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# The Unexonerated: Factually Innocent Defendants Who Plead Guilty

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THE UNEXONERATED:  
FACTUALLY INNOCENT DEFENDANTS WHO PLEAD  
GUILTY

John H. Blume\* & Rebecca K. Helm\*\*

*"It's a total injustice...These three men are being made to plead guilty to something they did not do" (John Byers- father of one of the alleged West Memphis Three victims)<sup>1</sup>*

**Abstract**

Several recent high profile cases, including the case of the West Memphis Three, have revealed (again), that factually innocent defendants do plead guilty. And, more disturbingly, in many of the cases, the defendant's innocence is known, or at least highly suspected, at the time the plea is entered. Innocent defendants plead guilty most often, but not always, in three sets of cases: first, low level offenses where a quick guilty plea provides the key to the cellblock door; second, cases where defendants have been wrongfully convicted, prevail on appeal, and are then offered a plea bargain which will assure their immediate or imminent release and third, where defendants are threatened with harsh alternative punishments if they do not plead guilty. There are three primary contributing factors leading to a criminal justice system where significant numbers of innocent defendants plead guilty to crimes they did not commit. The first is the perceived need that all defendants must plead. The second is the current draconian sentencing regime for criminal offenses. And, the final contributing

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<sup>1</sup> International Business Times Reporter, *West Memphis Three Walk to Freedom: Are They Really Innocent?*, International Business Times, August 20 2011, <http://www.ibtimes.com/articles/201046/20110820/west-memphis-three-walks-to-freedom-are-they-really-innocent-gulity-damien-echols-jason-baldwin-and.htm>.

factor is that plea bargaining is, for the most part, an unregulated industry. This article discusses cases in which innocent defendants pled guilty to obtain their release, thus joining the “unexonerated,” explores the factors that “cause” innocent defendants to plead guilty, and finally proposes several options the criminal justice system could embrace to avoid, or at least ameliorate, the plight of innocent defendants who plead guilty.

## I. Introduction.

On August 19<sup>th</sup> 2011, Damien Echols, Jason Baldwin and Jessie Misskelley, also known as the “West Memphis Three,” were released from prison nearly eighteen years after they were first arrested in connection with the murders of three eight year old boys in West Memphis, Arkansas.<sup>2</sup> Their freedom came at a significant cost however; to obtain their release they pled guilty to crimes they almost certainly did not commit. The deal offered by prosecutors was too “good” to turn down. We might like to think that such things don’t happen, or if they do, only very rarely, but, innocent defendants do plead guilty more than most people think, and certainly more often than anyone cares to admit. In this article, we will discuss several cases in which this occurred, the reasons why innocent defendants plead guilty, and finally offer some tentative proposals to reduce the number of instances in which this happens.

Let us begin with a more detailed discussion of the West Memphis Three case to set the stage. The defendants were arrested in 1993 after the bodies of three young boys – Christopher Byers, Stevie Branch and Michael Moore – were found naked and hogtied with their own shoelaces. The victims’ clothing was found in a nearby creek. Byers had deep lacerations and injuries to his scrotum and penis. An autopsy revealed that Byers died from multiple injuries,<sup>3</sup>

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<sup>2</sup> Campbell Robertson, *Deal Frees ‘West Memphis Three’ in Arkansas*, N.Y. Times, August 19 2011, [http://www.nytimes.com/2011/08/20/us/20arkansas.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/08/20/us/20arkansas.html?pagewanted=all&_r=0)

<sup>3</sup> FRANK J. PERETTI, WILLIAM Q. STURNER, CHRISTOPHER BYERS AUTOPSY, ARKANSAS STATE CRIME LABORATORY, May 7 1993, available at

and the other two boys from multiple injuries with drowning.<sup>4</sup> Misskelley confessed to the murders following a twelve hour police interrogation and implicated Echols and Baldwin in his confession. Misskelley later recanted but was convicted on the strength of his confession in February 1994 and sentenced to life imprisonment plus two twenty year sentences.<sup>5</sup> The prosecution's case against Misskelley was based almost entirely on his confession. In fact, without the statements, the prosecution's case could not have survived a directed verdict motion.<sup>6</sup>

Echols and Baldwin were convicted of three counts of capital murder shortly afterwards. The convictions were largely based on prosecution arguments that the defendants had been motivated as members of a satanic cult and witnesses who said they had heard the teenagers speak of the murders.<sup>7</sup> Echols was sentenced to death and Baldwin received a sentence of life imprisonment.<sup>8</sup>

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<http://www.autopsyfiles.org/reports/Other/west%20memphis%20three/branch,%20steve.pdf>

<sup>4</sup> FRANK J. PERETTI, WILLIAM Q. STURNER, STEVE BRANCH AUTOPSY, ARKANSAS STATE CRIME LABORATORY, May 7 1993, available at <http://www.autopsyfiles.org/reports/Other/west%20memphis%20three/branch,%20steve.pdf>; FRANK J. PERETTI, WILLIAM Q. STURNER, MICHAEL MOORE AUTOPSY, ARKANSAS STATE CRIME LABORATORY, May 7 1993, available at: <http://www.autopsyfiles.org/reports/Other/west%20memphis%20three/moore,%20james%20michael%20.pdf>

<sup>5</sup> *Youth is Convicted in Slaying of 3 Boys in Arkansas City*, N.Y. Times, February 5 1994, <http://www.nytimes.com/1994/02/05/us/youth-is-convicted-in-slaying-of-3-boys-in-an-arkansas-city.html>

<sup>6</sup> See *Misskelley v State of Arkansas*, 323 Ark. 449 (1996) at 459, where the Supreme Court of Arkansas states regarding Misskelley's case, "The statements [confessions made by Misskelley] were the strongest evidence offered against the appellant at trial. In fact, they were virtually the only evidence, all other testimony and exhibits serving primarily as corroboration".

<sup>7</sup> Campbell Robertson, *Deal Frees 'West Memphis Three' in Arkansas*, *supra*.

<sup>8</sup> *Id.*

In 2007, new evidence came to light. DNA testing revealed that biological material found at the crime scene did not belong to the victims or the three convicted defendants.<sup>9</sup> However, a hair found in one of the knots on one of the hogtied bodies was determined to be “not inconsistent” with a DNA sample obtained from the stepfather of one of the victims (who was also the last person seen with the victims).<sup>10</sup> Evidence of juror misconduct involving the foreperson of the jury was discovered,<sup>11</sup> and a witness who allegedly told police she had seen the defendants in the area where the crime occurred recanted her testimony.<sup>12</sup>

On November 4<sup>th</sup> 2010, the Arkansas Supreme Court ordered a state trial judge to determine whether the new DNA evidence rendered the convictions invalid.<sup>13</sup> However, before the hearing took place, the prosecution offered the West Memphis Three a “get out of jail” (but not free) opportunity. Although they would have to plead guilty to lesser charges, the three men would not have to admit their guilt; they would be permitted to plead guilty while still maintaining their innocence using what is commonly called an *Alford* plea.<sup>14</sup> And, the agreed upon sentence would be

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<sup>9</sup> Shaila Dewan, *Defense Offers New Evidence in a Murder Case that Shocked Arkansas*, N.Y Times, October 30 2007, <http://www.nytimes.com/2007/10/30/us/30satanic.html>. In fact, no DNA from the three alleged perpetrators had ever been discovered at the crime scene or on any item of evidence.

<sup>10</sup> Id.

<sup>11</sup> Campbell Robertson, *Deal Frees ‘West Memphis Three’ in Arkansas*, *supra*.

<sup>12</sup> Tim Hackler, *Complete Fabrication*, Arkansas Times, October 7 2004, <http://www.arktimes.com/arkansas/completefabrication/Content?oid=1886107>.

<sup>13</sup> Echols v State of Arkansas, 2010 Ark. 417.

<sup>14</sup> Campbell Robertson, *Deal Frees ‘West Memphis Three’ in Arkansas*, *supra*.

time served. Thus each defendant would be released immediately from prison after the pleas were entered. But, it was a “package” deal, and was null and void unless all three defendants said yes.<sup>15</sup> After some hesitation, all three defendants accepted the bargain, entered the pleas and were released.<sup>16</sup>

Was justice served? The plea bargain did secure the defendant’s freedom after eighteen years of confinement. It also ensured that Echols would not be executed. Almost any criminal defense lawyer, including the authors of this essay, would have advised them to take it (and would have cajoled them to take it if they hesitated). However their freedom came at a high price; the three men pled guilty to a murder they adamantly maintained they did not commit, which the overwhelming weight of the evidence suggested they did not commit, and which almost no one in the community where the crime occurred believed they committed. Furthermore, because a plea is a conviction, the three men are now all “convicted murderers.” This will continue to have significant effects on their ability to find employment, they are deprived of most of their civil rights and of any civil remedy they possibly had against either the police or prosecutors, leaving them without any compensation for the eighteen years of wrongful imprisonment.

The prosecution’s plea offer was (and was designed to be) highly coercive. The chances that any one of the three would have been found guilty at a new trial were slim; the prosecutors admitted as much.<sup>17</sup> But, the prospect of

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<sup>15</sup> David Koon, *Jason’s choice: friendship, freedom and a principled stand*, Arkansas Times, August 24 2011, <http://www.arktimes.com/arkansas/jasons-choice/Content?oid=1888400>

<sup>16</sup> Campbell Robertson, *Deal Frees ‘West Memphis Three’ in Arkansas*, *supra*.

<sup>17</sup> See Max Brantley, *Prosecutor’s Statement on West Memphis 3 Plea Deal*, Arkansas Times, August 19 2011, <http://www.arktimes.com/ArkansasBlog/archives/2011/08/19/prosecutors-statement-on-west-memphis-3-plea-deal> (in which the prosecutor, Scott Ellington, states: “it would be practically impossible to put on a proper case against the defendants in this particular case after eighteen years of extended litigation”).

immediate release from prison made “rolling the dice” at a new trial (assuming the judge ordered one) a risky proposition, and one not many persons imprisoned for nearly two decades would be likely to take, or one any competent attorney would advise them to take. Adding to the coercion was the condition that if any of the three rejected the offer, the other two could not take advantage of the deal. This put great pressure on Misskelley and Baldwin to accept the plea for their friend’s sake; Echols was still on death row and faced the possibility of execution.<sup>18</sup> In fact, press accounts revealed that Baldwin did not want to plead guilty and would have preferred to take his chances before a new jury. “This was not justice,” he said immediately following the plea. “However, they’re trying to kill Damien, sometimes you just have to bite down to save somebody.”<sup>19</sup> Echols later thanked Baldwin at a press conference for his decision to accept the plea despite his misgivings.<sup>20</sup>

The “deal” in this case almost certainly resulted in three innocent men pleading guilty to something they did not do. They were offered a deal they could not realistically refuse. They now stand “convicted” of the murders of three young boys. Should such a result be tolerated? Should prosecutors be allowed to coerce factually innocent defendants to plead guilty to crimes they did not commit? It is a question worth asking because the West Memphis Three case is not unique. Innocent defendants plead guilty quite frequently. It is one of many dark secrets of the criminal justice system.

