retained attorneys. Robert Alschuler, in his work *The Defense Attorney's Role in Plea Bargaining*, described the two routes to financial success for a private criminal defense attorney:

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88. *See* Abraham Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, 1 L. & SOC'Y REV 15, June 1967 at 36-37.

89. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS (Kathleen Maguire & Ann L. Pastore eds., 1996).

90. *See, e.g.*, Blumberg, *supra* note 88, at 28-29.

91. *See id. See also* Alschuler, *supra* note 67, at 1183, 1201, 1203.

One [route] is to develop, over an extended period of time, a reputation as an outstanding trial lawyer. In that way, one can attract as clients the occasional wealthy people who become enmeshed in the criminal law. If, however, one lacks the ability or the energy to succeed in this way or if one is in a greater hurry, there is a second path to personal wealth – handling a large volume of cases for less-than-spectacular fees. The way to handle a large volume of cases is, of course, not to try them but to plead them.[92]

For private attorneys, then, plea bargaining is an unexpendable process, allowing private defense counsel to quickly dispose of cases and keep their practices moving and profitable.[93]

Fee structure is also responsible for defense attorneys pleading many of their clients guilty.[94] There are two key ways that attorneys set fees—pay-by-stage and flat fees—with the latter method encouraging plea bargaining.[95]

First, an attorney may announce a fee only for the preliminary hearing or for the period before trial.[96] The attorney is then able to charge in accordance with the amount of time he expects to spend on the case. If, after initial work on the case, it appears that the attorney will have to spend a substantial amount of time on the case, he can adjust his fee accordingly at different stages of the case. However, few lawyers are interested in setting fees in this way because once an attorney has entered an appearance in court, he might not be able to withdraw from the case even when it appears that he needs to raise his fee, and the client is incapable of paying.[97]

Most commonly, private attorneys are paid their fee up front and in full even before they enter an appearance in court.[98] These attorneys either attempt to determine, based on a consultation, whether a case will go to trial or plead out and charge accordingly, or the attorneys will charge every client as though the case were going to go to trial.[99] This manner of fee setting and collection derives largely from the fact that criminal defendants are notoriously ungrateful clients and tend not to pay once the case has been disposed of.[100]

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92. Alschuler, *supra* note 67, at 1182.
93. *See* David Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 9 (1973).
94. *See Id.* at 9; Alschuler, *supra* note 67, at 1201; Blumberg, *supra* note 88, at 24-28.
95. *See* Alschuler, *supra* note 67, at 1199-1200; Blumberg, *supra* note 88, at 24-28.
96. *See* Alschuler, *supra* note 67, at 1199-1200.
97. *See id.*
98. *See id.*
99. *See id.*
100. *See* Blumberg, *supra* note 88, at 27.

In either case—whether an attorney charges as though the case will plead out or whether he charges as though it will go to trial—the attorney has an incentive to plead his client guilty.[101] Attorneys who charge low fees assuming that a case will not go to trial have an incentive to plead the client because they only charged with the expectation that the case would be disposed of quickly.[102] It seems quite clear that, if the attorney has received a flat fee, the fewer hours he spends on the case, the higher the hourly wage.

Attorneys who charge as though the case were going to trial also have an incentive to plead their clients guilty. These attorneys tend to rationalize recommending a guilty plea to their clients either on the ground that the deal the prosecution is offering is very good, or that the fee charged at the outset was not sufficient to cover unanticipated expenses.[103]

When a defense attorney sets a low fee because he "smells" a guilty plea, his initial assessment of the case undoubtedly tends to be a self-fulfilling prophecy. (The attorney's fee may, in fact, be inadequate to pay even the expenses of a trial.) Moreover, the problem does not entirely disappear when the attorney sets his fee at a higher level. Once the fee has been collected, a number of considerations may influence the attorney to accept a plea agreement that is not really in his client's interests. For one thing, unanticipated work may become necessary, and the attorney may think, "My fee was only $1,000; I've made almost a dozen court appearances already; the trial may take five days; and the deal the district attorney is offering isn't too bad."[104]

b. Public defenders. Public defenders are motivated to plead their clients guilty primarily because of their enormous caseloads.[105] Being salaried employees of the state, their income does not depend on the number of cases they quickly dispose of; rather, their job depends upon managing an overwhelming number of cases every year. The workload imposes time constraints per case and public defenders feel compelled to rapidly dispose of cases just like their private counterparts. If a public defender were to take a large number of cases to trial, other cases would languish and pile up, creating an unmanageable work situation.

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101. *See* Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73, 78-81 (1995).

102. *See* Alschuler, *supra* note 67, at 1201.

103. *Id.*

104. *Id.*

105. *See* Alschuler, *supra* note 67, at 1210; Emily Rubin, *Note, Ineffective Assistance of Counsel and Guilty Pleas: Toward a Paradigm of Informed Consent*, 80 VA. L. REV. 1699, 1715-16 (1994).

2. Noneconomic incentives

In addition to the financial incentives perceived by defense attorneys, there are significant non-financial incentives to plead a client guilty. One of the greatest of these incentives is the cooperation of court personnel.[106] Defense counsel is one of many actors in our criminal justice system, and defense attorneys understand that cooperation with the "system" is essential to handling cases expeditiously. In particular, defense counsel feels pressure from prosecutors, judges, and court clerks to move cases quickly to resolution. Like public defenders, prosecutors have very burdensome caseloads as well, and district attorneys depend on the willingness of defense counsel to accept plea offers.[107] Judges also feel the pressure of a high caseload and many judges consider themselves responsible for an overcrowded docket and work diligently to arrive at speedy dispositions.[108]

Judges and clerks of the court have many tools, which they can use to manipulate defense attorneys into producing guilty pleas.[109] Judges will often threaten to punish defendants more harshly if a case goes to trial,[110] and if an attorney seems resistant to pleading a client, the judge or clerk can, for example, make sure that the attorney is forced to wait the next time he needs something from the clerk or judge.[111]

Prosecutors exert pressure on defense attorneys to accept plea offers as well. This acts as a significant motivating factor because the relationship between a prosecutor and a defense attorney is a unique one. As one commentator notes:

> [T]he public defender and the prosecutor are trying cases against each other every day. They begin to look at their work like two wrestlers who wrestle with each other in a different city every night and in time to get to be good friends. The biggest concern of the wrestlers is to be sure they don't hurt each other too much. Apply that to the public defender and prosecutor situation, and it is not a good thing in a system of justice that is based on the adversary system.[112]

Because defense attorneys and prosecutors get to know each other and the pressures of each other's jobs quite well over time, each often

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106. *See* Birke, *supra* note 61, at 238, 241.

107. *See* Uphoff, *supra* note 101, at 88.

108. *See id.*

109. *See* Birke, *supra* note 61, at 241.

110. *See id.*

111. *See id.*

112. Alschuler, *supra* note 67, at 1210 (quoting D. MCDONALD, THE LAW: INTERVIEWS WITH EDWARD BENNETT WILLIAMS AND BETHUEL M. WEBSTER 10).

feels pressure to accept offers made by the other.[113] For example, a defense attorney is aware that he needs the cooperation of the prosecution, and most defense attorneys are careful not to alienate the Government. "Trade-outs," agreements between the defense and prosecution that one client of the defense attorney will plead guilty in exchange for leniency for another, are a common phenomenon.[114] They also are indicative of the "bureaucratic symbiosis" which characterizes the relationship between defense attorneys and prosecutors.[115] When defense attorneys are faced with such requests, they feel a great deal of pressure to accede to the prosecution's demands.[116]

A final incentive operating to produce guilty pleas is lack of confidence in the outcome at trial. Many attorneys consider the risk associated with going to trial very high because it is well understood that defendants convicted at trial usually receive more severe sentences than those who plead guilty.[117] Defense attorneys usually do not forget the instance when they encouraged a client to go to trial, only to have the client convicted and sentenced harshly.[118] That experience may dissuade attorneys from going to trial in the future. When an attorney pleads his client guilty, that decision cannot be proven wrong, and the attorney can convince himself that had he taken his client to trial, he probably would have been convicted and given a harsher sentence.

B. Defense Counsel's Evaluation of the Available Options

Defense attorneys realize early in their careers that the vast majority of their clients are factually guilty.[119] Adapting to this understanding leads defense attorneys to gravitate toward plea bargaining when faced with both factually guilty and innocent defendants. A defense attorney's perception that plea bargaining is rewarded by the system leads them to view cases—those involving guilty and innocent defendants—through a lens that makes plea bargaining a more desirable route than trying a case.[120] Through the course of their indoctrination into the plea bargain-

113. CHRISTOPHER E. SMITH, COURTS, POLITICS, AND THE JUDICIAL PROCESS 177 (1993) (noting that former defense attorney Abraham Blumberg called defense attorneys "double agents [acting] to advance their own interests in maintaining cooperative relationships in court, speeding case processing, and moving on to new cases").

114. Alschuler, *supra* note 67, at 1186.

115. *See* Alschuler, *supra* note 67, at 1210-12.

116. *See id.*

117. *See id.* at 1205.

118. *See id.*

119. *See* ALAN DERSHOWITZ, THE BEST DEFENSE 118 (1982); *see also* Andre A. Borgeas, *Note, Necessary Adherence to Model Rule 1.2(b): Attorneys do not Endorse the Acts or Views of Their Clients by Virtue of Representation,* 13 GEO. J. LEGAL ETHICS 761, 771 (2000).

120. *See* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Crimi-*

ing process, defense attorneys come to understand the benefits associated with plea bargaining and the difficulties associated with taking a case to trial.