As we will discuss below, the modern American criminal justice system has three features that create the

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<sup>18</sup> David Koon, *Jason’s choice: friendship, freedom and a principled stand*, *supra*.

<sup>19</sup> *Id.*

<sup>20</sup> “West Memphis Three”: Damien Echols overwhelmed by release, CBS News, August 19 2011, [http://www.cbsnews.com/8301-504083\\_162-20094730-504083.html](http://www.cbsnews.com/8301-504083_162-20094730-504083.html).

hydraulic pressure which increases the risk of innocent defendants pleading guilty: (1) the system's need (or at least perceived need) for the overwhelming majority of defendants to plead guilty; (2) draconian sentences for many offenses and offenders; and, (3) an almost complete lack of judicial regulation of the plea bargaining process. These three factors combine to create a system in which innocent defendants can be coerced to plead guilty.

## II. A Brief History of Plea Bargaining

We next provide a brief overview of the history of plea bargaining, a subject which (many) entire books have been written about.<sup>21</sup>

Plea bargaining first became common in the United States in the mid-1800s,<sup>22</sup> and by 1967 the American Bar Association was beginning to embrace the practice, noting that it was necessary given the system's lack of resources.<sup>23</sup> However, the constitutionality of the practice was not firmly established until 1970.<sup>24</sup> Negotiated pleas became the

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<sup>21</sup> See, e.g., GEORGE FISHER, PLEA BARGAINING'S TRIUMPH, A HISTORY OF PLEA BARGAINING IN AMERICA (2003), MIKE MCCONVILLE AND CHESTER MIRSKY, JURY TRIALS AND PLEA BARGAINING: A TRUE HISTORY (2005); MARY E VOGEL, COERCION TO COMPROMISE: PLEA BARGAINING, THE COURTS AND THE MAKING OF POLITICAL AUTHORITY (2007).

<sup>22</sup> JENIA I. TURNER, PLEA BARGAINING ACROSS BORDERS: CRIMINAL PROCEDURE (2009)

<sup>23</sup> See AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY 2 (Approved draft 1968).

<sup>24</sup> See *Brady v United States*, 397 U.S. 742 (1970). Robert Brady was indicted in 1959 for kidnapping and failing to release a hostage without harm, which carried a maximum penalty of death penalty. But, he could only be sentenced to death if: a) he went to trial; b) was convicted; and, c) the jury recommended death as the appropriate punishment. Brady chose to plead guilty to avoid the risk of capital punishment, and he was sentenced to fifty years imprisonment. Eight years later, Brady challenged the constitutionality of his guilty plea based on the Supreme Court's intervening decision in *United States v Jackson*, 390 U.S. 570, 583 (1968), which held that the statutory scheme authorizing the death penalty only for those who went to trial had the "inevitable effect...to

primary means of disposition of criminal cases as crime rates rose in the late 1960's and early 1970's and as the number of state and federal crimes proliferated in response to public demand for action. For example, the number of felony prosecutions (and the number of prison inmates) more than doubled between 1978 and 1990.<sup>25</sup> The increase in the number of cases was not accompanied by sufficient additional resources to handle them, i.e., additional prosecutors, public defenders and judges.<sup>26</sup> Thus, it quickly became generally accepted that the system could only process the growing backlog of cases by reducing the number of trials. To reduce trials, it was essential that more defendants plead guilty.<sup>27</sup> And, they did.

Today plea bargaining is accepted as an essential and permanent component of the American criminal justice system. Between 2008 and 2012 more than 96% of all resolved criminal cases culminated in plea bargains rather than trial.<sup>28</sup> In 2012, 97% of cases that were resolved were settled through pleas, with only 3% being adjudicated in

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discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial." Brady argued that his plea was invalid as it was induced by the threat of death. The Court, however, held that Brady's plea was knowing and intelligent at the time it was entered; he understood the risks and obtained the benefit of the bargain. *Id.* at 756. Furthermore, the Court determined that the criminal justice system could not operate if intervening decisions upset pleas previously entered. *Id.*

<sup>25</sup> William J Stuntz, *Bordenkircher v Hayes: Plea Bargaining and the Decline of the Rule of Law in CRIMINAL PROCEDURE STORIES* 351, 378 (STEIKER, 2005).

<sup>26</sup> *For e.g.* From 1974 to 1990, almost the same period in which caseloads doubled, the number of assistant prosecutors nationwide rose less than 20%, from 17,000 to 20,000 (BUREAU OF JUSTICE STATISTICS, US DEPARTMENT OF JUSTICE, PROSECUTORS IN STATE COURTS (1990), at 1, available at <http://www.bjs.gov/content/pub/pdf/psc90.pdf>)

<sup>27</sup> Stuntz, *supra* at 363.

<sup>28</sup> US SENTENCING COMMISSION, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, FIGURE C, [http://www.ussc.gov/Research\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2012/sbtoc12.htm](http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/sbtoc12.htm)

bench or jury trials.<sup>29</sup> As Justice Kennedy recently observed: “the reality [is] that the criminal justice system today is for the most part a system of pleas, not a system of trials.”<sup>30</sup> And the view of pleas has changed. Once thought to be a “necessary evil,”<sup>31</sup> plea bargaining is now applauded as an efficient means of disposition. Two terms ago, in a different case, Justice Kennedy, again speaking for a majority of the Court, stated: “[t]o note the prevalence of plea bargaining is not to criticize it. The potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing means that a plea agreement can benefit both parties.”<sup>32</sup>

*The system’s need for defendants to plead guilty*

The current conventional wisdom is that without the ability to dispose of the vast majority of cases through plea bargaining, the criminal justice system would collapse inwardly upon itself like a legal black hole. More than forty years ago, then Chief Justice Warren Burger stated that “a reduction from 90% to 80% in guilty pleas requires the assignment of twice the judicial manpower and facilities” and, “a reduction to 70% trebles the demand.”<sup>33</sup> Regardless of whether the former Chief Justice’s resource allocation assessments are accurate, it is almost universally accepted by the participants in the system that there are not enough

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<sup>29</sup> Id.

<sup>30</sup> *Lafler v. Cooper*, 132 S.Ct. 1376, 1388 (2012).

<sup>31</sup> *Lafler*, *supra* at 1397 (Scalia, J., dissenting) (“until today, [plea bargaining] has been regarded as a necessary evil. It presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense ; and for guilty defendants it often—perhaps usually—results in a sentence well below what the law prescribes for the actual crime. But even so we accept plea bargaining because many believe that without it our long and expensive process of criminal trial could not sustain the burden imposed on it, and of system of justice would grind to a halt”).

<sup>32</sup> *Missouri v. Frye*, 132 S.Ct. 1399, 1407-08 (2012).

<sup>33</sup> Warren E. Burger, *The State of the Judiciary*, 56 A.B.A. J. 929, 931 (1970).

personnel, court time or funds to try every case, or for that matter even any significant percentage of cases.<sup>34</sup> In *Santobello v New York* the Supreme Court concluded plea bargaining was: "... an essential component of the administration of justice...If every criminal charge were subjected to a full scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities."<sup>35</sup> Thus while some critics question the fairness and integrity of a system that must forego trials to survive, the practice is not going away.<sup>36</sup> Quite the contrary; as noted by the Supreme Court in *Missouri v Frye*: "In today's criminal justice system the negotiation of a plea bargain rather than the unfolding of a trial, is almost always the critical point for a defendant".<sup>37</sup>

*Draconian sentences for many offenses and offenders*

Assuming that it is correct and desirable (or at least necessary) that most defendants plead guilty, the most effective way for the prosecution to induce pleas is to offer incentives to defendants to waive their right to trial. However, the rise in crime rates described above was accompanied by a political demand to "get tough" on

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<sup>34</sup> See Hessick and Saujani, *Plea Bargaining and Convicting the Innocent The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 *BYU J. Pub. L.* 189 at 227 (2002) (outlining the argument that plea bargaining is necessary for system efficiency); *Blackledge v. Allison*, 431 U.S. 63, 71 (1977) ("whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered they can benefit all concerned").

<sup>35</sup> 404 U.S. 257 (1971), at 260

<sup>36</sup> See Q2 2013 UNITED STATES SENTENCING COMMISSION, SECOND QUARTER FY2013 QUARTERLY SENTENCING UPDATE, TABLE 22 at [http://www.ussc.gov/Data\\_and\\_Statistics/Federal\\_Sentencing\\_Statistics/Quarterly\\_Sentencing\\_Updates/USSC\\_2013\\_Quarter\\_Report\\_2nd.pdf](http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Quarterly_Sentencing_Updates/USSC_2013_Quarter_Report_2nd.pdf) (showing that from October 1 2012 to March 31 2013, 96.9% of criminal cases were resolved by plea rather than by trial).

<sup>37</sup> *Frye, supra* at 1408

crime.<sup>38</sup> Thus during the same period, minimum and maximum sentences also rose sharply, as did the enactment of a variety of recidivist statutes.<sup>39</sup> Furthermore, in the same era, legal definitions of criminal intent and liability were also expanded making it easier to convict defendants of more serious crimes. Given the new weapons in their inducement arsenal, prosecutors began to “encourage” guilty pleas by threatening harsher punishments.<sup>40</sup> As legislatures added new crimes and increased sentences, a “menu” was created giving a charging list of sentencing options to prosecutors to extract bargains.<sup>41</sup> This created a plea bargaining system whereby extremely coercive “deals” were offered to defendants both in terms of incentives to forego trial and avoidance of much harsher punishment.

*Lack of judicial regulation of the plea bargaining process*

The system can operate in such a coercive manner because plea bargaining is, for the most part, an unregulated “industry.” It is true that there are some statutes and rules that provide guidelines and limits on plea bargaining.<sup>42</sup> In federal cases, for example, the judge who accepts the plea must be satisfied that there is “a factual basis” for it, advise the defendant whether the court is bound by the parties’ recommendations, decide whether to accept or reject the plea agreement and ensure the proceedings are captured in a verbatim record to facilitate review.<sup>43</sup> However, judicial focus for the most part is on whether the plea was knowing and intelligent. The determination of whether the plea agreement is truly voluntary does not depend on the substantive terms or generosity of the bargain. Because a

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<sup>38</sup> Stuntz, *supra* at 378.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *See, e.g.*, Ariz Crim Proc Rule 17.4; Colo Crim Proc Rule 11(f); Fed Rules Crim Proc Rule 11.

<sup>43</sup> Fed. R. of Crim. Pro. P. 11.

plea is only involuntary when it is “the result of force or threats or of promises” extraneous to the agreement itself,<sup>44</sup> prosecutors have wide latitude in setting the terms of plea arrangements.<sup>45</sup>

*Debate regarding the current system and conviction of innocent defendants*

This system, including its desirability and morality have been, and continue to be, debated in the academy and by judges and practicing lawyers. The academic literature is varied in its reaction to plea bargaining and consists primarily of both attempts to provide a theoretical justification for plea bargaining,<sup>46</sup> and critiques of the

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<sup>44</sup> Fed. R. of Crim. Pro. P. 11(b)(2).