In determining whether to plea bargain or take a case to trial, defense counsel ideally assesses the risk of conviction at trial. The determination of success or failure at trial depends on consideration of a variety of factors including, but not limited to, the defendant's record, the facts of the case, the prosecutor's personality, the prosecutor's willingness to go to trial, the judge's reaction to certain types of crimes, and the precedents in terms of prior dispositions for this type of offense.[121] Although commentators have described this weighing process in almost algebraic terms, most defense attorneys agree that the question of whether or not an acquittal will be won at trial is a question answered by reference to instinct.[122] Defense attorneys develop over time an intuition for discerning the strength of a case and rely on a "gut feeling" to determine a defendant's guilt or innocence; whether to suggest a plea or go to trial, therefore, often depends largely on the defense attorney's "feel" for the case.[123]

Defense attorneys learn of a client's guilt in many ways. Attorneys who deal with defendants charged with misdemeanors find that their clients quite quickly and readily admit their guilt, since the crimes charged are not very stigmatizing, and the defendants are most concerned with disposing of the case quickly.[124] Defendants who are charged with more serious crimes are much less likely to confess to their attorneys; some attorneys believe that this reluctance derives from the defendant's belief that an attorney is more likely to zealously defend a client whom he believes to be innocent rather than one whom he knows to be guilty.[125] Hence, the first story such a defendant will often offer is one that exculpates him. Newer attorneys will typically believe the defendant only to find after conferring with the prosecutor on the case and learning more facts that the story is false. Young attorneys might continue to believe their client's protestations of innocence even in the face of compelling state evidence, but eventually these attorneys will realize what they will later come to assume at the outset—that their client is guilty.

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nal Justice, 107 YALE L.J. 1, 33 (1997); *see also* Schulhofer, supra note 10, at 1988-90.

121. *See* Rebecca Hollander-Blumoff, Note, *Getting to "Guilty": Plea Bargaining as Negotiation*, 2 HARV. NEGOTIATION L. REV. 115, 116 (1997).

122. *See* Alschuler, *supra* note 67.

123. *See id.*

124. *See* Uphoff, *supra* note 101, at 83; Alschuler, *supra* note 67; WILLIAM F. MCDONALD, U.S. Dep't. of Justice, PLEA BARGAINING: CRITICAL ISSUES AND COMMON PRACTICES 102 (1985).

125. *See* MILTON HEUMANN, PLEA BARGAINING 59 (1978).

Thus, as defense attorneys evaluate case after case before them, they come to realize that the vast majority of their clients are factually guilty.[126] It is rare that defense counsel is confronted with the railroaded innocent defendant; most commonly, the defendant will be an individual who is guilty of the crime charged, or at least guilty of a crime substantially similar to the one with which he is charged.[127] Whether the defense attorney is confronted with a guilty client or an innocent one, the question before the attorney remains the same—should he opt for an adversary procedure or a plea bargain? As the attorney evaluates the two courses open to him, the sanctions of the former approach contrast sharply with the rewards of the latter; he is at all times conscious of the risks of being an adversary and the benefits of being a plea bargainer.[128]

If the defense attorney chooses an adversarial posture, he will need to request from the prosecutor a copy of the police report, the defendant's record, the basic facts of the case, etc. To get this information, an attorney must file a Motion for Discovery. While young defense attorneys believe that such motions should be filed in many cases, seasoned attorneys realize that prosecutors resent these motions and prefer to communicate orally and informally. Since prosecutors usually expect to dispose of a case by plea bargaining, they tend to find that discovery motions are a waste of time.[129] Prosecutors and judges alike thus indoctrinate defense attorneys into the plea bargaining process by communicating to attorneys that time-consuming motions should be forsaken in favor of plea negotiation.[130] Prosecutors and judges may simply tell the attorney that these discovery motions are needless formalities and that more informal communication or bargaining should be undertaken.[131] If an attorney still insists on filing motions, a prosecutor might attempt to drag a case out, deny the attorney files, threaten to go to trial when the defense is not yet certain that trial is the best route, or insist on plea bargaining when the defense wants to go to trial. Throughout this experience, an attorney learns that prosecutors have a great deal of control over case disposal and that cooperating with the prosecution is a necessity. Most commonly, cooperating with the prosecution means understanding that a plea bargain is the norm, an adversary proceeding is used rarely, and a

126. *See id.* at 60.
127. *See id.*
128. *See id.* at 61.
129. *See id.*
130. *See id.* at 65-66.
131. *See id.* at 63-64.

client who pleads guilty is entitled to the reward of a less severe sentence.[132]

A variety of explanations account for the idea that a trial equals sanctions[133] while plea bargain equals rewards.[134] One justification is that a defendant who pleads guilty saves the state time and money and thus deserves leniency.[135] Another explanation is that a defendant who pleads guilty expresses remorse and a desire to be rehabilitated and so deserves to be treated less harshly.[136] Yet another argument justifying this sanctions/rewards system relates to the proposition that there is a chance in every case that the defendant will be acquitted.[137] A defendant who admits his guilt sacrifices his chance for acquittal and deserves to be treated better than a defendant who plays the odds.

Regardless whether these arguments are compelling or sufficient to justify a system which encourages defense attorneys to persuade their clients to plead guilty, the fact remains that this is how the system operates. Implicit in sanctions, such as those described above, are the system's encouragement to plea bargain.

Also influencing the defense attorney is another consideration mentioned earlier—that most of his clients are factually guilty.[138] Sanctions for an adversary approach and weak cases propel the defense attorney toward plea bargaining. Contrary to what young attorneys expect, defendants are often eager to plead guilty.[139] These defendants are simply eager to "get it over with," and they often seem rather unconcerned with developing a criminal record, provided that the penalty is not severe. These defendants are motivated also by considerations such as damage to their reputations from a lengthy trial, and the savings in time and money

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132. *See id.* at 66.

133. Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 952 (1983) (noting that "a defendant may plead guilty, not because contesting the charges against him would be too much trouble, but because a judge or prosecutor has threatened to "up the ante" or to impose a more severe penalty if he exercises the right to trial. The threat of differential punishment, whether phrased in terms of rewarding a plea of guilty or of penalizing the exercise of the right to trial, is the essence of the plea bargaining process.").

134. Palmer, *supra* note 34, at 515 (noting that "plea bargaining benefits the defendant because he may avoid pre-trial detention, conviction for a felony, and conviction for a crime which has a stigma attached to it").

135. Easterbrook, *supra* note 11, at 308-22.

136. *Cf.* Palmer, *supra* note 34, at 513 (noting that plea bargaining "allows the defendant to acknowledge guilt and manifest a willingness to assume responsibility for his actions").

137. *Cf.* Rebecca Hollander-Blumoff, Note, *Getting to "Guilty": Plea Bargaining as Negotiation*, 2 HARV. NEGOTIATION L. REV. 115, 132 (1997) ("Law enforcement officials or agency members may want the certainty of a plea agreement rather than the risk of acquittal at trial.").

138. *See supra* note 119.

139. *See id.*

which plea bargaining brings.[140] The defendant's eagerness to plea bargain then serves as yet another pressure on the defense attorney to settle the case.

C. The Right to Effective Assistance of Counsel

1. History of the right

For the past sixty-five years, the right to counsel has been understood to incorporate the right to the effective assistance of counsel. In *Powell v. Alabama*,[141] the United States Supreme Court considered the timing of the appointment of counsel and held that counsel must not be appointed "under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."[142] Almost three decades ago, in *McMann v. Richardson*,[143] the Court ruled that defendants are "entitled to the effective assistance of competent counsel. . .and cannot be left to the mercies of incompetent counsel."[144]

Following the *McMann* decision, many convictions were challenged on the basis of counsel's failure to provide effective assistance. Without clear standards from the Supreme Court for assessing whether a defendant received the effective assistance of counsel, appellate courts employed a variety of tests. At one time, the query was whether counsel's performance rendered the trial a "mockery of justice."[145] However, the majority viewed the correct analysis to be whether the lawyer's conduct measured up to that of a reasonably competent attorney.[146] In 1983, the Second Circuit became the last federal court of appeals to replace the "farce and mockery" standard with a "reasonable competency" test.[147]

Despite the evident struggle in the federal appellate courts to define effective assistance of counsel, the Supreme Court did not address the issue until *Strickland v. Washington*.[148] In the face of mounting numbers of ineffective assistance challenges, the Court declined to delineate standards of effective assistance.[149] Instead, the Court set up a two-pronged

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140. *See* Uphoff, *supra* note 101, at 82.

141. 287 U.S. 45 (1932).

142. *Id.* at 71.

143. 397 U.S. 759 (1970).

144. *Id.* at 771.

145. *See, e.g.*, Bottiglio v. United States, 431 F.2d 930, 931 (1st Cir. 1970); Diggs v. Welch, 148 F.2d 667, 670 (D.C. Cir. 1945).

146. *See, e.g.*, Cooper v. Fitzharris, 586 F.2d 1325, 1328 (9th Cir. 1978); United States v. Bosch, 584 F.2d 1113, 1121 (1st Cir. 1978).

147. *See* Trapnell v. United States, 725 F.2d 149, 153 (2d Cir. 1983).

148. 466 U.S. 668 (1984).

149. *See id.* at 687-88.

test for reviewing ineffective counsel claims. The defendant must show that (1) the attorney's performance "fell below an objective standard of reasonableness,"[150] and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[151]

In the vast number of claims of ineffective assistance of counsel, the focus is usually on activities related to trial. The overwhelming majority of criminal cases, however, are resolved by plea bargain.[152] When a defendant challenges the validity of a guilty plea, the court must examine whether the plea was voluntarily, knowingly, and intelligently entered.[153] The year after *Strickland*, the defendant in *Hill v. Lockhart*, alleged that his guilty plea was involuntary due to the ineffective assistance of counsel.[154] Specifically, he alleged that his attorney provided him with erroneous information regarding his parole eligibility date, and that he relied on this inaccurate information when he decided to plead guilty.[155]

In *Hill*, the Supreme Court held that the ineffective assistance standard enunciated in *Strickland* was applicable to claims arising from the plea process.[156] In order to prevail, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."[157] The Court concluded that there was no evidence that the defendant would have insisted on a trial if he had received accurate information, and, therefore, the defendant failed to show the necessary prejudice.[158]

Although a defendant must satisfy both prongs of the *Strickland* test to prevail on an ineffective assistance of counsel claim, certain circumstances will trigger a presumption of prejudice. For example, if a defendant can show he was denied assistance of counsel altogether, the claim will be meritorious.[159] In addition, certain kinds of state interference with counsel's assistance give rise to a presumption of prejudice.[160] Courts

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150. *Id.* at 688.