<sup>45</sup>For example, as noted previously, in *Brady v United States*, the Court held that the threat of the death penalty could be used to induce a guilty plea as long as the plea was knowing and intelligent. Furthermore, a large differential between the sentence a defendant would face after trial, and the sentence he receives under the terms of the plea agreement, does not render the agreement involuntary. *Bordenkircher v Hayes* (434 U.S. 357 (1978) effectively rejected the suggestion that prosecutors cannot threaten a criminal punishment that has not been applied, at least occasionally, to similarly situated defendants. This means that a charge that would not have been brought originally could be threatened if a guilty plea was rejected. Justice Powell was critical of this in his *Hayes*' dissent stating: “[t]he question that must be asked is whether the prosecutor might have reasonably charged the respondent under the Act in the first place.” While the Federal Sentencing Guidelines may have remedied this to some extent, for example by only allowing a maximum sentence reduction of 25% from the benchmark sentence in return for a guilty plea, this was largely neutralized by the case of *United States v Booker* 543 U.S. 220 (2005) which reduced the status of the guidelines from binding to advisory.

<sup>46</sup> See, e.g., Thomas W. Church, Jr., *In Defense of “Bargain Justice,”* 13 L. & Soc'y Rev. 509, 511 (1979) (defending the rationality of the plea bargaining system against critics); James E Bond, *PLEA BARGAINING AND GUILTY PLEAS* 2D. ED. NEW YORK: CLARK BOARDMAN & CO., 1982 (discussing the constitutional status of plea bargaining and standards for accepting guilty pleas); Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. Legal Stud. 289, 308-09 (1983) (arguing that plea-bargaining is desirable as a mechanism for setting the price of crime); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909 (1992) (setting forth a contract theory of plea bargaining and urging structural modifications to account for innocent defendants),

current plea bargaining process.<sup>47</sup> Some object to the new reality of plea bargaining on the basis that it diminishes community participation in the criminal justice system, places too much power (and coercive power) in the hands of prosecutors rather than neutral judges, often pits lawyers against their clients thus eroding the attorney-client relationship, and allows defense counsel to “cut corners.”<sup>48</sup>

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Frank H Easterbrook, *Plea Bargaining as Compromise*, 101 Yale L.J. 1969 (1992) (defending plea bargaining based on autonomy and efficiency); Scott W Howe, *The Value of Plea Bargaining*, 58 Okla. L. Rev. 599, 603 (2005) (arguing that plea bargaining is valuable as it maximizes deserved punishment at a reasonable cost and generally treats defendants fairly).

<sup>47</sup> Albert W. Alschuler, *Implementing The Criminal Defendants Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. Chi. L. R. 931, 932 (1968) lists some common objections: plea bargaining makes a substantial part of an offender's sentence depend, not upon what he did or his personal characteristics, but upon a tactical decision irrelevant to any proper objective of criminal proceedings. In contested cases, it substitutes a regime of split-the-difference for a judicial determination of guilt or innocence and elevates a concept of partial guilt above the requirement that criminal responsibility be established beyond a reasonable doubt. It also deprecates the value of human liberty and the purposes of the criminal sanction by treating these things as commodities to be traded for economic savings—savings that, when measured against common social expenditures, usually seem minor; *see also*, Katherine J. Strandburg, *Deterrence and the Conviction of Innocents*, 35 Conn. L. Rev. 1321, 1336 (2003) (using an economic model of costs and benefits to review law enforcement strategies to suggest that the widespread use of plea bargaining may in fact decrease deterrence); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 Yale L.J. 1979, 1992 (1992) (challenging the contract defense of plea bargaining); Daniel Givelber, *Punishing Protestations of Innocence: Denying Responsibility and Its Consequences*, 37 Am. Crim. L. Rev. 1363, 1364-71, 1384 (2000) (contending that plea bargaining unfairly punishes virtually everyone who insists upon trial); Dervan and Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem* 103 *Journal of Criminal Law & Criminology* 1 (2012) (discussing a study involving school children in which more than half of the innocent participants were willing to falsely admit guilt for a benefit).

<sup>48</sup> *See, e.g.*, Albert Alschuler, *Lafler and Frye: Two Small Band-Aids for a Festering Wound*, 51 *Duq. L. Rev.* 673 (noting that the plea bargaining system subjects defense attorneys to temptations to disregard their clients interests); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 *Harv. L. R.* 2463 (2004) (noting a lack of oversight of lawyers in the plea bargaining process); William Stuntz, *Plea Bargaining and Criminal Laws Disappearing Shadow*, 117 *Harv. L. Rev.* 2548 (2004) (describing the

Proponents of plea bargaining counter that it promotes efficiency and autonomy, it is essential, according to its defenders, that criminal cases be resolved without trials.<sup>49</sup> They also maintain that despite the potentially coercive power placed in prosecutor's hands, even an innocent defendant is better off when she chooses to plead guilty in order to assure a more lenient result if she concludes that there is a risk of wrongful conviction at trial.<sup>50</sup> By allowing a defendant to choose whether to accept a plea bargain or take their chances at trial, the rational defendant (so the theory goes) will only choose to plead guilty if the chances of being found guilty are high (or process costs are high compared to the costs of a guilty plea). Therefore, according to this school of thought, even innocent defendants gain from plea bargaining. A further advantage of the plea bargaining system is said to be respect for an individual's autonomy in that it gives the defendant some ability to control her destiny.<sup>51</sup>

Relying on the consensual nature of the practice, the Supreme Court, as noted above, has praised plea bargaining as benefiting all participants in the criminal justice system as

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criminal law as a "menu" of options which prosecutors can use to dictate the terms of plea bargains).

<sup>49</sup> See, e.g., *Santobello v New York* 404 U.S. 257 (1971) ("...the disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining' is an essential component of the administration of justice...If every criminal charge were subjected to a full scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.")

<sup>50</sup> Josh Bowers, *Punishing The Innocent*, 156 U. Pa. L. Rev. 1117 (2008), 1158-1159.

<sup>51</sup> Joseph Goldstein, *For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent, and the Plea Bargain*, 84 Yale L.J. 683, 685 (1975) (arguing that the rules governing plea bargaining "are rooted in a basic commitment . . . to respect human dignity by protecting the right of every adult to determine what he shall do and what may be done to him").

well as the public.<sup>52</sup> The Court has focused on the supposed benefits, even in cases where there is strong evidence of vindictive treatment and coercive tactics. For example, in *Bordenkircher v Hayes*,<sup>53</sup> Justice Stewart's majority opinion defended the practice against a challenge based on the prosecutor's decision to increase the charges with "unique severity"<sup>54</sup> against a defendant who refused to plead guilty. Hayes was indicted for uttering a forged instrument in the amount of \$88.30. The prosecutor offered Hayes a term of five years imprisonment in exchange for a guilty plea.<sup>55</sup> Hayes, believing five years was excessive given the modest amount of funds illegally obtained, turned it down. Because Hayes had two prior felony convictions for similar offenses, the prosecutor then indicted Hayes, as he had promised he would, under the Kentucky Habitual Criminal Act. Hayes was convicted and sentenced to the mandatory term of life imprisonment with the possibility of parole.<sup>56</sup> Hayes argued that the prosecutor's actions were vindictive and thus violated the Due Process Clause. The Supreme Court rejected Hayes' due process challenge, even though the prosecutor conceded that he charged Hayes as a habitual criminal for the purpose of inducing a plea.<sup>57</sup> Despite previous decisions establishing that state practices designed to discourage the assertion of constitutional rights, including

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<sup>52</sup> Santobello, *supra*, at 261 ("Disposition of charges after plea discussions... leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pretrial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned").

<sup>53</sup>434 U.S. 357 (1978).

<sup>54</sup> *Id.* at 372.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 359.

<sup>57</sup> *Id.* at 370

the right to jury trial, are “patently unconstitutional,”<sup>58</sup> the Court determined that since the prosecutor could have legitimately charged Hayes under the Habitual Criminal Act initially had he chosen to do so, it was not vindictive (in the constitutional sense) to use the act to induce the plea after Hayes rejected the initial offer. Justice Stewart’s majority opinion also hailed the virtues of plea bargaining: “properly administered plea bargaining can benefit all concerned,” and described plea bargaining as “give and take” negotiations between sides with relatively equal bargaining power.<sup>59</sup> Emphasizing mutual advantage, with both sides gaining by agreements to persuade defendants to plead to lesser charges, the Court stated that it is completely legitimate for a prosecutor to “induce [pleas] by promises of a recommendation of a lenient sentence or reduction of charged and thus by fear of the possibility of a greater penalty upon conviction after a trial,”<sup>60</sup>

But saying it is so, even if it is the Supreme Court that says it, does not make it so. In many cases, there is no true mutuality of advantage, or true free choice for defendants given the highly coercive nature of the practice. As others have noted, *Hayes* allows a prosecutor to apply leverage by filing charges that would not have been brought against the defendant absent plea bargaining considerations and which no one, including the prosecutor that levies them, believes are appropriate.<sup>61</sup> Superficially, the defendant appears to receive a benefit if the prosecutor agrees to dismiss the added charges in exchange for a guilty plea, but the benefit

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<sup>58</sup> See, *Chaffin v. Stynchcombe*, 412 U.S. 17, 32 n. 20a

<sup>59</sup> Hayes, *supra* at 362

<sup>60</sup> Id. at 363

<sup>61</sup> Stephen Ross, *Ignoring Prosecutorial Abuse in Plea Bargaining*, 66 Cal. L. Rev. 875, 879 (1978); see also William Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, *supra* (“Criminal law is different. Its primary role is not to define obligations, but to create a menu of options for prosecutors. If the menu is long enough – and it usually is – prosecutors can dictate the terms of plea bargains. When that is so, litigants...bargain in the shadow of prosecutors preferences, budget constraints, and political trends”).

is, in reality, illusory. Innocent defendants, even those who are unlikely to be found guilty at trial, are pleading guilty.<sup>62</sup>

The lack of advantage to many innocent defendants is exacerbated by the fact that prosecutors often offer the strongest incentives to defendants in cases where the evidence is weakest, as it is necessary to do so to secure a conviction.<sup>63</sup> Here, the mutuality of advantage argument does not work as prosecutors can extract a guilty plea in almost any case, regardless of the defendant's guilt or innocence, by dramatically changing the cost-benefit analysis.<sup>64</sup> Rarely will a defendant refuse to consider any plea offer at all. Many defendants, even innocent ones, are willing to accept a lesser punishment in return for avoiding the risk of a much harsher sentence following conviction

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<sup>62</sup> See Michael O Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 Harv. L. Rev. 293 (1975) (concluding that more than two-thirds of "marginal" plea bargain defendants would be acquitted or dismissed if they were to contest their cases).

<sup>63</sup> See Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. Chi. L. Rev. 50, 59-65 (1968) (suggesting that prosecutors offer the best bargains in weak cases, including ones in which defendant may be innocent); see also James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 Harv. L. Rev. 1521 (1981), at 1534-35 (explaining why prosecutors are likely to offer the greatest incentives for those defendants with the greatest chance of acquittal at trial); Welsh S. White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. Pa. L. Rev. 439 (1971) at 451 ("According to Martin Erdman, New York prosecutors often reduce their sentence recommendations by at least fifty percent if they believe that there is a fifty percent chance of a hung jury, and by a great deal more if they believe that there is a fifty percent chance of acquittal").

<sup>64</sup>The coercive nature of pleas can be illustrated by looking at the sentencing results in cases where defendants plead guilty compared to sentences imposed on defendants convicted at trial. Beverley Cook found, for example, that persons charged with violations of the Federal Selective Service Act who were convicted at jury trials received sentences about twice as severe as offenders who pled guilty (Cook, *Sentencing Behavior of Federal Judges: Draft Cases 1972*, 42 U. Cin. L. Rev. 597, 609 (Table 3) (1973)) and Hans Zeisel found that the sentences of New York City defendants convicted at trial were 136% more severe than those proposed by prosecutors in pretrial offers to the same defendants. (Zeisel, *The Offer That Cannot Be Refused*, in F ZIMRING & R FRASE, *THE CRIMINAL JUSTICE SYSTEM, MATERIALS ON THE ADMINISTRATION AND REFORM OF THE CRIMINAL LAW* 558, 561 (1980).

(even if the risk is very small).<sup>65</sup> Thus prosecutors can extract guilty pleas even from defendants who are likely to be found not guilty at trial.<sup>66</sup> These defendants do not benefit from the plea in any genuine sense. This is an especially effective tactic in cases where capital punishment is a potential sentencing option. The possibility of being sentenced to death, even if it is remote, can lead defendants, even innocent ones, to plead guilty to get the death penalty “off the table.”<sup>67</sup>

And, the theoretical mutuality of advantage is virtually non-existent in this context. The reality is that there is little defense counsel can do to protect their clients. Prosecutors have the clear and undeniable upper hand; they can overcharge, leverage overbroad laws, exploit the information imbalance, wear down the defendant with (often extended) pre-trial incarceration and top it off with the possibility of a draconian sentence to shape the bargain in such cases.<sup>68</sup>

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<sup>65</sup> See Russel D Covey, *Longitudinal Guilt: Repeat Offenders, Plea Bargaining, and the Variable Standard of Proof*, 63 FLA Rev 431, 450, (2011), (“When the deal is good enough, it is rational to refuse to roll the dice, regardless of whether one believes the evidence establishes guilty beyond reasonable doubt, and regardless of whether one is factually innocent. The risk of inaccurate results in the plea bargaining system thus seems substantial”); Donald G Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U.Ill. L. Rev. 37, 49 (“The reality of sentencing differentials is generally enough to deprive defendants of any real choice in plea bargaining”).

<sup>66</sup> See Finkelstein, *supra* (concluding that more than two-thirds of “marginal” plea bargain defendants would be acquitted or dismissed if they were to contest their cases).

<sup>67</sup> See Hugo A. Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stan. L. Rev. 21, 63 (1987) (reviewing five cases in which innocent defendants pled guilty in order to avoid the risk of a death sentence), *see also* <http://www.nytimes.com/2012/04/01/us/released-but-not-exonerated-kerry-max-cook-fights-for-true-freedom.html?r=2&hp> (describing the case of Kerry Max Cook).

<sup>68</sup> See Alexandra Natapoff, *Gideon Skepticism*, 70 Wash. & Lee L. Rev. 1049, 1065-66 (2013) (noting that mandatory minimum sentences and heavy trial penalties often pressure defendants into pleading guilty no matter how good their lawyers are, the structural challenges of fair plea

*The Curious Case of the Alford Plea*

Further evidence of the criminal justice system's addiction to guilty pleas (even in cases where a defendant might be innocent) can be found in the Supreme Court's decision in *North Carolina v Alford*.<sup>69</sup> Henry Alford was charged with first degree murder. The prosecution announced its intention to seek the death penalty. Then, the state offered Alford a deal. If he pled guilty to second degree murder, he would be sentenced to a term of imprisonment. Alford took it. During the plea colloquy, he adamantly insisted that he was innocent, and that he was only pleading guilty because of the substantial down side risks.<sup>70</sup> When the case reached the Supreme Court, it held that defendants may knowingly and voluntarily plead guilty, even while protesting their innocence, if the judge determines there is "strong evidence of actual guilt."<sup>71</sup> The plea was not constitutionally defective, even though Alford's primary motivation for the plea was avoiding the death penalty,<sup>72</sup> because the standard for determining the validity of guilty pleas "remains whether the plea represents a voluntary and intelligent choice among the alternative course of action open to the defendant."<sup>73</sup>

While the *Alford* plea was not officially acknowledged by the Supreme Court until 1970, nolo contendere pleas, also grounded in not admitting guilt, have existed since medieval times.<sup>74</sup> Nolo contendere (or no contest) pleas originated

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bargaining far exceed the question of counsel's performance in individual cases).

<sup>69</sup> 400 U.S. 25, 37 (1970).

<sup>70</sup> Id. at 27-28

<sup>71</sup> Id. at 37-38

<sup>72</sup> Id. at 31

<sup>73</sup> Id. at 31

<sup>74</sup> Warren Moise, *Sailing Between the Scilla and Charybdis: Nolo Contendere*

from a procedure whereby a defendant, hoping to avoid imprisonment, tried to end the prosecution by offering money to the King without admitting guilt.<sup>75</sup> Although the practical consequences of the two pleas are basically the same, *Alford* and *nolo contendere* pleas differ in two respects.<sup>76</sup> First, unlike *Alford* pleas, *nolo contendere* pleas generally avoid estoppel in later litigation. Second, defendants who plead *nolo contendere* simply refuse to admit guilt, while defendants making *Alford* pleas affirmatively protest their innocence. The Supreme Court determined there was no constitutional difference between the pleas because “the Constitution is concerned with the practical consequences, not the formal categorizations, of state law.”<sup>77</sup> Today, forty-seven states permit *Alford* pleas.<sup>78</sup>

When one steps back a bit from the world as we currently know it, the *Alford* plea is a curious legal construct. It permits someone who insists that they are innocent to plead guilty to a crime they do not acknowledge committing; guilty but not guilty. One would think that if a defendant says he did not commit the crime, the criminal justice system would insist on a trial to resolve the question. Although there is some efficiency gained by allowing *Alford* pleas; the primary one being that it allows guilty defendants to plea bargain while saving face with their spouses, children, parents and/or friends,<sup>79</sup> the device provides

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and *Alford Pleas*, S.C law, May 17, 2006, at 10 (citing F. POLLACK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 517 (2d ed. 1909)).

<sup>75</sup> *Id.*

<sup>76</sup> Claire Molesworth, *Knowledge Versus Acknowledgement: Rethinking the Alford Plea in Sexual Assault Cases*, 6 *Seattle J. Soc. Just.* 907, 912 (2008).

<sup>77</sup> *Alford*, *supra* at 37.

<sup>78</sup> Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 *Corn. L. Rev.* 1361, 1372 (2003).

<sup>79</sup> Proof of this lies in the fact that *Alford* pleas are most commonly used in cases involving sexual assault, violence and white collar crime. Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*. *Id.*

additional incentives for factually innocent defendants to plead as they can receive the benefits of a guilty plea without having to falsely admit guilt. *Alford* pleas, therefore, exacerbate the risk of truly innocent defendants pleading guilty.

### III. Why Do Innocent Defendants Plead Guilty?

In an ideal world, factually innocent defendants would not be charged with crimes they did not commit. In that same world, innocent defendants who were wrongly charged would never plead guilty, but would go to trial and be acquitted by a jury of their peers. But that is not the world we live in. We now know, for example, due to the availability of DNA testing, that at least twenty-nine individuals who pled guilty to crimes they did not commit served a combined total of more than one hundred and fifty years in prison before their exonerations.<sup>80</sup> Why do they do it?

There are three principal reasons why innocent defendants plead guilty. First, innocent persons charged with relatively minor offenses often plead guilty in order to get out of jail, to avoid the hassle of having criminal charges hanging over their heads, or to avoid being punished for exercising their right to trial. Second, defendants who were wrongfully convicted, but have their conviction vacated on direct appeal or in post-conviction review proceedings, plead guilty to receive a sentence of time served and obtain their immediate (or at least imminent) freedom. Third, some

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<sup>80</sup> See [http://www.innocenceproject.org/Content/When\\_the\\_Innocent\\_Plead\\_Guilty.php](http://www.innocenceproject.org/Content/When_the_Innocent_Plead_Guilty.php). The Innocent Project estimate that false confessions are involved in about 25% of wrongful convictions that are later overturned by DNA testing. To give a few examples, John Dixon pled guilty in 1991 to a rape he did not commit and spent ten years in prison before being exonerated by DNA evidence, Christopher Ochoa pled guilty in 1989 to a murder he did not commit and spent nearly twelve years in prison before DNA testing led to his exoneration and Jerry Frank Townsend pled guilty in the 1970s to six murders and one rape and served nearly twenty-two years in prison before DNA testing led to his exoneration.

innocent defendants plead guilty due to the fear of a harsh alternative punishment, e.g., the death penalty.<sup>81</sup>

**A. Defendants charged with minor or relatively minor offenses.**

The largest category is the first; innocent persons charged with relatively minor offences. Spend time talking to any “front line” public defender or persons in our poorest communities and they will tell you that many innocent defendants charged with relatively minor crimes plead guilty in order to get out of jail or avoid spending additional time in jail. In many of these cases, the defendants do not have a constitutional right to an attorney or a jury trial, and, especially if they are incarcerated pre-trial, will plead guilty just to get out of jail.<sup>82</sup> The incentives are quite strong; most of these defendants are poor, and thus unable to afford bond, retain counsel or care for their families. In many instances, they already have some kind of criminal record, and in the communities in which they live the stigma of a

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<sup>81</sup> There are also potential (but likely smaller) fourth and fifth categories of cases in which innocent defendants plead guilty, which we will not discuss in detail here. The fourth category consists of innocent defendants who have a prior conviction but whose only chance of acquittal at trial is to testify in their own defense. But, due to the very real fear that they will be impeached with the prior conviction and the jury will – despite instructions to the contrary – draw a propensity inference from the prior conviction that the defendant is guilty, the defendant elects to plead guilty. See John H Blume, *The Dilemma of the Criminal Defendant with a Prior Record – Lessons from the Wrongfully Convicted*, 5 *Journal of Empirical Legal Studies* 477 (2008) (noting numerous instances of innocent defendants who did not testify in their own defense – some of whom pled guilty – because they had a prior conviction). The fifth category consists of innocent defendants who make false confessions due to coercive interrogation by the police and plead guilty, on advice of counsel, due to the difficulty in persuading jurors that people do, in fact, confess to crimes they did not commit. See Douglas Starr, *Do police interrogation techniques produce false confessions?*, *The New Yorker*, December 9 2013, [http://www.newyorker.com/reporting/2013/12/09/131209fa\\_fact\\_starr](http://www.newyorker.com/reporting/2013/12/09/131209fa_fact_starr).