151. *Id.* at 694.

152. *See supra* note 89.

153. *See* North Carolina v. Alford, 400 U.S. 25, 31 (1970).

154. *See* Hill v. Lockhart, 474 U.S. 52 (1985).

155. *See id.*

156. *See id.* at 57.

157. *Id.* at 59.

158. *See id.* at 60.

159. *See* United States v. Cronic, 466 U.S. 648, 659 (1984) (holding that if counsel entirely fails to subject the prosecution's case to adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable).

160. *See* Rubin, *supra* note 105, at 1714 (quoting Strickland v. Washington, 466 U.S. 668, 692 (1984)).

have differentiated between direct and indirect state interference. Direct interference includes situations such as a judicial order preventing counsel from meeting with a defendant. Indirect interference typically involves late appointment of counsel, or creation of a conflict of interest by appointment of one attorney to represent multiple codefendants.[161] Finally, "[a] defendant enjoys a similar, though more limited, presumption of prejudice when he can show that defense counsel actively represented conflicting interests."[162] Although the defendant must show an actual instead of a potential conflict of interest, once he has made that showing, he need only show that the "actual conflict of interest adversely affected his lawyer's performance" in order to make out a Sixth Amendment violation.[163] The defendant is then entitled to relief without regard to the effect of counsel's conduct on the outcome of the proceeding; he need not demonstrate prejudice as it is defined in *Strickland*.[164]

2. Plea bargaining and the right to effective assistance of counsel

Implicit in the previous discussion is the idea that defense attorneys, because they sometimes presumptively favor plea bargaining, fail to provide effective assistance of counsel to their clients without regard to the defendant's innocence or guilt. The entry of a guilty plea is a critical stage of criminal proceedings and requires effective[165] and competent[166] counsel. It involves the defendant waiving the right to confront witnesses,[167] the right to challenge the introduction of evidence to be used against him,[168] and the right to a trial by a jury of his peers.[169] The Supreme Court has upheld the constitutionality of the plea bargaining process and recognized that it is an indispensable part of the criminal justice system.[170]

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161. *See* Maureen Green, Comment, *A Coherent Approach to Ineffective Assistance of Counsel Claims*, 71 CALIF. L. REV. 1516, 1520 (1983).

162. See Rubin, *supra* note 105, at 1714 (quoting Cuyler v. Sullivan, 466 U.S. 335, 350 (1980)).

163. *See id.* (quoting Cuyler v. Sullivan, 466 U.S. 335, 348 (1980)).

164. Strickland v. Washington, 466 U.S. 668, 687 (1984).

165. United States *ex rel.* Healey v. Cannon, 553 F.2d 1052, 1056-57 (7th Cir. 1977), *cert. denied*, 434 U.S. 874 (1977) (holding a guilty plea entered without effective assistance of counsel is invalid).

166. *See* McMann v. Richardson, 397 U.S. 759, 771 (1970) (holding the advice of counsel regarding plea considerations must be "within the range of competence demanded of attorneys in criminal cases.").

167. *See* Boykin v. Alabama, 395 U.S. 238, 243 (1969).

168. *See McMann*, 397 U.S. at 770-71.

169. Brady v. United States, 397 U.S. 742, 748 (1970).

170. *See, e.g.*, Blackledge v. Allison, 431 U.S. 63, 71 (1977).

The American Bar Association standards warn defense attorneys that "[u]nder no circumstances should a lawyer recommend to a defendant acceptance of a plea unless a full investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial."[171] Because any informed decision to plead guilty must consider the likelihood of conviction were the case to go to trial, investigation is needed to accurately determine the strength of the prosecution's case. Counsel ought to speak to witnesses and investigate possible defenses. Research into relevant statutes may also be required because the defendant's belief that he is guilty *in fact* may not coincide with the elements of the statute that must be proven as a matter of law. Information discovered from an investigation that may reveal unexpected weaknesses in the prosecution's case may then be used during plea negotiations to attain a more favorable plea than would otherwise have been possible.

The decision to plead guilty rests with the defendant after consultation with his lawyer.[172] This necessitates that the lawyer spend time with the defendant, communicating his assessment of the strength of the prosecution's case, the applicable issues of law, and the possible legal alternatives.[173] Courts have held that there has been ineffective assistance of counsel when a defendant confesses guilt prior to appointment of counsel and counsel fails to investigate or provide a full explanation of the consequences of a plea;[174] when counsel, without familiarizing himself with the facts of the case or investigating possible defenses, allows his client to plead guilty;[175] when counsel fails to investigate and utilize exculpatory governmental records prior to entry of a guilty plea;[176] and, when a guilty plea is entered on the same day that the lawyer first consulted with his client, leading to a presumption that a defense has not

171. STANDARDS FOR CRIMINAL JUSTICE Standard 4-6.1(b). Standard 4-4.1 also states that "[t]he duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty."

172. See MODEL RULES OF PROFESSIONAL RESPONSIBILITY EC 7-7 (quoting that "the authority to make decisions is exclusively that of the client, and if made within the framework of the law, such decisions are binding on the lawyer. . . ."). Rule 1.2(a) also states that "in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered. . . .").

173. *See* MODEL RULES OF PROFESSIONAL RESPONSIBILITY EC 7-8; *See also* Herring v. Estelle, 491 F.2d 125, 128 (5th Cir. 1974) (stating the client must be counseled as to how the applicable statutory provisions of the law relate to the facts of the defendant's case).

174. *See, e.g.*, Bell v. Alabama, 367 F.2d 243, 247 (5th Cir. 1966), *cert. denied*, 386 U.S. 916 (1967).

175. *See* Mason v. Balcom, 531 F.2d 717, 725 (5th Cir. 1976); *see also* Walker v. Caldwell, 476 F.2d 213 (5th Cir. 1973).

176. *See* United States v. Norman, 412 F.2d 629 (9th Cir. 1969).

been adequately prepared.[177] All of these forms of ineffective counsel are common in the plea bargaining context where defendants are represented by counsel, who for lack of adequate time, advise them to plead guilty.[178]

The very nature of the plea bargain system invites inadequate representation and underscores the need for refining the system. Defense attorneys often have little time to devote to their cases and often can manage only quick and cursory interactions with their clients and prosecutors.[179] Moreover, prosecutors and defense attorneys are often encouraged to enter into plea negotiations for no other reason than that they have longstanding bargaining relationships.[180] As such, individual cases fail to receive the attention they deserve as the bargaining process becomes more and more habitual for defense attorneys and prosecutors.[181] Although ineffective counsel claims based on incompetence are characterized as being caused by defense attorneys, one has to ask whether the state contributes to the incompetence. While incompetence of the sort just described characterized by some commentators as "institutional incompetence"[182] does not clearly rise to the level of state interference as contemplated by the case law mentioned in the previous section, incompetence derived from lack of time, funding, and pressure from the system to deal with heavy case loads may constitute state interference with the defendant's right to counsel.[183] At the very least, the state sanctions and encouragement of plea bargains through prosecutors and judges often result in the quality of legal representation being compromised.[184]

The plea bargain system also arguably subjects defense attorneys to conflicts of interest that compromise their ability to provide effective representation. Public defenders are often responsible for innumerable cases at a time.[185] Privately retained attorneys are sometimes largely motivated to plea bargain because their fees are so low.[186] Similarly, the overcrowded criminal justice system cannot accommodate many lengthy,

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177. *See* Bryant v. Peyton, 270 F.Supp 353, 358 (D. W.Va. 1967) (raising a concern that when a plea quickly follows the initial consultation there may be suspicion either of neglect or that the guilty plea was prompted by the pressure of time, preventing full preparation of defense).

178. *See* JAMES E. BOND, PLEA BARGAINING AND GUILTY PLEAS § 2.09 (2d ed. 1978); Uphoff, *supra* note 101, at 78-81.

179. *See* Uphoff, *supra* note 101, at 78-81.

180. *See* Alschuler, *supra* note 67, at 1210. See also Hollander-Blumoff, *supra* note 121, at 127.

181. *See* HEUMANN, *supra* note 125, at 74, 86, 90.

182. *See* Rubin, *supra* note 105, at 1715; Vivian Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths – A Dead End?*, 86 COLUM. L. REV. 9, 62 (1986).

183. *See* Rubin, *supra* note 105, at 1715-16.

184. *See id.*

185. *See id.*

186. *See* Bazelon *supra* note 93 at 9.

expensive jury trials. Each of these factors makes a plea bargain an attractive option hard to refuse. Attorneys may find themselves recommending pleas to their clients just because it is more convenient to do so.[187]

Although it is true that conflicts of interest derived from time and money considerations are not as direct a conflict of interest as where one attorney is representing multiple co-defendants, the attorney's judgment is still compromised.[188] A defense attorney's potential for divided allegiances pull him in so many directions that his ability to fully and fairly advise his client is undermined.[189] That counsel is engaging in decision-making regarding his client's case while faced with such divided allegiances is arguably another reason why counsel's performance should not be characterized as completely " 'untrammeled and unimpaired' by state action."[190]

To summarize, the temptation to plead puts a burden on the ability of defense counsel to advise defendants fully and impartially about the wisdom of a guilty plea. As Professor Alschuler noted, "This system subjects defense attorneys to serious temptations to disregard their clients' interests. . . ."[191] As a result, defense attorneys may encourage defendants to plead guilty pursuant to offers that do not accurately reflect the strength of the government's case.

IV. THE JUDGE

The option to plead has existed from our nation's founding. In the early eighteenth century, however, most courts actively discouraged guilty pleas in felony cases.[192] Blackstone's Commentaries stated that "the courts were very backward in receiving and recording [a guilty plea]. . .and will generally advise the prisoner to retract it. . . ."[193] Encouraged by the court, virtually every prisoner insisted on taking his case to trial.[194] For example, in the rape and murder of a 13-year old white girl by a black man, the court initially refused to enter the plea, ordered a mental examination to test for sanity, proceeded to conduct a full judicial

187. *See* Uphoff, *supra* note 101, at 77-78.