<sup>82</sup> Alexandra Natapoff, *Misdemeanors*, 85 *S. Cal. L. Rev.*, 101, 134-135 (2012) (describing the pressure on defendants accused of misdemeanors to plead guilty to get out of jail).

criminal conviction, especially for a minor offense, is low. Even if they are released on bail, the trial will not be for months, possibly longer, and it is often inconvenient or expensive to go to court for things like “roll-call.” And, they frequently know, and will be advised, that if they reject a favorable plea and are found guilty, the judge will punish them for exercising their right to trial.<sup>83</sup> Thus, many defendants will do whatever it takes to get out of jail or avoid a trial; including pleading guilty to a crime they did not commit.

Erma Faye Stewart, for example, was thirty and a single mother of two when she was arrested as part of a drug sweep based on the word of a confidential informant.<sup>84</sup> With no one to take care of her two small children, Stewart decided to plead guilty to delivery of a controlled substance. She was sentenced to ten years probation, and she was required to pay \$1800 in fines and report to her parole officer monthly, an hour later, she was released.<sup>85</sup> The confidential informant was later exposed as a fraud and the charges were dropped against the other defendants charged in the sweep, who had not pled guilty.<sup>86</sup> The reality is that, for many defendants like Erma Stewart, a guilty plea often represents the only readily available key to the cellblock door.

These defendants can be significantly harmed by their convictions.<sup>87</sup> Their criminal records can deprive them of

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<sup>83</sup> See Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 *Crim. L. Q.* 67 (2005) (describing the magnitude of the “trial penalty” whereby harsher sentences are imposed on a defendant who has been convicted after trial than would have been imposed had she pled guilty).

<sup>84</sup>See <http://www.pbs.org/wgbh/pages/frontline/shows/plea/four/stewart.html>

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* Stewart’s attempts to invalidate her guilty plea were rebuffed by the courts.

<sup>87</sup> See Michelle Alexander, *Go to Trial: Crash the Justice System*, *N.Y. Times*, March 10 2012, [http://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html?\\_r=0](http://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html?_r=0), describing Erma Faye Stewart’s case (Ms. Stewart was saddled with a felony record; she

employment as well as educational and social opportunities and a minor conviction can affect eligibility for professional licenses, child custody, food stamps, student loans and health care.<sup>88</sup>

### **B. Defendants who prevail during the appellate process**

Second, innocent defendants who are wrongfully convicted and then win a new trial, may plead guilty in order to secure their immediate or imminent release. This was true of the West Memphis Three, and, under the right circumstances can be an appealing option to an innocent defendant. Why? Think about it from the wrongfully convicted person's perspective. They have been to trial and, despite knowing they were innocent, the jury found them guilty. Having seen the criminal justice system in operation, "up close and personal" so to speak, it is not hard to imagine that such a defendant would be reluctant to "roll the dice" at a retrial.<sup>89</sup> Even in cases where new evidence has come to light, e.g., the DNA evidence in the case of the West Memphis Three, the prosecution will often attempt to bargain with the defendants in order to secure a guilty plea and maintain the conviction. Most prosecutors and law enforcement officers are hostile to post-conviction claims of innocence.<sup>90</sup> This has been described as a "conviction psychology" which leads prosecutors and police to resist claims of innocence in order to maintain the integrity of the criminal justice system (by not admitting that the system had

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was destitute, barred from food stamps, evicted from public housing and as a result had her children placed in foster care).

<sup>88</sup> Alexandra Natapoff, *Misdemeanors*, *supra*, at 104.

<sup>89</sup> See Russel Covey, *supra* ("When the deal is good enough, it is rational to refuse to roll the dice, regardless of whether one believes the evidence establishes guilt beyond a reasonable doubt, and regardless of whether one is factually innocent.")

<sup>90</sup> Daniel Medwed, *The Zeal Deal: Prosecutorial Resistance To Post-Conviction Claims of Innocence*, 84. B.U. L. Rev. 125(2010) (analyzing the institutional and political factors deterring prosecutors from accepting the legitimacy of post-conviction innocence claims).

made a mistake), improve their own chances of promotion (by maintaining conviction rates), and avoid wasting time (as they still believe defendants are guilty regardless of how persuasive the evidence of innocence is).<sup>91</sup> Therefore, prosecutors will often offer highly coercive deals involving immediate or near immediate release from jail to secure a conviction.

The West Memphis Three is not the only recent example of this sad reality. We will briefly discuss several instances where this happened.<sup>92</sup> Sterling Spann was convicted of the murder and sexual assault of an elderly widow, Melva Neill, in 1981. The jury sentenced him to death.<sup>93</sup> During the post-conviction investigation, a private investigator discovered that exactly sixty days before Ms. Neill was brutally murdered, another elderly white woman was killed in the same rural area pursuant to the same *modus operandi* (the victim was sexually assaulted, strangled, and left in the bathtub). The same investigator discovered that exactly sixty days after the Neill murder, a third elderly white female was sexually assaulted and strangled (she had no bathtub but fluid was poured on the body).<sup>94</sup> Further investigation revealed that a paranoid schizophrenic, Johnny Hullett, was convicted of killing the third victim. When interviewed by members of Spann's defense team, Hullett insisted Spann was innocent and acknowledged his own involvement in the murders.<sup>95</sup> One of the leading forensic pathologists in the world, Werner Spitz, examined all three

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<sup>91</sup> Id. In some cases, the plea is extracted to prevent the defendant from bringing a civil action.

<sup>92</sup> In two of which, in the interest of full disclosure, the Cornell Capital punishment Clinic served as counsel of record for the defendant.

<sup>93</sup> Keith Morrison, *A 20 year quest for freedom*, NBC news, June 11 2007, [http://www.nbcnews.com/id/19161103/ns/dateline\\_nbc-crime\\_reports/t/-year-quest-freedom/#.Uij\\_KamgQts](http://www.nbcnews.com/id/19161103/ns/dateline_nbc-crime_reports/t/-year-quest-freedom/#.Uij_KamgQts)

<sup>94</sup> State v Spann, 334 S.C. 618, 620 (1999). Spann had been arrested and was incarcerated at the time of the third homicide.

<sup>95</sup> Keith Morrison, *A 20 year quest for freedom*, *supra*.

autopsy reports and concluded that given the unique nature of the strangulation in all three cases, the murders were committed by one person.<sup>96</sup> Leading criminal profilers including the chief former FBI profiler, also concluded that the crimes were committed by one person and that Hullett, not Spann, matched the profile.<sup>97</sup> Furthermore, the fingerprint and serological evidence that led to Spann's conviction at trial was tainted. Even the State's fingerprint examiner conceded that the prosecution's theory of how Spann's prints were left at the scene was "impossible."<sup>98</sup> Given this new evidence of innocence, the South Carolina Supreme Court ordered a new trial.<sup>99</sup>

Prior to the retrial, the prosecution offered to allow Spann to enter an *Alford* plea making him immediately eligible for parole; the prosecution also agreed that it would not oppose parole. Having spent twenty years on death row, Spann, who had been out on bond for more than a year prior to the scheduled trial, decided to take the deal.<sup>100</sup> His sister, who had been his "rock" during the many years he was incarcerated, had recently been killed in an automobile accident.<sup>101</sup> And, one of his best friends on death row, Richard Johnson, was executed, despite Johnson's strong claim of factual innocence.<sup>102</sup> Devastated by his sister's

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<sup>96</sup> State v Spann, 334 S.C. 618, *supra*, at 621.

<sup>97</sup> *Id.*

<sup>98</sup> Keith Morrison, *A 20 year quest for freedom*, *supra*.

<sup>99</sup> State v Spann, 334 S.C. 618, *supra*.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> See Johnson v. Catoe, 548 SE 2d 587 (2001). The South Carolina Supreme Court rejected, by a 3-2 vote, Johnson's final appeal which was based on newly discovered evidence of innocence despite the fact that one of Johnson's co-defendants admitted that they committed the murder (*see* 548 SE 2d at 594). Governor Jim Hodges then denied Johnson's request for clemency despite the fact that the victim's widow asked the Governor to commute the sentence, as did the state senator from the district in which the crime occurred, based on the new

death, and frightened by Johnson's execution, Spann decided he needed to put the matter behind him, plead guilty and secure his freedom.<sup>103</sup> His attorneys, one of whom is a co-author of this article, concurred in Spann's decision.

Edward Lee Elmore recently made a similar choice.<sup>104</sup> Elmore was convicted in Greenwood County, South Carolina 1982 of the rape and murder of a woman for whom he worked as a "yard-man." His conviction was reversed on direct appeal,<sup>105</sup> but he was convicted and sentenced to death a second time. On appeal from that conviction and death sentence, a third trial was ordered (but this time only on the issue of punishment), and Elmore was again sentenced to death.<sup>106</sup> After years of appeals, he was (finally) granted a new trial by a panel of the United States Court of Appeals for the Fourth Circuit in December of 2011.<sup>107</sup> Despite being one of the, if not the most conservative federal court of appeals in the United States,<sup>108</sup> Elmore's panel described the case as illustrating "extreme malfunctions in the state criminal justice system."<sup>109</sup> The court of appeals

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evidence. Hodges received 1850 letters and emails asking for clemency for Johnson (*see* Jim Davenport, *Hodges denies clemency, trooper's killer to die today*, *The Post and Courier*, May 3 2002).

<sup>103</sup>Keith Morrison, *A 20 year quest for freedom, supra*. We would note that Spann is successfully employed as a car mechanic in Charlotte, North Carolina, and he is still happily married to the woman he met (and married) while incarcerated on death row.

<sup>104</sup> Raymond Bonner, *When Innocence Isn't Enough*, *N.Y. Times*, March 2 2012, <http://www.nytimes.com/2012/03/04/opinion/sunday/when-innocence-isnt-enough.html?pagewanted=all>

<sup>105</sup> *State v Elmore* 308 S.E. 2d 781 (1983).

<sup>106</sup> *State v Elmore* 332 S.E.2d 762 (1985)

<sup>107</sup> *Elmore v Ozmint* 661 F.3d 783 (4<sup>th</sup> Cir. 2011).

<sup>108</sup> *See* John H. Blume, *The Dance of Death or (Almost) "No One Gets Out of Here Alive": The Fourth Circuit's Capital Punishment Jurisprudence*, 61 *S.C. Law Rev.* 465 (2010).