188. *See* Rubin, *supra* note 105, at 1716.

189. *See id.*

190. *Id.* (quoting Holloway v. Arkansas, 435 U.S. 475, 482 (1978)).

191. Alschuler, *supra* note 67, at 1180.

192. *See* Albert Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States,* 61 U. CHI. L. REV. 867, 922 (1994).

193. WILLIAM M. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 4 (1900).

194. *See* J.M. Beattie, CRIME AND THE COURTS IN ENGLAND, 1600-1800, 336-37 (1986).

inquiry, and entered his plea only when the judge was convinced that the defendant's plea was truly voluntary.[195]

By the end of the nineteenth century, judges became less active in dissuading plea bargaining, which caused bargaining to become more common; while the rise of plea bargaining corresponds to the increase of criminal appeals and the incidence of defendants with criminal histories testifying at their own trials, the decline in judicial oversight also increased its prevalence.[196] As plea bargaining became more popular, concerns about its effect on innocents increasingly found their way into academic and political discourse. In particular, critics argued that judges should play no role in facilitating a government bargain with a criminal defendant because it created the potential for improper judicial action as well as distorted our traditional notions of judicial impartiality. [197]

Thus, this Part will examine how the judge's current role in plea bargaining—a profound departure from the role of the judge under the previous system—has fundamentally altered a judge's duty to protect the due process rights of the accused. In particular, this Part considers some of the structural features of plea bargaining as they pertain to the judge, and this article will argue that the judge can operate within this structure to guard against inherent biases in favor of government bargains. An examination of these issues is vital, not only because of the implications for our criminal justice system, but also because it is possible to remedy some of the problems arising from the judge's role in plea bargaining. Judicial opportunity for intervention in the search for guilt or innocence does, in fact, exist—the judge can play a crucial role in circumventing the incidence of inaccurate results by adequately using her position to identify and protect the rights of innocent defendants.

Section A will provide both a descriptive and legal framework for a judge's involvement in a plea bargain. First, the traditional duties of the trial judge will be reviewed to further understand how the judge's facilitation in the incarceration of innocents is antithetical to his constitutional role. Second, the legal guidelines that shape judicial action in the plea bargaining process including federal case law, federal sentencing guidelines, and Rule 11 of the Federal Rules of Criminal Procedure will be considered. In Section B, the institutional factors that motivate judges to strengthen and promote the plea bargain system will be outlined. In Section C, this unfortunate reality of the plea bargain system will be cri-

195. Commonwealth v. Battis, 1 Mass (1 Will.) 95, 95-96 (1804).

196. *See* George Fisher, *Plea Bargaining's Triumph,* 109 YALE L. J. 857, 1039 (2000) (arguing that growth of criminal appeals coincided with the Supreme Court's legal affirmation of plea bargaining).

197. Judith Resnick, *Managerial Judges,* 96 HARV. L. REV, 376, 377 (1982).

tiqued in order to demonstrate how the judge facilitates convicting the innocent.

A. Creating a Framework

1. Historical role of the judge

The function of the trial judge distinguishes the United States' adversarial model from the inquisitorial model employed in many other countries.[198] In the adversarial model, the prosecution and the defense develop and present their cases to the jury. The fact finder, whether it is the judge or the jury, listens to the witnesses and reviews the evidence submitted by the parties.[199] The passive nature of the trial judge dates back to our founding. The framers created a document, which "ensure[d] federal judicial independence from the Executive" and "vest[ed] substantial adjudicatory power in the people."[200] Constitutional limitations placed on federal judges ensured that the parties had the major responsibility over the definition of the case or controversy at trial.[201]

The guilty plea is very often a result of a negotiated plea, that is, a defendant's agreement to plead guilty to a criminal charge in exchange for a reasonable expectation of receiving some consideration from the government.[202] The judge typically is not an active participant in this negotiation exercise, but stands as an independent examiner whose role is to verify that the defendant's plea is voluntary, knowing, and uncoerced.[203] One of the central tenets of both the adversarial system and the plea bargaining process is that the judge remains impartial. Impartiality has two components:

Absence of bias and non-participation in prosecution of the case or in presentation of the evidence and arguments. The non-participation of the tribunal is another essential element of the adversary system: the parties have the responsibility of prosecuting and presenting their own best cases and of challenging the prosecution and presentation of their opponents.[204]

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198. JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION, 126-28 (2d ed. 1985).

199. Party-presentation and party-prosecution are two fundamental traits of adversarialism. *See* FLEMING JAMES & GEOFFREY C. HAZARD JR., CIVIL PROCEDURE §1.2 (2d ed. 1977).

200. Resnick, *supra* note 197, at 381.

201. U.S. CONST. art. iii, §2, cl. 1.

202. *See* Stephen J. Schulhofer, *Is Plea Bargaining Inevitable,* 97 Harv. L. Rev. 1037, 1040 (1984).

203. *See* Fogus v. United States, 34 F.2d 97, 98 (4th Cir. 1929).

204. Michael Pinard, *Limitations on Judicial Activism in Criminal Trials,* 33 CONN. L. REV. 243, 252 (2000).

One commentator noted that, it is not just the philosophy behind our adversarial system that denotes the role of the trial judge but the very symbols of judges that exist in our democracy that support this view.[205] "The robes, the odd etiquette of the courtroom, and the appellation "your honor" all serve to remind both litigants and judges of the special nature—the essential estranged quality of their relationship."[206] While these mythic symbols represent disengagement and dispassion, this classical view of the judge's role may exacerbate the innocence problem rather than curb it.[207] Further, while the evolution of our law concerning the rights of the accused has also served to institutionalize impartiality, in reality it may also serve to curb the search for justice.

2. The law

Inherent in our criminal justice system is a power imbalance between the prosecution and the defense. The Constitution has afforded the accused with numerous rights to minimize this imbalance.[208] The trial judge provides an additional safeguard because she is charged with the duty to ensure that these rights are not violated. Thus, the main constitutional issue that concerns the judge is determining whether the plea is coercive by violating the accused's rights against self-incrimination and to a trial.[209]

a. Procedures: Rule 11. While a defendant does not have a fundamental right to plea bargain, if he chooses to plea, Rule 11 of the Federal Rules of Criminal Procedure governs the procedure in federal court.[210] Pleas take three forms: guilty, not guilty and *nolo contendere*. Rule 11 (c)-(g) procedures demand that the parties create a full record of the plea bargaining process for the court to ensure compliance with due process.[211] Guilty pleas can either be given as conditional or unconditional. In order for a defendant to enter a conditional plea, he must get the consent of the prosecutor and the approval of the judge.[212] In *Menna v. New York*, the Supreme Court held that a guilty plea waives all non-jurisdictional

205. *See* Resnick, *supra* note 197, at 181.

206. *Id.* at 183.

207. The "face" of the judge, as either a passive observer situated to make sure that the rules of the game are followed or a scientist committed to the discovery of the truth, can affect the conviction of innocents because it defines the boundaries of the judicial involvement.

208. *See* U.S. CONST. amend. VI.

209. *See id.*

210. FED. R. CRIM. P. 11

211. *See id.*; Nancy Pridgen, Note, *Avoiding the Appearance of Judicial Bias: Allowing a Federal Criminal Defendant to Appeal the Denial of a Recusal Motion Even After Entering an Unconditional Guilty Plea,* 53 VAND. L. REV. 983, 1001-02 (2000).

212. FED. R. CRIM. P. 11 (a)(c).

errors.[213] Non-jurisdictional errors include double jeopardy claims, claims that the indictment fails to state an actionable offense, and questions regarding the trial judge's impartiality.[214] Additionally, Rule 11 directs the judge to determine whether the plea was "voluntary."[215] A defendant can later invalidate a plea if the judge fails to fulfill these duties under Rule 11.[216]

In the federal system, Rule 11 outlines the duties of the judge in the plea bargaining process. The judge has to ensure that the plea is voluntary, has basis in fact, and would further the administration of justice.[217] The judge's position is supervisory; she cannot participate in the plea bargaining itself. However, once the plea is entered the judge has broad discretion over accepting or rejecting the plea.[218] The Supreme Court in *North Carolina v. Alford* held that Rule 11 requires judges to find a factual basis for the guilty plea before the court can enter a judgment against the defendant.[219] The judge must inquire into the defendant's understanding of the charge and the consequences of his plea and satisfy himself that there is a factual basis for the plea.[220] Even though the factual finding is not held to the same bar as a finding of guilty by a jury trial, it is sufficient to uphold the conviction of a self-proclaimed innocent.

b. Right to trial: the Sixth Amendment. The Supreme Court has held it unconstitutional for a judge to punish a defendant for exercising her Sixth Amendment constitutional right to a jury trial.[221] Sentencing schemes have been constitutionally questioned because they potentially increase the risk of higher punishment if a defendant exercises his constitutional right to go to trial. The Supreme Court currently determines whether the defendant's exercise of his right to trial has been burdened by looking at the process of the sentencing scheme rather than the subjective behavior of the prosecutor or the judge.[222]

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213. 423 U.S. 61, 62 n.2 (1975). (Stating "[a] guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established").

214. *See* FED. R. CRIM. P. 11.

215. *See* FED. R. CRIM. P. 11 (d)

216. *See id.*

217. *See id.* at 11(e)(5), 11(c)-(d), 11(f).

218. *See id.* at 11(e)(2). Under Rule 11, the court has discretion to reject the specific package offered by the prosecutor and the defense attorney. If that happens the defendant has the opportunity to withdraw the plea.

219. 400 U.S. 25, 39 nn. 10-11 (1970). The judge in certain cases may refuse to accept the defendant's plea.

220. *See* FED. R. CRIM. P. 11.

221. *See* Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) (holding that legally there is no element of punishment for the "give-take" of plea bargaining because the defendant is still free to accept or reject the prosecutor's offer.)

222. *See* United States v. Goodwin, 457 U.S. 368 (1982).

One can waive her constitutional right as a result of explicit or implicit bargaining.[223] Explicit bargaining is the negotiation between the prosecutor and defense attorney over the degree of punishment. Implicit bargaining occurs between the judge and the defendant when the judge views the defendant's guilty plea as evidence of contrition or acceptance of responsibility that can favorably impact the sentence the defendant receives. An example of an implicit bargaining scheme is Section 3E1.1 of the Federal Sentencing Guidelines.[224] This section gives judges the discretion to reduce a sentence upon a showing that the defendant has accepted responsibility for a crime.[225]

Although in *United States v. Pearce* the Court declared that a judge may not use her sentencing power to put defendants in the position of making "unfree choices,"[226] the judicial discretion offered by Section 3E 1.1 may lead to this result. The only way a plea is attractive to a defendant is if it offers a large sentence differential. Thus, judges must increase the cost of going to trial by increasing the post-verdict sentence. One way that many courts have avoided this constitutional conundrum is by classifying the judge's actions (the presentation of a large sentencing differential) as a denial of a benefit rather than a penalty.[227]

In *United States v. Jones*, the D.C. Circuit argued that failure to plead guilty requires the withholding of leniency by pointing to both Section 3E.1.1 and constitutional precedent which maintains that the "whole notion of showing leniency to some deserving defendants requires the withholding of leniency from less deserving individuals. . .[I]n absence of a 'remorse-o-meter' the sentencing judge should look to objective conduct such as the guilty plea."[228] While the Supreme Court has been suspicious of sentencing schemes that burden a defendant's rights, these systems have been upheld on the basis of efficiency and cost savings.[229]

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223. *See* Andrew Siegal, Note, *The Sixth Amendment on Ice—United States v. Jones: Whether Sentencing Enhancements For Failure to Plead Guilty Chill the Exercise of the Right to Trial,* 43 AM. U.L. REV. 645, 655 (1994).

224. United States Sentencing Commission, Guidelines Manual § 3E1.1 (Nov. 1992).

225. *See id.*

226. 191 F.3d 488 (4th Cir. 1999).

227. *See* United States v. Jones, 973 F.2d 928, 943 (D.C. Cir. 1992) (Mikva, J., concurring in part, dissenting in part).

228. *See id.* at 1478 (citing United States v. Wilson, 506 F.2d 1252, 1259-60 (7th Cir. 1974)).

229. *See id.*

B. Judicial Incentives to Allow a Plea Bargain

1. Advantage of reputation

Judges are guided by concerns of reputation that may affect the inquiry into actual guilt. Every party involved in the plea bargaining process engages in various tradeoffs. The prosecutor relinquishes his right to seek the highest sentence in exchange for certainty that the defendant will serve time. The defendant in turn releases his right to trial in exchange for certainty of a lower sentence.[230] Finally, the judge relinquishes his right to facilitate the truth finding process in exchange for the certainty that his decision will not be subjected to reversible error.[231]

While one can argue that judges, prosecutors, and defense attorneys are similarly situated in that each have a mutual interest in reducing the uncertainty discussed above, judges may face more severe injury to reputation than prosecutors in the face of reversal. Plea bargaining forecloses this possibility because without a trial, a judge cannot commit a reversible trial error.[232] Plea bargaining, therefore, reduces the total number of reversible errors committed by judges across the country.

If the number of plea bargains made by defendants were either to cease or decrease, this would inevitably increase the total number of trials.[233] Statistically, the increase in the number of trials would lead to an increase in the likelihood of error rate at these trials. Trials are elaborate, costly, and complex, which increases the potential for mistake. If plea bargaining were suddenly to be phased out, thereby increasing the number of trials in a system that was previously operating at one-fourth of its capacity, the risk of mistake would be high.[234] Thus, trial judges have the incentive to allow or at least not to impede the plea bargaining process because it decreases the risk to reputation caused by reversible errors.

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230. A defendant's certainty of sentence is also strengthened by the plea withdrawal rule in Rule 11 of the Federal Rules of Criminal Procedure. This rule says that if the judge rejects the plea agreement, she must allow the defendant to withdraw her plea.

231. Early in the 19th century, judges were not concerned with reversal rates because there were very few appeals. The increase in the likelihood of appeals gives defendants more procedural protections. This increased the concessions granted to defendants in exchange for guilty pleas that would foreclose the risk of appeal. *See* Alschuler, *supra* note 133, at 931.

232. *See* George Fisher, *Plea Bargaining's Triumph,* 109 YALE L. J. 857, 1039 (March 2000).

233. *See* Robert E. Scott and William J. Stuntz, *A Reply: Imperfect Bargains, Imperfect Trials, and Innocent Defendants,* 101 YALE L. J. 2011, 2012 (1992).

234. *See id.*

2. Reducing caseload

The rising caseload of each individual state and federal judge has created a disincentive for a more exacting analysis by the judge. Since 1938, the federal courts have experienced an increasingly large caseload.[235] This growth can be attributed to the increase in the population, the creation of new rights and wrongs, the increase of lawyers, and the expansion of attorney fee incentives to litigate.[236] Beginning in the 1960s, social scientists and commentators began to describe the judiciary's looming backlog as a "crisis in the courts" created by "lazy judges devoting little time to their work."[237]

It has been said that most trial judges look for guilty pleas the way "a salesman looks for orders."[238] The pressures for judges to be efficient and effective have led many judges to embrace the plea bargaining process. While judges point to their administrative need to process a large number of cases with limited resources as their greatest reason for plea bargains, growing criticism of case backlog has undoubtedly pressured widespread acceptance.[239] A judicial system that works at a maximum level of efficiency generates social utility in an already overloaded judicial system. A mere reduction of ten percent in the number of defendants plea bargaining would require more than twice the amount of judicial manpower and resources.[240] While a surge in new trials would generate administrative complications for the judiciary, the utility of foregoing this cost is contingent upon the assumption that citizens spend fewer resources for pleas than trials while getting the same result. If scholars and commentators are correct in maintaining that plea bargaining facilitates the incarceration of innocent defendants, then this perverse result would reduce any social utility gained by cost savings from foregoing trial.

Additionally, some supporters of plea bargaining may argue that if caseloads were increased they would prevent judges from making an exacting analysis of the facts. This obstacle would have devastating effects for the plight of innocents because it would hinder the search for actual guilt or innocence. Some commentators argue that trials would become

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235. *See* Resnik, *supra* note 197, at 396.

236. *See Id.*, at 396-97.

237. *Id.*

238. *Id.*, at 345.

239. *See* Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1099-100 (1976)

240. *See* Malvina Halbertstam, *Criminal Law: Towards Neutral Principles in the Administration of Criminal Justice: A Critique of Supreme Court Decisions Sanctioning the Plea Bargaining Process*, 73 J. CRIM. L. & CRIMINOLOGY 1, 36 (1982). *See also* Burger, *supra* note 15, at 931.

less stringent and more casual, thereby increasing the possibility that innocents will be found guilty.[241]

While this argument on the surface seems meritorious, it is unclear whether the institution of plea bargaining remedies the obstacles created by large caseloads. First, it is not clear that an increase in the number of trials would conserve judicial resources better than the current system. The existing plea bargain system is overrun with prosecutors and defense attorneys who already use time, delay, and judicial proceedings as strategic devices to burden the search for truth, thereby enticing defendants to plead. Second, the system will not be overrun by trials requested by guilty defendants purporting to be innocent. If a majority of defendants are actually guilty, it is not clear that a shift in the judicial promotion of plea bargaining would cause them to forgo a plea in order to go to trial where they are more likely to receive a longer sentence.

In short, judges should be weary of plea bargaining's promise of a quick fix for scarce judicial resources. Heightened judicial scrutiny would not hinder the prosecution of guilty defendants nor overburden scarce resources. Instead, it would provide for the easy identification of innocent defendants. Finally, while efficiency and speed are important ends, the use of plea bargaining to further these objectives leaves many of plea bargaining's broader problems unaddressed.

If one was to acknowledge that reducing caseload is an important end in a judicial system that has little resources, one must also be cognizant that it may have coercive effects for those who have committed no crime. Efficiency and speed may encourage a court to accept the plea of an innocent defendant who has been manipulated by the state to plead in fear of an unfair conviction at trial. Thus, if a trial were a perfect mechanism for detecting innocence, plea bargaining would "be a perfect separation devise. Any rational innocent defendant would refuse all plea offers, go to trial, and win."[242] Thus, the judge, who has been enshrined with the power and the expectation that he will police the plea bargaining process, may foster the conviction of innocents in the name of institutional pressure.

Further, institutional pressure from colleagues, superiors, litigants and looming caseloads may lead to *active* participation by the judge to encourage defendants to plea bargain.[243] Judges are also encouraged to foster plea bargains by prosecutors and defense attorneys.[244] This pres-

241. *See* Scott & Stuntz, *supra* note 39, at 1916.

242. Scott & Stuntz, *supra* note 233, at 2013.

243. *See* Schulhofer, *supra* note 202, at 1041.

244. Prosecutors and defense attorneys suffer from the same administrative pressures as judges do.

sure is created by the fact that both parties want to see the successful completion of their joint venture. Thus, they both seek to present the judge with an illusion of intrinsic fairness of the defendant's plea package. Since this illusion appears to offset any costs to justice created by the potential that an innocent defendant has been enticed to plea, the judge is free to pursue his desire to reduce caseloads by supporting the plea bargaining process.