<sup>109</sup> *Elmore v Ozmint, supra*, at 786

also described the prosecution's case as "underwhelming," "flimsy" and indicative of "police ineptitude and deceit."<sup>110</sup>

Following the Fourth Circuit's decision, the prosecution offered Elmore a deal; he could plead guilty pursuant to *Alford* in exchange for time served and immediate release. With the alternative being a year or more in jail prior to a retrial and then having to face a fourth jury, Elmore, with some reluctance, accepted the plea offer and walked out of a maximum security prison several days later.<sup>111</sup> In this case too, his lawyers agreed with his decision. Public reaction to the plea was mixed, with most agreeing that the plea was unfair. The New York Times, for example, published an editorial entitled, "When innocence is not enough."<sup>112</sup> Elmore, who is happy to no longer be incarcerated, spent more than thirty years in prison for a crime he did not commit, and has not, and will never be, truly "exonerated."<sup>113</sup>

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<sup>110</sup> Elmore v Ozmint, *supra*, at 871.

<sup>111</sup> Jeffrey Collins and Meg Kinnard,, *Ex-Death Row inmate walks out a free man*, The State, March 3 2012, <http://www.thestate.com/2012/03/03/2175467/ex-death-row-inmate-walks-out.html>

<sup>112</sup> Raymond Bonner, *When Innocence Isn't Enough*, N.Y. Times, March 2 2012, <http://www.nytimes.com/2012/03/04/opinion/sunday/when-innocence-isnt-enough.html?pagewanted=all>

<sup>113</sup> A "new" member has recently joined the unexonerated in this category of case. George Souliotes spent nearly 17 years in prison after being found guilty of a triple murder for allegedly starting a fire that killed three people. A federal court granted the writ of habeas corpus and vacated his conviction finding that the arson evidence was scientifically flawed and trial counsel was ineffective for failing to adequately challenge it (*Souliotes v Grounds*, 2013 U.S. Dist. LEXIS 32717 (E.D. Cal. Mar. 6, 2013)). The prosecution then offered Souliotes a deal: he would be immediately released if he pled no contest to three counts of involuntary manslaughter for failure to maintain working smoke detectors (even though the house did have a smoke alarm). What is most striking is that the prosecution conceded there was no evidence that the fire had been started deliberately. In other words, there was no evidence that the "crime" Souliotes pled guilty to was – in fact – a crime. Nevertheless, Souliotes agreed to the "deal" and the trial judge accepted it (*see Maura Dolan, Arson Convict Proves His Innocence After 16 Years Behind Bars*, L.A Times, July 3 2013, <http://www.latimes.com/local/la->

### C. Avoiding harsh alternative punishments.

Finally, factually innocent defendants may plead guilty because they are afraid that they will be punished (often quite severely) for exercising the Sixth Amendment right to jury trial. In many murder cases, for example, the prosecution will threaten the defendant with capital punishment if he does not plead guilty.<sup>114</sup> After being notified that the prosecution was seeking the death penalty against them, Phillip Bivens and Bobby Ray Dixon pled guilty to a 1979 Mississippi rape and murder in exchange for a sentence of life imprisonment. In 2010, DNA testing

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me-c1-freed-prison-20131017-dto,0,2232794.htmlstory#axzz2kRWBOhRP). Souliotes apparently hoped the state would acknowledge he was wrongfully convicted and compensate him for his confinement but the plea ended any such possibility. (See Maura Dolan, *Out of Prison and into the Unknown*, L.A. Times, October 17 2013, <http://www.latimes.com/local/la-me-c1-freed-prison-20131017-dto,0,2232794.htmlstory>). Other examples of defendants who have prevailed during the appellate process and then pled guilty include Kerry Max Cook and Sunny Jacobs. Cook's case is particularly interesting as Cook has now been conclusively proven innocent. Cook was charged with, convicted of and sentenced to death for the brutal murder and rape of Linda Jo Edwards in Texas. The post-conviction investigation revealed that the testimony of several key witnesses was perjured, and that the prosecution suppressed exculpatory evidence. After Cook was granted a new trial, the prosecution offered a no contest plea in exchange for a sentence of time served. Cook accepted. Subsequently, DNA testing conclusively established Cook's innocence. Thus Cook was able to transition from the unexonerated to the exonerated (see <http://www.pbs.org/wgbh/pages/frontline/shows/plea/four/cook.html>). Sunny Jacobs was convicted and sentenced to death for the 1976 murders of two law enforcement officers in Florida, a third co-defendant received a life sentence after pleading guilty and testifying against her and her partner. Following the discovery that the chief prosecution witness had given contradictory statements, the prosecutor proposed an Alford plea which Jacobs accepted. She was released in 1992 (see <http://www.deathpenaltyinfo.org/additional-innocence-information>).

<sup>114</sup>See, James S. Liebman, *The Overproduction of Death*, 100 Colum. L. Rev. 2030, 2097 & n.165 (2000) and; Hugo A. Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stan. L. Rev. 21, 63 (1987) (reviewing five cases in which innocent defendants pled guilty in order to avoid the risk of a death sentence).

conclusively established their innocence.<sup>115</sup> This was also a factor in the West Memphis Three case; the fact that Damien Echols was on death row contributed to the decision of the three men to plead guilty.<sup>116</sup> But even where death is not a sentencing option, prosecutors often have other potential harsh sentences, including lengthy terms of imprisonment, including life without parole as well as enhancements for second or third time offenders that can be used to induce reluctant defendants, even innocent ones, to plead guilty in exchange for a reduction in the amount of time that will have to be served.<sup>117</sup>

#### IV. Reducing the Number of the Unexonerated?

There is clearly a problem; in a fair criminal justice system innocent defendants would not plead guilty to crimes they did not commit. But, they do. We are not exactly sure how often it occurs, but the numbers are not so small that the phenomena can be dismissed as artifact. On the other hand, it is possible that innocent defendants pleading guilty is simply the cost of doing plea business. In

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<sup>115</sup> See [http://www.innocenceproject.org/Content/When\\_the\\_Innocent\\_Plead\\_Guilty.php](http://www.innocenceproject.org/Content/When_the_Innocent_Plead_Guilty.php) (describing the case of Phillip Bivens and Bobby Ray Dixon, and other cases in which innocent defendants have pled guilty, usually to avoid the potential for a long sentence, or death).

<sup>116</sup> David Koon, *Jason's choice: friendship, freedom and a principled stand*, *supra*.

<sup>117</sup> See [http://www.innocenceproject.org/Content/James\\_Ochoa.php](http://www.innocenceproject.org/Content/James_Ochoa.php) (describing the case of James Ochoa who pled guilty to a 2005 carjacking he did not commit to avoid a possible sentence of 25 years to life if convicted at trial. Ten months after his conviction, DNA testing proved his innocence). Another former Cornell Capital Punishment Clinic client, Johnny Ringo Pearson was charged with murder and related offenses. After nearly a decade of pre-trial litigation revolving around Pearson's competency to stand trial, he was found to be a person with mental retardation and thus not eligible for the death penalty pursuant to the Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). But, he was still facing a potential sentence of life imprisonment. The prosecution offered a plea bargain pursuant to which Pearson would be released after a relatively short additional term of imprisonment. Given the alternatives, Pearson was willing to accept the bargain despite strong evidence of factual innocence.

the South there is an old saying: “People like sausage and justice; but no one likes to see how either one is really made.” Maybe that is true in the plea bargaining context. If the system must induce virtually all defendants, somehow and somehow to plead guilty, then not only the guilty but also the innocent will in some instances agree to plead guilty. And, no feasible solutions come readily to mind. This seems especially true for the persons charged with relatively minor offenses who plead guilty for time served to get out of jail. But, we are not quite ready to throw up our hands and give up. So, let us briefly discuss some possibilities.

First, the criminal justice system could eliminate plea bargaining. While this is viewed by most people, including a majority of the current Supreme Court, as unthinkable, many European criminal justice systems do not allow the practice, and they manage their criminal dockets adequately.<sup>118</sup> In a world without the ability to plea bargain, we would expect to see two adjustments benefitting innocent (and also guilty) defendants. First, charges would be dismissed in more cases. Without the ability to use many of the currently sanctioned highly coercive practices, prosecutors would dismiss weak cases rather than working to get the “best” deal possible. And since, on average, weak cases are more closely associated with innocence, innocent defendants would benefit from a no-bargaining regime. Second, charging decisions would have to become more rational. In today’s plea driven market, prosecutors have incentives to overcharge in order to start the “bidding” so to speak.<sup>119</sup> Without the ability to bargain, however, prosecutors would be forced to charge more appropriately, at least in regard to the expected disposition of cases. Another benefit which would protect the innocent would be

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<sup>118</sup> WORLD PLEA BARGAINING: CONSENSUAL PROCEDURES AND THE AVOIDANCE OF THE FULL CRIMINAL TRIAL 344, 363-66 (S. Thaman ed. 2010).

<sup>119</sup>See Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 Harv. L. Rev. 150 (2012) (noting that the current charging system is akin to “sticker price” on a new car. It is not intended to be the sale price, and only a fool would pay it. Rather it is intentionally set at an (unreasonably) high price to facilitate the expected negotiations).

that the prosecutors would not be able to freely “purchase” the testimony of jailhouse informants with a dismissal or reduction in charges or sentence, thus eliminating a leading cause of wrongful convictions.<sup>120</sup>

One of the authors of this article’s thinking regarding the morality and utility of plea bargaining has undergone a metamorphosis over the years. During his years as a full-time practicing criminal defense lawyer, he fully embraced the conventional wisdom that pleas were essential. He could see the limitations of the “mutuality of advantage” rationale, but living inside the system prevented him from thinking outside of it. He now believes there is much to be said for jettisoning the plea driven system. It places the enforcement of the criminal law in the hands of prosecutors and defense lawyers, does not make legislators accountable for their legislation (and thus promotes political posturing with draconian legislation) and has a corrosive effect on the attorney-client relationship.<sup>121</sup> However, without modifications to current minimum/maximum punishment

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<sup>120</sup> See ROB WARDEN, *THE SNITCH SYSTEM: HOW INCENTIVIZED WITNESSES PUT 38 INNOCENT AMERICANS ON DEATH ROW*, CENTER ON WRONGFUL CONVICTIONS, NORTHWESTERN UNIVERSITY SCHOOL OF LAW (2005), available at <http://www.innocenceproject.org/docs/SnitchSystemBooklet.pdf> (describing informant testimony (often from jailhouse informants) as the “leading cause of wrongful convictions in U.S. capital cases”); see also Alexandra Natapoff, *Beyond Unreliable, How Snitches Contribute to Wrongful Convictions*, 37 Golden Gate U.L. Rev 107, 109- 111 (presenting data on “snitch generated” wrongful convictions) (2006-2007).