C. Problems with the Judge's Role in the Plea Bargaining Process

1. Neutral arbitrator?

The institutional pressures discussed above have undermined the basic tenet that judges should be neutral in overseeing the accuracy of a defendant's plea. Many classify the judge's role in the plea bargaining process as simply the residual effect of the inevitability of bargaining within the system. Without bargaining, the criminal justice system would come to a halt.[245] In most plea bargain systems, the judge neither participates in the negotiation process nor vests his sentencing authority in the prosecutor. In the adversarial model, "the judge is a neutral and detached magistrate whose function is to mediate and resolve the opposing parties' inevitable conflicts."[246]

The judge's impartiality cannot serve as a check on procedural injustice by the State unless she is afforded the opportunity to play a significant role in the outcome of the defendant's plea. Federal Sentencing Guidelines have significantly reduced judicial discretion over sentences.[247] Because judges are not allowed to actively participate in the plea bargaining process, the true negotiation of the plea is between the defense attorney and the prosecutor. "A defendant's sentence is now determined in large part, by the prosecutor's decisions and the public defender's adeptness in manipulating the Guidelines, as compared to the previous system where the judge was almost solely responsible for the sentence."[248]

The reduction of judicial power creates problems for the traditional role of the judge. First, it creates procedural complications by diminishing the possibility that she can actively employ neutral arbitration. Sec-

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245. *See* Schulhofer, *supra* note 202, at 1040

246. Martin Marcus, *Above the Fray or into the Breach: The Judge's Role in New York's Adversarial System of Criminal Justice*, 57 BROOKLYN L. REV. 1193, 1193 (1992).

247. *See* Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833, 838-39 (1992).

248. Joseph Hall, Note: *Guided To Injustice?: The Effect of the Sentencing Guidelines on Indigent Defendants and Public Defense*, 36 AM. CRIM. L. REV. 1331, 1332 (1999).

ond, it increases the unequal bargaining power that underlies the relationship between the defendant and the prosecution.

"A guilty plea is as much as a blindfolded plunge as a trial."[249] Pleas offer more attractive rewards and decrease the dismissal prospects if the defendant elects to go to trial. The inherent reduction of anxiety regarding one's sentence provided by the plea alone may provide the necessary incentive for the risk averse defendant to plead. Additionally, the certainty that the plea will be rewarded furthers the compulsion to plead. The large percentage of guilty pleas that we have seen in the past decade can be attributed to the high probability that they will be rewarded. A 1995 study by the Department of Justice reported that over 92 percent of all federal criminal defendants entered a plea of guilty or *nolo contendre*.[250] The problem for innocent defendants is heightened by the Supreme Court's decision in *Carolina v. Alford*, which held that an accused is not forbidden from entering a valid guilty plea while maintaining his innocence.[251] Judges who are cognizant of the perverse structural incentives for innocents to plead have a higher duty to maintain their neutrality. If innocents are faced with judges who are plea friendly and use threats of heightened sentences to encourage pleas, they are more likely to forgo their trial rights.[252]

2. Information defects and the principal/agent problem

While the decline in the importance of neutrality has had questionable results, limited court access to all information in the bargain process has created enormous barriers for the innocent defendant. The defense attorney and the prosecutor possess more information regarding the probability of conviction than the judge.[253] The judge's knowledge is limited to the complaints and summaries the parties have filed with the court. Thus, the judge lacks any additional information that could be used to assess the culpability of the defendant.[254] The prosecutor has no incentive to offer any additional information to the judge, because the prosecutor does not want to volunteer information that may encourage the judge to reduce the sentence downward.[255] This not only creates an

249. Alschuler, *supra* note 133, at 1081.

250. *See* U.S. DEPT. OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 476 (1995).

251. *See* Carolina v. Alford, 400 U.S. 25, 37 (1970).

252. *See* Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387 (1970) (stating "the primary purpose of plea bargaining is to assure that the jury trial system established by the Constitution is seldom utilized").

253. *See* Abraham S. Goldstein & Martin Marcus, *The Myth of Judicial Supervision in Three Inquisitorial Systems: France, Italy, and Germany*, 87 YALE L.J. 240, 242-43 (1977).

254. *See* Schulhofer, *supra* note 202, at 1071.

255. *See* generally Note, *The Prosecutor's Duty to Disclose to Defendants Pleading Guilty*, 99

information defect in the bargaining process, but also a principal-agent problem.

The prosecutor in the traditional plea bargaining setting can be described as the judge's agent. Agency problems are exacerbated when the prosecutor's interest and the judge's interest are not similarly aligned. In plea bargaining, the judge and the prosecutor are motivated by different factors. The prosecutor is interested in exacting as much punishment as she can get under the law.[256] Prosecutors are praised for being hard on crime and demanding maximum sentences from the judge or jury. The judge is simply concerned with determining the truth and ensuring that the interests of the community are addressed. Those interests are not necessarily dependent upon obtaining the greatest sentence. However, even if interests between the prosecutor and the judge were aligned, the agency relationship undermines the justice rationale that guides the system.

An alliance between the judge and prosecutor leads to bias within the justice system, thwarting the truth-seeking process.[257] The legitimacy of an adversarial system is dependent upon the impartiality of the judge.[258] If the power dynamics are such that society can legitimately construe the prosecutor and the judge to be working together as a team, then impartiality does not exist.

Finally, the agency problem exacerbates the market defects discussed above. Assuming that there is an agency relationship between the judge and the prosecutor, it should be the prosecutor and not the judge who sets the price (sentence). Unfortunately, in our criminal system the judge sets the price even though she has less information than her agent. This creates the possibility that more innocent defendants will be convicted because information pointing to innocence will likely be kept from the judge.[259]

3. Focus on administrative rather than substantive/procedural justice

While efficiency and speed are ideals that judges should aspire to in managing their respective courtrooms, our Constitution's promise of due process should take precedence over administrative convenience. Our

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HARV. L. REV. 1004 (1986).

256. *See* Brady v. U.S., 373 U.S. 742 (1970) (stating that the decision to plea is highly influenced by the accused's appraisal of the strength of the state's case).

257. *See* Alschuler, *supra* note 6, at 107.

258. The right to an impartial judge is not explicitly guaranteed by the Constitution. However, the Supreme Court has recognized the importance of this right in *Tumey v. Ohio*, 273 U.S. 510, 510 (1927).

259. *See* Julie R. O'Sullivan, *In Defense of the U.S. Sentencing Guidelines' Modified Real-Offense System*, 91 NW. U. L. REV. 1342, 1343 (1997).

criminal justice system's aim is to provide a criminal defendant with adequate procedures. The Constitution affords many rights to the defendant including a right to trial by a jury of one's peers, a right against self-incrimination, and a right to counsel.[260] Thus, the court, in order to guarantee that these rights are protected, has an intrinsic concern to police prosecutorial misconduct. In the context of plea bargaining, the focus on procedural justice is improper because it subverts the fundamental idea that all defendants are innocent until proven guilty. Under the traditional system, "the parties, not the judge, have the major responsibility for all control over the definition of the dispute."[261] Similarly, under the plea bargaining process, the jury is entirely absent and the judge's role is narrow in focus. The plea bargain system also does not procedurally function unless the defendant is presumed to be guilty.[262] Thus, the judge plays an important role in institutionally maintaining this subverted presumption. The judge's role is not to ascertain whether the defendant in fact committed the crime. His role is simply to ascertain whether the defendant's plea is voluntary and to find a factual basis for the defendant's commission of the crime.[263]

It can be argued that the plea bargain system does not undercut the presumption of innocence, but actually upholds the presumption and acts as an effective tool to determine guilt or innocence. If the defendant is innocent, he will chose to go trial rather than plead. The problem with this argument is that the plea bargain process inadvertently shifts the burden of proof to the defendant, and in our adversarial system, burden is everything. The defendant, not the State, has the incentive to muster all the evidence he can find to prove his innocence. Furthermore, sentencing guidelines, applicable to the defendant if he goes to trial, are an unjust signal to the defendant of the merits of his case[264] and are an inadvertent pressure mechanism by the state to induce the defendant to plead guilty.[265]

The court's need to handle large case loads with minimal resources must be balanced against giving the accused his constitutionally guaranteed due process rights. The court, by sanctioning plea bargains in almost

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260. *See* U.S. CONST, amend. V & VI.

261. *See* Resnik, *supra* note 197, at 382.

262. *See* Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 UCLA L. REV. 1179, 1222 (1993).

263. *See* Bethany v. State, 814 S.W.2d 455, 462 (Tx. Ct. App. 1991) (stating "we rely on an adversarial system to produce just results. Where a trial judge abandons his position as a neutral arbiter and takes on the role of an advocate, this system cannot function and fairness is lost.").

264. *See* O'Sullivan, *supra* note 259, at 1362.

265. *See* Jean Choi DeSombre, *Vulnerable Population in Japan: Comparing the Notions of the Japanese and the U.S. Criminal Justice System: An Examination of Pretrial Rights of the Criminally Accused in Japan and the United States*, 14 UCLA PAC. BASIC L.J. 103, 132 (1995).

every situation arguably implies that due process is too costly for society. It can be argued that the socially correct sentences are the ones deliberated on by judges and juries, not the ones bargained for by the prosecutor. The judge, as both the symbolic and institutional guarantor of the defendant's due process rights, must guard against any actions that facilitate violations.

V. REFORMS

The preceding discussion has shown that the prosecutor has incentives to enter into a plea bargain without much concern as to whether the defendant is guilty or innocent. In response to this problem, some people, most notably Alschuler,[266] Schulhofer,[267] and Easterbrook,[268] have called for radical reforms to the plea bargaining process. Easterbrook sums the premise by recommending complete abolishment of plea bargaining, replacing it with a return to an exclusively trial system. He asserts that "convicting the innocent is unequivocally easier in a world that permits plea bargaining."[269] The argument, however, supposes that those innocent defendants who enter a plea constitute a superset of those who would be convicted at trial without directly addressing the higher likelihood of innocent defendants being convicted at reckless trials.[270] Nor has implementation of mandatory trial schemes been fruitful.[271]

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266. *See* Alschuler, *supra* note 133, at 935-97.

267. *See* Schulhofer, *supra* note 10, at 1979-80.

268. *See* Frank Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1972-73 (1992).

269. Schulhofer, *supra* note 267, at 2007.

270. *See* Scott & Stuntz, *supra* note 39, at 1932.

271. *See* Robert Weninfer, *The Abolition of Plea Bargaining: A Case Study of El Paso County, Texas*, 35 U.C.L.A. L. REV. 265, 313 (1987); *see also* Michael L. Rubenstein & Teresa J. White, *Plea Bargaining: Can Alaska Live Without It?*, 62 JUDICATURE 266 (1978); *see also* Schulhofer, *supra* note 10, at 2006. In 1975, El Paso banned plea-bargaining. Within a few years some prosecutors and judges were ignoring the rule and allowing plea bargaining. Weninfer, *supra* at 306-07. The result was inconsistent charging procedures for defendants facing prosecutors who allowed plea bargaining. *Id.* at 308-09. Defense lawyers had to turn away clients because the clients could not afford to retain their services for a full trial. Furthermore, the public remained uninformed of these covert bargains because the bargains were kept silent because they were illegal. *Id.* at 307-08. Another example of an attempt to remove plea bargaining in 1975 occurred in Alaska. Rubenstein & White, *supra* at 267. Alaska's system suffered the same ailments as El Paso's. The Alaska trial rate only marginally increased, indicating that the system was not being followed. *Id.* at 272. The defendants who bore the brunt of the prosecutor's wrath were minor offenders, whose penalties significantly increased. *Id.* at 275; *see also id.* at 273("In examining [violent crimes]. . .we found that the policy had absolutely no impact on sentences.").

Schulhofer noted that Philadelphia adopted a middle road between mandatory trial and voluntary plea-bargaining by allowing the defendant to waive jury trial and accept a bench trial. Schulhofer, *supra* note 202, at 1062-63. The benefits of the system were that the defendant still retained most of his rights, and that the prosecutor had to make reduced concessions, which, in turn, increased their consistency, to defendants to convince them to forego the jury trial. Schulhofer, *su-*

The people opposed to plea bargaining perceive the process in the wrong frame of reference. They oppose it on the grounds of unfairness and the practical abrogation of the presumption of innocence. However, the prosecutor merely offers the choice to the defendant to assert his right to trial, and, therefore, the goal should be not to cast off the plea bargain system, but to refine it so that the innocent defendant is not faced with unconscionable coercion to enter the plea. We should modify the current system to reduce incentives to plead guilty.

A. Reducing Incentive to Plea Bargain by Reducing Trial Penalty

Limiting the increase in penalties for not pleading benefits the guilty and innocent equally. The reforms below will not significantly decrease the state's overall punitive power against the defendant; although the prosecutor loses some of his discretionary power, the defendant, who already is in a disadvantaged position, gains the larger benefits.

1. Compel the prosecutor to bring maximum charges

Currently, the prosecutor may bring charges and offer a bargain supported by threats of more severe charges if the defendant does not enter the bargain. The defendant perceives that if he enters a plea, he will benefit from sentence reduction. If he decides to go to trial, he will be punished with an indictment for a more serious crime. If the prosecutor was forced to bring all his charges at once, as proposed in Blackmun's dissent in *Bordenkircher v. Hayes*,[272] the defendant would at least initially know the maximum extent of his liability, and not have to worry whether the prosecutor had the necessary evidence to ensure an indictment for the more severe crime. Armed with more information, the defendant would be in a better position to bargain. This reform would particularly benefit innocent defendants because the measure of risk is more readily calculable. The risk averse will likewise have to face fewer unknown variables, inherently reducing the risk to the defendant.

This suggestion increases the burden of certainty on the prosecutor as to the charges he will bring before filing. Given the resource and information superiority of the state, the burden is a small imposition on the prosecutor. Moreover, allowing the defendant to know both the maximum charges that could be brought against him and the maximum sentence after a conviction by a jury would also further reduce apprehension of trial. Therefore, prior to the hearing at which the judge accepts a plea,

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pra note 10, at 2003-04. However, the problem of paying for counsel persisted. *Id.* at 1990. Furthermore, the city had to take a sunk cost in hiring the manpower to hear the cases. *Id.* at 2004.

272. 434 U.S. 357, 365-68 (1978).

there should be a hearing in which the judge summarily assesses the evidence before him and determines a maximum possible penalty were the defendant to be convicted by a jury.[273]

A criticism of this proposal is that the prosecutor would have a greater incentive to overcharge. However, overcharging is already rampant, and this proposal requires that the prosecutor have sufficient evidence to obtain a conviction.

2. Reduce the coercion

The innocent defendant pleads guilty to charges in order to benefit from certain incentives. By reducing the incentives, the innocent defendant is more likely to assert his innocence and go to trial; at the same time, the incentive to accept a plea must still be sufficiently large to remain attractive to the guilty defendant.

By being able to control the charges brought and dismissed as well as promise certain sentence reductions, the prosecutor potentially holds great leverage over the defendant. Consider a prosecutor who offers a defendant a sentence of six months for pleading instead of risking a conviction with a thirty year sentence;[274] to place the bargain outside of the innocent person's interests the probability of conviction would have to be less than 1.7 percent.[275] Especially in the case of a habitual offender law,[276] this amount of discretionary power is not uncommon.

As explained by Schulhofer, substituting a flat reduction for plea-bargaining may also further protect the innocent.[277] Currently, the plea bargain system presents the defendant who has the least chance of conviction with the best offers. The expected value of the sentence unaltered, the risk averse defendants take more pleas. However, if we assume that innocent defendants are less likely to be convicted than guilty ones, for the innocent defendant the expected value of the guilty plea sentence with a flat reduction is greater than the expected value of the sentence

273. This system, applied as a more equitable system for all defendants without broaching the innocence topic, was discussed in. Note, *Restructuring the Plea Bargain*, 82 YALE L.J. 286 (1972). In that system, the judge issued a maximum possible sentence if the defendant elected to go to trial at the pre trial hearing. Id. at 301-02.

274. According to 28 U.S.C.A sec. 994(b)(2) the minimum sentence is the greater of six months or 75 percent of the maximum sentence. Fed. Rule of Crim. P. 11(f) states that the prosecutor's discretion to enter new charges that are reasonably related to the committed crime is virtually plenary. Moreover, the prosecutor has almost complete power over dismissing charges under Fed R. Crim P. 48. Similarly in *United States v. Ammidown*, 497 F.2d 615 (1974), the D.C. Circuit held that the trial court should not overturn a prosecutor's decision not to prosecute unless the decision is contrary to the public interest, which the prosecutor has not considered.

275. As six months is approximately 1.7 percent of 30 years.

276. *See Bordenkircher*, 434 U.S. 357.

277. *See* Schulhofer, *supra* note 10, at 2006-08.

from conviction. Therefore, the risk averse innocent defendant would have greater incentives to go to trial.[278]

Although this may discourage defendants from offering information to apprehend and convict other, more powerful criminals, the legislatures could pass a harsh obstruction of justice law to persuade the defendant to give information.[279] Moreover, because this plan removes a large portion of the prosecutor's discretion, which may have benefited some types of criminals, those defendants should more readily be allowed to participate in diversion plans, and the jury should have the option of sentencing a defendant to a diversion plan.

Another coercive element that should be removed from the plea bargaining scheme is that of the prosecutor threatening to bring charges against the defendant's relatives if he does not plead guilty. The threat is highly relevant in the case of the innocent defendant because he must choose whether to sacrifice himself to save his loved ones. This is not to say that the prosecutor should be prevented from bringing charges against the defendant's relations if he does not plead, but the prosecutor should not be allowed to elicit a plea by threatening the action.

B. Reduce the Chance of Conviction for Innocent Defendants

1. Increased discovery

Based on the assumption that innocent defendants are less likely than guilty ones to be convicted at trial, then a major boon to innocent defendants would be to increase discovery. Increased discovery would allow all defendants to evaluate all the evidence against them.[280] This disclosure would permit defendants to make, among other things, more reasoned estimates about their chances for conviction. In the case of the innocent defendant, this would have two effects. First, he would be less likely to be blustered by the prosecutor's claims that a deal would be in the defendant's best interests. The defendant could measure for himself, with the aid of counsel, the prudence of entering a plea. Second, since by hypothesis innocent defendants may be more risk averse, exact knowledge of the prosecutor's evidence removes one more unknown, and therefore reduces the overall risk that the defendant faces.

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278. *See id.* at 2004.

279. Such a law might call for a sentence multiplier instead of an addition. Notice that this law would not be disagreement with the plan for maximum charging as the defendant is committing a new crime after the charges have been filed.

280. *See* United States v. Bagley, 473 U.S. 667, 692-93 (1985) (Marshall, J., dissenting).

There are three arguments against wholesale discovery. First, the costs to the prosecutor are too high. While the costs may be high in full disclosure, the costs may actually be lower than the ones already incurred by sifting through evidence to determine what is material and what is not.[281] Second, there is the contention that the defendant will abuse disclosure to threaten government witnesses.[282] While possible, the truth is that the majority of defendants lack the resources to threaten a witness, and those that do, have the resources already and will most likely have the means to ascertain who the government's witnesses are. In states like New Jersey that permit discovery of government witnesses, crime against witnesses has been exceptionally low.[283] Third, it is possible that a defendant will use the discovery to his advantage to craft fallacious defenses.[284] Although possible, with the requirements of notice for alibi and other special defenses, this argument is largely specious.

2. Require pro bono work

Required pro bono work by practicing attorneys is a frequently discussed option to provide effective assistance to indigenous defendants. The benefits of this system include a reduction in the relative burden for attorneys, and it provides extra manpower for defendants to spend with attorneys. Indubitably, many attorneys would regard mandatory pro bono service to be an annoyance and an obstacle preventing them from work that they consider more important. However, establishing a monitoring requirement to maintain bar status may well remove the bulk of disincentives while maintaining the benefits.

C. Enhance Judicial Discretion

In the plea bargaining process, the prosecutor and the defense counsel come to an agreement on the particular charge or charges. Additionally, the parties agree on the sentence, or at least the maximum sentence, that the prosecutor will recommend that the judge impose. This agreement is then submitted to the judge for approval. Under Federal Sentenc-

281. John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 EMORY L.J. 437, 488 (2001). *Cf.* Santobello v. New York, 404 U.S. 257, 261 (1971) (suggesting that plea bargaining "is to be encouraged because of efficiency and cost-savings).

282. Douglass, *supra* note 281, at 511; *accord* 18 U.S.C. 3500(a) (prohibiting disclosure of witness statements before trial).