<sup>121</sup> Because most defendants are indigent, they are represented by public defenders or court appointed counsel. Most of these attorneys have large caseloads and incentives to dispose of cases as quickly as possible with as little time spent on each case as possible. Thus, the first conversation that many defendants have with their attorneys focuses on a plea, i.e., what can the client “live with.” (See AMERICAN BAR ASSOCIATION, *GIDEON’S BROKEN PROMISE, AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE* (2004), 16 at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_bp\\_right\\_to\\_counsel\\_in\\_criminal\\_proceedings.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf)). This, understandably, leaves many defendants with the impression that their attorney: a) does not care whether they are innocent or guilty or whether their rights were violated; and, b) does not intend to conduct a factual investigation.

and sentencing regimes, which are, at least for the moment not viable, a non-plea bargaining world is not the solution, especially given that most of the rest of the world, again at least for now, is not prepared to eliminate the practice.<sup>122</sup>

A similar, but more limited possibility would be not to allow *Alford* pleas. It is, as we have previously noted, an odd thing that we allow defendants to plead guilty to crimes they insist they did not commit. A rational criminal justice system, in our view, would respond to a denial of guilt with something resembling the following: “ok, if you say you did not do it, we have a procedure for determining whether the evidence is sufficient to convict; it is called a trial.” Doing away with *Alford* pleas would have the effect of forcing some innocent defendants to go to trial, where they would (hopefully) be acquitted. And, in other cases, prosecutors would likely dismiss the charges instead of using the *Alford* plea to seal the deal. But, on the other hand, *Alford* pleas do have a practical value. They allow some guilty defendants to plead who would not otherwise do so to save face especially in cases involving sexual assaults (although that is a strange reason to embrace the practice), and guilty-but-not-guilty pleas also permit some potentially innocent defendants who would be convicted at trial to obtain a better outcome (which is the equivalent of saying that a little less injustice beats more injustice). The most significant objection

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<sup>122</sup> In fact, if anything, the Supreme Court has “constitutionalized” the status quo. *Lafler v. Cooper*, *supra*, 132 S.Ct. at 1397 (“the Court today opens a whole new field of constitutionalized criminal procedure: plea bargaining law”). In three cases over the last several years the Court has found trial counsel ineffective for deficient performance in plea bargaining. In *Padilla v. Kentucky*, 559 U.S 356 (2010), 130 S.Ct.1473 (2010) the Court held that it was deficient performance to give the client erroneous advice regarding the immigration consequences arising from a guilty plea. In *Lafler*, the Court found counsel’s performance deficient based on erroneous advice that resulted in the defendant rejecting a favorable plea in favor of going to trial (at which he was convicted and received a substantially more severe sentence). And, in *Missouri v. Frye*, *supra*, counsel was found ineffective for failing to inform the defendant of a plea offer that lapsed. The defendant later pled guilty, but in exchange for substantially less favorable terms. In doing so, the Court stated that “the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences.” 132 S.Ct. at 1388.

to this proposal, however, is that as long as plea bargaining in general is still available in the non-*Alford* context, the most likely result of eliminating the practice would be to simply drive cases now resolved by *Alford* pleas “underground” into the available plea bargaining market.

Third, the criminal justice system could (and definitely should) require more judicial supervision of the plea bargaining process. At one end of the spectrum, judges could be authorized to strike the death penalty as a potential punishment if the court thought it was being used only for, or primarily for, “plea extraction” purposes. But, this is likely to do little good. Even assuming a judge acting in good faith,<sup>123</sup> it is difficult to overcome the information gap problem. How is a judge to know if the prosecutor is acting coercively or vindictively except in the most egregious cases?<sup>124</sup> One possibility would be to adopt the model suggested by Justice Powell in his *Hayes* dissent, where he stated: “the question that must be asked is whether the prosecutor might have reasonably charged the respondent

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<sup>123</sup> We would also note the problem of judicial hostility to criminal defendants generally, especially in jurisdictions where judges are elected. See Eric Sandberg-Zakian, *Rethinking “Bias”: Judicial Elections and the Due Process Clause after Caperton v A.T. Massey Coal Company*, 64 Ark. L. Rev. 179 (2010).

<sup>124</sup> Another proposal we considered but ultimately opted not to advance was (substantially) more rigorous enforcement of Rule 3.8 of the American Bar Association Model Rules of Professional Conduct, which states: “*The prosecutor in a criminal case shall: (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause...*”. As our discussion of the West Memphis Three and George Souliotes cases illustrated, this rule is “honored in the breach.” In theory, more vigorous enforcement of the rule would prevent some of the extremely coercive plea bargains offered in very weak cases. This would be particularly relevant to cases classed in our second category (defendants who prevail during the appellate process). However, as our colleague Brad Wendel pointed out, there is also the danger that any significant increase in disciplining prosecutors carries the significant risk of making the situation worse, not better. This is true for two reasons. First, it encourages lead prosecutors to misrepresent the strength of cases to ensure the facial existence of probable cause. The second, and more important reason, is that it would discourage prosecutors from offering plea bargains to these defendants at all.

under the Act in the first place".<sup>125</sup> However, unfortunately even this may be unrealistic, judges are busy, dockets are crowded; in large urban areas the system is driven by the rule of "meat in/sausage out."

Another needed reform in the area of judicial supervision of plea bargaining is to allow trial and appellate courts to consider the "voluntariness" of the plea. Current legal doctrine focuses myopically on whether the plea was knowing and intelligent. This, in turn, focuses on questions like: was the defendant aware of the rights he was waiving by entering the plea (the right to jury trial, the right to testify, the right to confront witnesses)?<sup>126</sup>; was the defendant aware of nature of the charges he was pleading guilty to?<sup>127</sup>; was the defendant aware of the maximum punishment?<sup>128</sup>; and, was there a factual basis for the plea?<sup>129</sup> But very little attention is given to whether the plea was truly voluntary. For example, the pleas entered by the West Memphis Three easily satisfied the knowing and intelligent inquiry. But, that was not what was wrong with the pleas they were offered. The problem was that virtually no rational defendant, even an innocent one, would turn the deal down. Thus courts should recognize, and more importantly enforce, a voluntary guilty plea requirement. The right would be somewhat akin to a voluntariness challenge to an incriminating statement. Current confession law doctrine uses a totality of the circumstances test and asks courts to inquire whether, considering the totality of the circumstances, the individual's will was overborne by coercive interrogation practices.<sup>130</sup> While this would be a step forward, it is not without significant downsides. First, unless a court has the power not only to set aside the plea

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<sup>125</sup> Hayes, *supra*, at 370.

<sup>126</sup> Fed. R. Crim. P. 11(b)(1)(B)-(F)

<sup>127</sup> Fed. R. Crim. P. 11(b)(1)(G).

<sup>128</sup> Fed. R. Crim. P. 11(b)(1)(H)-(J).

<sup>129</sup> Fed. R. Crim. P. 11(b)(3).

<sup>130</sup> See *Colorado v. Connelley*, 479 U.S. 157 (1986).

but also to dismiss the charges, then defendants like Spann and Elmore benefit little from being returned to the *status quo ante*. Second, totality of the circumstances tests very rarely work to a criminal defendant's benefit. In the confession context, for example, voluntariness challenges are many, successful ones are very, very few.<sup>131</sup>

Fourth, the current law in most jurisdictions barring a defendant from bringing a civil action if he pleads guilty could be modified. Allowing civil suits even if a defendant pleads guilty would discourage the practice of forcing innocent defendants to plead guilty, or in some cases, would allow the individual to recoup some damages for the loss of liberty. If the defendant prevailed in such a suit, it should also serve to restore a person's civil rights. However, the objections are many. Guilty as well as innocent defendants would sue. While, in many cases, courts could quickly separate the "wheat from the chafe," the nuisance suit factor makes this effectively a non-starter.

Fifth, in our second category of cases, where innocent defendants who are wrongfully convicted and then win a new trial plead guilty in order to secure their immediate or imminent release, a different prosecutor's office could be assigned to the case after the appellate reversal. The new prosecutorial team, which in theory would not be as invested in again securing a conviction, would decide whether to dismiss the case, offer a plea or go forward with the prosecution. This might help to reduce the effect of institutional and political factors that prevent prosecutors accepting the legitimacy of post-conviction innocence claims<sup>132</sup> and therefore encourage weak cases to be dismissed rather than settled through plea bargaining. However, again we are skeptical. Prosecutors are a "tight knit" group and will be reluctant to earn the ire of their

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<sup>131</sup> See *Missouri v Seibert*, 542 U.S. 600, 609 (2004) (stating that it takes "unusual stamina" to maintain a statement is involuntary if authorities have adhered to Miranda dictates and that "litigation over voluntariness tends to end with the finding of a valid waiver").

<sup>132</sup> See Daniel Medwed, *The Zeal Deal: Prosecutorial Resistance To Post-Conviction Claims of Innocence*, *supra*.

current or former prosecutorial colleagues (or law enforcement officers) by dismissing the charges.

As our penultimate suggestion, we offer a more detailed proposal that – to our knowledge – has not previously been suggested in the literature. That is the use of citizen panels to review guilty pleas after the fact in cases where defendants allege they pled guilty to a crime they did not commit. If this procedure were adopted, defendants who plead guilty pre-trial in exchange for time served (or some nominal additional punishment) would, upon request, have their claim of innocence reviewed by a citizen review panel.<sup>133</sup> This would allow defendants to take the benefit of the guilty plea (which as we have described above they will often be forced to do) while still providing a forum for them to make the case that they were in fact innocent and explain why they pled guilty to a crime they did not commit.

Citizen review panels and boards are already used in the United States in two main areas: allegations of police misconduct;<sup>134</sup> and, child welfare citizen review boards, to ensure child welfare.<sup>135</sup> These are independent boards comprised of civilians, and while not courts, they do hear cases, make objective determinations and have the authority to make recommendations. For example police review boards usually hear allegations of police misconduct made by the public and recommend sanctions for officer misconduct to the Chief of Police, Mayor and/or City Council who can then implement the sanctions. Boards often have the power to subpoena people, documents and other

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<sup>133</sup> A possible variation of this would be review by a panel of retired judges. But for reasons that follow, we prefer to utilize private citizens.

<sup>134</sup> See for e.g., the Las Vegas Citizen Review Board <https://www.citizenreviewboard.com/>, the Pittsburgh Citizen Review Board <http://www.city.pittsburgh.pa.us/cprb/>, the Atlanta Citizens Review Board <http://acrbgov.org/> and the San Diego Citizens Review Board <http://www.sandiego.gov/citizensreviewboard/>

<sup>135</sup> See for e.g., the New Mexico Child Abuse and Neglect Citizen Review Board <http://www.nmcrb.org/> and Oregon's Foster Care Review Board <http://courts.oregon.gov/OJD/OSCA/cpsd/citizenreview/index.page>

evidence.<sup>136</sup> Different review boards have different procedures by which members are appointed to the boards, for example some boards are elected by officials<sup>137</sup> and other boards appoint members from public volunteers.<sup>138</sup>

In the case of review of guilty pleas of persons alleging innocence, one easy to implement option would be to select a panel of citizens from those called for jury service. Potential jurors are usually selected at random from lists of those who are registered to vote and/or have a driver's license.<sup>139</sup> Most potential jurors are not actually selected to serve on a jury because most criminal cases plead and civil cases settle.<sup>140</sup> Instead of having these members of the public effectively sit around and for the most part wait to be selected for a jury (i.e., do nothing), some could serve on a "plea review board."

Review would not tantamount to a full trial and would and should not be overly formalistic given that most defendants will not be able to afford counsel. Instead, upon a defendant's request, the panel would be presented with summary materials about the case (i.e., the arrest warrants and indictment(s)/information, the sentencing range for the alleged crimes charged, the sentencing range for the crime(s) to which the defendant pled, the sentence imposed and how long the defendant was incarcerated prior to the plea), and an explanation from the defendant as to why she pled guilty to a crime she did not commit. The panel would then

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<sup>136</sup> See, for e.g., the Pittsburgh Citizen Review Board <http://www.city.pittsburgh.pa.us/cprb/>

<sup>137</sup> See, for e.g., the Atlanta Citizens Review Board <http://acrbgov.org/>

<sup>138</sup> See, for e.g., Las Vegas Citizen Review Board <https://www.citizenreviewboard.com/>

<sup>139</sup> See, United States Courts information at <http://www.uscourts.gov/FederalCourts/JuryService/about-jury-service.aspx>

<sup>140</sup> See, for e.g., State of Connecticut Judicial Branch jury statistics at [http://www.jud.ct.gov/statistics/jury/Jury\\_12.pdf](http://www.jud.ct.gov/statistics/jury/Jury_12.pdf) (showing that in the Connecticut Superior Court in 2012, 537,041 summonses were issued, 92,851 jurors served and 6,154 jurors were selected for trial).

determine whether the totality of the circumstances suggests “substantial doubt as to the accuracy of the guilty plea.” In cases involving pleas to misdemeanors, the review panel could be given the power to set aside a conviction and functionally acquit the defendant if it concluded that there was substantial doubt as to the accuracy of the plea. In felony cases (where there is likely to be more resistance to acquittal by a panel), a finding of substantial doubt could qualify the defendant for a post-conviction relief proceeding (and the appointment of counsel) on the grounds that it is likely they pled guilty to a crime they did not commit.<sup>141</sup> The case would then go before a judge to determine whether there was enough evidence to support the guilty verdict.

In many cases the evidence would show the defendant was guilty, for example in cases where the prosecution has strong evidence against a defendant or where the defendant has no convincing explanation as to why she entered a guilty plea. However, in other cases defendants would be able to make the requisite showing. Regardless, the guilty plea panel procedure we are proposing would provide some opportunity to have convictions set aside for “unexonerated” persons without putting significant pressure on criminal justice infrastructure.

Thus defendants who decided to plead guilty rather than go to trial would still have some opportunity to have their guilt or innocence decided by a panel of their peers. While historically this citizen involvement in the criminal justice system was provided by jury trials,<sup>142</sup> we no longer have a system of jury trials. As the Supreme Court recently stated, we have a system of pleas.<sup>143</sup> But the core function

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<sup>141</sup> This is currently not a ground for post-conviction relief in any jurisdiction we are aware of, although some states do have a general “in the interests of justice” category of post-conviction claim. See, e.g., S.C. Code § 17-27-20(a)(4).

<sup>142</sup> The Supreme Court has stated that juries “guard against a spirit of oppression and tyranny on the part of rulers” and act as an intermediary between the State and criminal defendants (United States v Gaudin 515 U.S. 506, 510-511).

<sup>143</sup> Lafler, *supra*, at 1388.

that jurors play – providing an accused “an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge”<sup>144</sup> – is equally important in the current “need to plead” system.<sup>145</sup> The ability to have a citizen plea review panel would extend the historical protection provided by juries to all defendants, not just the 3% who go to trial.<sup>146</sup> This is especially critical in the current regime as innocent defendants who plead guilty

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<sup>144</sup> *Duncan v Louisiana*, 391 U.S. 145 (1968), at 156. See also Richard Lippke, *Plea Bargaining After Lafler and Frye: Plea Bargaining in the Shadow of the Constitution*, 51 Duq. L. Rev. 709, 714 (2013) (“Jury trials were viewed as serving important public values, in ensuring the integrity of charge adjudication procedures against the suspicions of corruption or tyranny, and in educating the public by bringing them into contact with more learned judges and involving them in debates about public affairs”).

<sup>145</sup> See Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 86 N.Y.U. L. Rev. 911 at 916 (2006) (noting that in the current system plea bargaining subverts rights to public information and participation in criminal trials and describing plea bargaining as a “low visibility procedure run by insiders”).

<sup>146</sup> In her excellent article, *The Plea Jury*, 85 Indiana L. J. 731 (2010), Laura Appleman proposes the use of a “plea jury” that would be impaneled to sit alongside the judge in deciding whether to accept a guilty plea. Under Appleman’s proposal, the jury would assess three things: whether the factual basis admitted by the defendant fits the alleged crimes; whether the plea was knowing and voluntary; and, whether the proposed sentence is appropriate. We have no fundamental quarrel with this suggestion, but we believe our proposal to be more pragmatic and effective especially in cases in our first and the largest category (defendants charged with minor or relatively minor offences). It is not feasible to impanel a jury in such cases given the current criminal justice infrastructure. Furthermore, the questions put to the jury in Appleman’s proposal do not necessarily speak to the systemic pressures that lead to innocent defendants pleading guilty. For example, there is no consideration of the strength of the underlying evidence and no consideration beyond the current “knowing and voluntary” standard of reasons why the defendant may be pleading guilty to something they did not do. Additionally, if the plea jury does not accept the plea, then the defendant is permitted to withdraw the plea and go to trial, a different plea could be agreed to, or the plea jury could recommend a different sentence. In many cases, this would not actually help an innocent defendant who wanted or needed to be released from custody as soon as possible.

are often those who are most vulnerable to over-zealous prosecutors.<sup>147</sup>

We acknowledge that there may be difficulties with our proposal because some potential jurors selected to participate on a guilty plea review panel may take the “intuitive” approach that someone who pleads guilty probably is guilty (the “I would never plead guilty to something I did not do” mentality). However, this could be remedied by providing the panel with some basic information about “unexonerated” defendants. A more fundamental problem may be that, without access to counsel or resources, the procedure may be of limited value for many persons who plead guilty. On the other hand, keeping the process simple and not overly “legalistic” would encourage participation even by unrepresented defendants. We understand that it is not a perfect proposal, but it would provide some access to justice to innocent defendants who plead guilty and would also provide much needed citizen involvement in the criminal justice system.

Finally, we could attempt to truly level the criminal justice playing field by: a) adequately funding indigent defense systems,<sup>148</sup> b) increasing the quality of appointed defense counsel<sup>149</sup>; c) mandating true open file policies by

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<sup>147</sup> Because establishing review by a guilty plea panel would provide some oversight of prosecutors plea bargaining behavior and would hopefully discourage the current widespread practice of threatening excessive punishments in order to pressure defendants into pleading guilty.

<sup>148</sup> See John H. Blume and Sheri Lynn Johnson, *Gideon Exceptionalism?*, 122 Yale L.J. 2126 (2013) (detailing the pervasive problem of incompetent defense counsel and inadequate funding for investigative and expert services for indigent defendants).

<sup>149</sup> See *Wilbur v. City of Mt. Vernon*, 2013 U.S. Dist. LEXIS 171187 (W.D. Wash. Dec. 4, 2013), in which the District Court found that public defense systems in Mt Vernon and Burlington, Washington deprived those faced with misdemeanor charges of the right to assistance of counsel, in what had become a “meet and plead” system.

prosecutors;<sup>150</sup> d) not allowing jailhouse informants to testify;<sup>151</sup> and, e) preventing the use of what has been recognized by the National Science Academy as “junk” forensic science.<sup>152</sup> But, in the final analysis, this is probably the most unrealistic of all the proposals we have discussed.

## V. Conclusion

The case of the West Memphis Three may be unique in the amount of publicity it attracted, but it represents only the tip of the iceberg of “unexonerated” defendants. As Justice Kennedy recently observed: “the reality [is] that the criminal justice system today is for the most part a system of pleas, not a system of trials.”<sup>153</sup> The current criminal justice system (this “system of pleas”) offers no effective safeguards to defendants to protect them against over-zealous prosecution or even effective oversight of prosecutorial conduct. Vulnerable defendants are left at the mercy of prosecutors, who not only need to deal with cases quickly to clear their heavy workloads, but also often have professional incentives to obtain convictions quickly.<sup>154</sup> In this system, the protections afforded by trial by jury, said to be “fundamental

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<sup>150</sup> See Robert P. Mosteller, *Exculpatory Evidence, Ethics and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 Geo. Mason L. Rev. 257 (2008) (highlighting the importance of disclosing exculpatory information and evidence).

<sup>151</sup> Alexandra Natapoff, *Beyond Unreliable, How Snitches Contribute to Wrongful Convictions*, *supra*.

<sup>152</sup> See NATIONAL ACADEMY OF SCIENCE REPORT, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009) at <https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf>; see also Paul C. Giannelli, *Wrongful Convictions and Forensic Science: The Need To Regulate Crime Labs*, 86 N.C. L. Rev. 163 (2007) (documenting failures of crime labs and forensic techniques and arguing for increased regulation of forensic evidence).

<sup>153</sup> Lafler, *supra*, at 1388.

<sup>154</sup> Daniel Medwed, *The Zeal Deal: Prosecutorial Resistance To Post-Conviction Claims of Innocence*, *supra*, at 134 (reviewing professional incentives for prosecutors to obtain and maintain convictions).

to the American scheme of justice"<sup>155</sup> are lost, legal regulation is almost non-existent and, as William Stuntz stated: "law's shadow disappears" leaving a system where a defendant's fate is dependent on "prosecutorial preferences, budget constraints and political trends."<sup>156</sup> In this system, innocent people are pleading guilty, and join the "unexonerated," often with severe consequences.

We have made several suggestions to reduce the number of the "unexonerated" and to infuse additional judicial oversight and citizen participation in to the criminal justice system. Our most original suggestion is to use citizen review panels made up of jury members to review guilty pleas and ensure that there is not "substantial doubt" as to the accuracy of a plea. If developed and implemented, this could provide some opportunity to have convictions set aside for "unexonerated" persons and, without putting significant pressure on criminal justice infrastructure, preserve the fundamental principle that: "the truth of every accusation...should be confirmed by the unanimous suffrage of...equals and neighbours, indifferently chosen and superior to all suspicion".<sup>157</sup> We recognize the practical difficulty in any proposed reform of the current plea bargaining process and the substantial debate that has already taken place as to reform of the system, but, at a minimum, we hope to stimulate debate and discussion of the plight of the "unexonerated."

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<sup>155</sup> *Duncan v Louisiana*, 391 U.S. 145, 149 (1968).

<sup>156</sup> William Stuntz, *Plea Bargaining and Criminal Laws Disappearing Shadow*, 117 *Harv. L. Rev.* 2548, 2548 (2004)

<sup>157</sup> *Duncan v Louisiana*, 391 U.S. at 151-152.