283. Interview with Margaret Murphy, former State's Attorney in Newark, New Jersey, and currently a public defender in Jersey City. Telephone interview, September, 2000.

284. *Cf.* United States v. Mezzanatto (allowing waiver of plea discussion confidentiality to thwart potential defendant perjury); Nix v. Whiteside, 475 U.S. 157, 173 (1986) (recognizing problems with defendant's fabricating testimony).

ing Guidelines, plea bargains dictate a sentence within a very narrow range.[285] These constraints diminish the power of the judge.

Federal Sentencing Guidelines give a prosecutor substantial control over the sentence. According to the Federal Judicial Center, nearly 75 percent of all district court judges believe that prosecutors have the greatest influence over sentences under the Guidelines.[286] However, the judge does have an opportunity to depart from the Guidelines on a case-by-case basis if she determines that there are mitigating circumstances.[287] Unfortunately, appellate support for rigid adherence to the Guidelines has caused many trial judges to refuse to exercise their discretion under the Guidelines by intervening and finessing sentences for fear of reprisal.

The judge should use his mitigating factors discretion to play a more active role in pointing out the weakness or undue harshness of a given sentence. Additionally, this discretion in the Sentencing Guidelines establishes a framework to allow a bargain to occur directly between defense counsel and the judge with prosecutors having the right to object but not to prevent its imposition.[288] By limiting the prosecutor's discretionary power, the prosecutor's law enforcement viewpoint can still be heard in the sentencing process, but the judge will have more control. Finally, this recommendation will realign the precarious power balance between the judge, prosecutor, and the defense attorney so as to check prosecutorial exploitation.

While initiatives such as eliminating mandatory minimums, increasing judicial power to decrease sentences downward, and making plea commitments binding may seem attractive, none of these options would allow prosecutors and judges to prevent completely innocent defendants from being prosecuted; these reforms would simply reduce the amount of time innocent defendants spend in jail. Moreover, these initiatives do not internalize the cost to society of convicting the innocent.[289] The public bears a huge cost when it puts an innocent person in jail because he elected to forgo the risk of doing hard time for a lighter sentence. Reducing sentences also increases the chance that guilty defendants would be able to subvert the system by posing as innocents in order to do reduced

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285. *See* Joseph Hall, Note, *Guided to Injustice? The Effect of the Sentencing Guidelines on Indigent Defendantss and Public Defense,* 36 Am. CRIM. L. REV. 1331, 1332 (1999).

286. FEDERAL JUDICAL CENTER, THE U.S. SENTENCING GUIDELINES: RESULT OF THE FEDERAL JUDICIAL CENTER'S 1996 SURVEY 7 (1997).

287. Mitigating circumstances are age, education, mental condition, and family responsibilities. The Federal Sentencing Guidelines refer to these as factors "not ordinarily relevant" in making sentencing recommendations. *See* U.S. Sentencing Commission Guidelines Manual §§5H1.1-1.10 (1992).

288. *See* Marcus, *supra* note 214 at 1207.

289. *See* Scott & Stuntz *supra* note 233, at 2012.

time. Thus, removing power from the prosecutor and putting it in the hands of the judge, while aligning the incentives discussed earlier toward justice rather than harsh sentences, avoids these problems. Finally, Federal Sentencing Guidelines are an appropriate mechanism for judges to use their discretion. A major benefit of the Guidelines is they set the "price" of the bargain. This places an inherent check on the risk of compulsion by innocent defendants to plead because they have a better sense of what their pre-trial and post-trial sentences will be.

The judge should not merely be a rubber stamp for a particular plea or sentence because both the prosecutor and the defense attorney agreed upon it. An uninformed judge who plays no role in the negotiations of the plea bargaining process risks imposing an unjust result. Alternatively, a judge who participates too aggressively, risks coercing the defendant to plea. Since the defendant has a right to plea to anything less than all the charges in the indictment with the permission of the court, this gives courts both the legal mandate and the necessary discretion to inquire into the validity of the plea.

The term "judicial activism" unfortunately conjures up concerns about impartiality, fairness, and efficiency; however, these fears can easily be alleviated. First, greater activism will not frustrate impartiality or fairness. Judges will not be advocates but facilitators in the bargaining process. The judge's involvement will be checked because she cannot coerce a guilty plea by "threatening the defendant with dire consequences" or through the "explicit threat of a heavier sentence should he choose to proceed to trial;" the prosecutor will retain that power.[290] Second, greater involvement will create efficiency. While judges will be spending greater amounts of time managing plea bargains, the number of appeals could be reduced, providing a larger savings on the entire process.[291] A defendant can challenge the plea on appeal by arguing that she had ineffective assistance in negotiating and entering the plea. If a judge takes more of an activist role in ascertaining the "knowing and voluntary" standard of the plea,[292] his inquiry will be on the record, and the resulting conviction will likely stand up on appeal. Most importantly, increased involvement by judges will decrease the conviction of innocent defendants.

What would this enhanced involvement look like? Although one is apprehensive about encouraging a judge to supervise the bargaining process, greater judicial supervision of unusually high sentences would be salubrious when those sentences are the result of system defects that

290. *See* Marcus, *supra* note 246 at 1209.

291. *See* Pinard, *supra* note 204, at 254.

292. Fed R. Crim P. 11(c); *see also* United States v. Mezzanatto, 513 U.S. 196, 200-01 (1995).

discount the defendant's claim of factual innocence. For example, an *Alford* plea should serve as a signal to the judge that there is a case for heightened scrutiny. While efficiency and saving of judicial resources are important ends, there are a few cases that embody truly disturbing plea bargains. Cases that facilitate injustice to due process and fundamental fairness are good targets for judicial resources.

Judges are in a better position to control these biases because only atrocious lawyering by the defense attorney will mandate a finding of ineffective assistance of counsel and help remedy the innocence problem. Additionally, a refusal to plead by the defendant would not be an adequate signal of innocence since guilty defendants can copy this signal making it meaningless.[293] Judicial activism—allowing judges to regulate plea bargains to help facilitate the separation of innocent defendants from guilty ones—is a normatively attractive solution. The federal and most state systems already allow for judges to reduce the sentence agreed upon by the prosecutor and the defendant.[294] While it is not simply reduction we call for but enhanced scrutiny in particular cases, the ability of judges to employ a more active role will maximize the innocent defendant's chance of acquittal.

D. Heighten Evidentiary Standards for Defendants Who Wish to Make an Alford Plea

The dual system of plea bargaining and jury trials has worked to eliminate the strain on the criminal system's legitimacy. Defendants, by admitting guilt, intrinsically erase any doubt of guilt that society or the judge may feel regarding the defendant's alleged crime. In contrast, society feels more apprehensive about a case where a defendant passionately professes his innocence but is ultimately convicted by a jury that may have returned the "wrong" verdict.

The *Alford* plea allows a defendant to plead guilty while maintaining his innocence. While one may feel some inherent discomfort in allowing the incarceration of a defendant who protests his innocence, the *Alford* plea has some merit because it avoids forcing defendants to admit moral guilt even though they admit factual guilt. For example, a defendant may have murdered a victim, but the defendant considers himself the victim of the system or abuses by victim. The defendant may prefer to maintain his innocence and plead in order to diminish the risk of going to trial. By affording the defendant an opportunity to enter an *Alford* plea, the legal

293. *See* Scott & Stuntz, *supra* note 39, at 1954.

294. *See* Easterbrook, *supra* note 268, at 1972.

system avoids confronting the problem of psychological coercion.[295] Unfortunately, while the legal system distances itself from the quandary of entering an individual's psyche, it also risks the vitality of its reputation for protecting the innocent until they are proven guilty. Additionally, the current procedure for an *Alford* plea creates the potential for coercion. A defendant may enter an *Alford* plea because of the inducement created by sentence differentials. Thus a defendant, who is charged with a capital crime, may plead to avoid receiving the death penalty even though he is innocent.

If an *Alford* plea is to be allowed, standards for proof must be established to avoid the problem of innocent convictions. If the court, when discerning the factual basis for the plea, requires the prosecutor to put on prima facie evidence, evidence that if unrebutted would allow the case to go to the jury with a reasonable probability of the defendant's conviction, then adequate safeguards would be in place. Enker has argued that a "conviction by judicial admission does not satisfy this requirement if the admission has been induced by unfair means which might induce an innocent person to plead guilty."[296] Thus, it is not sufficient for the judge to simply ask the defendant why he is pleading, while maintaining his innocence. We would recommend implementing additional safeguards such as evidence that is subjected to the various evidentiary rules that exclude biased, or unreliable information. We do not believe that these safeguards will overburden scarce judicial resources. If ninety percent of all defendants are guilty and prefer to plea in the absence of a plea bargain, establishing the guilt of those who refuse to participate should not be that exacting.[297]

Alford pleas are an example of a systematic attempt at justice, which has lead to the entrenchment of preexisting injustice. We must be cognizant of the potential for loss of public legitimacy created by unjust plea bargains. Schulhofer stated:

The innocent defendant, facing a small possibility of conviction on a serious charge, considers it in his interest to accept conviction and a small penalty. The defendant's choice to plead guilty can be rational from his private perspective, but it imposes costs on society by undermining public confidence that criminal convictions reflect guilt beyond a reasonable doubt.[298]

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295. *See* Halberstam, *supra* note 240, at 31-32.

296. *Id.* at 33 (quoting Enker, PERSPECTIVES ON PLEA BARGAINING IN THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 113 (1967)).

297. *See id.* at 45.

298. Schulhofer, *supra* note 10, at 2000.

Public trust that the constable has not blundered is important, not only as a sentiment pertaining to the adequate administration of the law, but also to its normative value which encourages people to obey the law. If people trust that courts, law, government, and its officers are morally committed to the fair administration of justice, it will breed both a sense of attachment and admiration. These social norms have the capability of serving as the most effective deterrent of crime. If people feel that the legal system is unfair because it incarcerates the innocent, deviant behavior will increase because citizens will believe that violating the law is not so reprehensible.