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## A NEARLY PERFECT SYSTEM FOR CONVICTING THE INNOCENT

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A NEARLY PERFECT SYSTEM FOR CONVICTING THE  
INNOCENT

*Albert W. Alschuler\**

I. HOW TO CONVICT THE INNOCENT

A law school casebook asks whether plea bargaining “convict[s] defendants who are in fact innocent (*and* would be acquitted [at trial]).”<sup>1</sup> As the question indicates, the fact that plea bargaining may lead some innocent defendants to plead guilty is not a powerful criticism of this practice. The casebook asks whether plea bargaining increases the *number* of wrongful convictions. Because no one can know how many wrongful convictions are produced either by trials or by guilty pleas, the question may seem unanswerable.

But in fact the answer is easy. Convicting defendants who would be acquitted at trial is one of the principal goals of plea bargaining. “Half a loaf is better than none,” prosecutors say.<sup>2</sup> “When we have a weak case for any reason, we’ll reduce to almost anything rather than lose.”<sup>3</sup> If the correlation between “weak cases” and actual innocence is better than random, plea bargaining surely “convict[s] defendants who are in fact innocent (*and* would be acquitted [at trial]).”

Prosecutors engage in both “odds bargaining” and “costs bargaining.” That is, they bargain both to ensure conviction in doubtful cases and to save the costs of trial. Were a prosecutor to engage in odds bargaining alone, he might estimate a defendant’s chance of conviction at trial at 50% and this defendant’s probable sentence if convicted at trial at ten years. Splitting the difference, the prosecutor then might offer to recommend a sentence of five

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<sup>1</sup> SANFORD H. KADISH ET AL., *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 12 (9th ed. 2012).

<sup>2</sup> Albert W. Alschuler, *The Prosecutor’s Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 60 (1968).

<sup>3</sup> *Id.* at 59.

years in exchange for a plea of guilty. Five years is what economists would call the defendant's "expected" sentence—his predicted post-trial sentence discounted by the possibility of acquittal.<sup>4</sup>

An offer of five years, however, would leave a risk-neutral defendant indifferent between pleading guilty and standing trial, and the prosecutor hopes to avoid a trial. He does not want the defendant to be indifferent. The prosecutor therefore engages in costs bargaining as well as odds bargaining. He tailors his final offer, not to balance, but to overbalance the defendant's chances of acquittal.<sup>5</sup> This prosecutor may offer four years in exchange for a plea—or two or three.<sup>6</sup> One can easily discover real-world cases in which prosecutors fearful of defeat at trial have struck bargains allowing defendants facing potential life sentences to plead guilty to misdemeanors.<sup>7</sup>

When a prosecutor has no chance of obtaining a conviction at trial, he may be unable to make an offer that will overbalance the defendant's chances of acquittal.<sup>8</sup> In every other case, however, the prosecutor can reduce the offered punishment to the point that it will become advantageous for the defendant to plead guilty whether he is guilty or innocent. Trials should occur only when defendants irrationally press their luck or when prosecutors and defendants disagree about probable trial outcomes and sentences.<sup>9</sup> In fact,

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<sup>4</sup> As I have noted elsewhere, this description of the "expected" sentence is oversimplified, but the oversimplification does not affect the points I make in text. See Albert W. Alschuler, *Straining at Gnats and Swallowing Camels: The Selective Morality of Professor Bibas*, 88 CORNELL L. REV. 1412, 1413 n.7 (2003).

<sup>5</sup> See Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 289 (1983) (describing plea bargaining as an element of a "well-functioning market system").

<sup>6</sup> If defendants were as concerned as prosecutors with avoiding the costs of trial, costs bargaining would disappear from the equation. As I have explained elsewhere, however, they are not. See Albert W. Alschuler, Lafler and Frye: *Two Small Band-Aids for a Festering Wound*, 51 DUQ. L. REV. 673, 693 (2013).

<sup>7</sup> See, e.g., Alschuler, *supra* note 2, at 61; Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1311 (1975).

<sup>8</sup> Even when a prosecutor has no hope of prevailing at trial, he may be able to obtain a guilty plea by bluffing. See Alschuler, *supra* note 2, at 65 (describing bluffing by both prosecutors and defense attorneys). Moreover, "process costs" may induce defendants to plead guilty even when their guilt cannot be proven at trial. See Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 949–56 (1983).

<sup>9</sup> Reforming the bargaining process by giving defendants more information is unlikely to reduce the number of wrongful convictions significantly. Except when discovery reveals that the prosecutor has no chance at trial, it may only get the innocent better deals. See Russell D. Covey, *Signaling and Plea Bargaining's Innocence Problem*, 66 WASH. & LEE L. REV. 73, 91 (2009) ("[E]nhanced discovery may not increase the disparity between the plea rate of guilty and innocent persons . . .").

trials are extremely rare in the American criminal justice system. The Supreme Court noted in 2012 that 97% of federal convictions and 94% of state convictions are the result of guilty pleas.<sup>10</sup>

Shawn Bushway, Allison Redlich, and Robert Norris recently provided evidence that real-world plea bargaining fits the economic model just described. They presented a hypothetical aggravated robbery case to 1585 prosecutors, defense attorneys, and judges, offering one of sixteen evidentiary variations on the case to each respondent.<sup>11</sup> They asked each respondent to estimate the likelihood of conviction at trial, the probable sentence following conviction at trial, and what sentence the respondent would accept as part of a plea agreement. For all but a few variations, the average acceptable sentence following a guilty plea was *less* than the predicted trial sentence discounted by the likelihood of acquittal.<sup>12</sup> Plea bargaining plainly makes it advantageous for innocent defendants with good prospects of acquittal to plead guilty.

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<sup>10</sup> Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) (citing DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, Table 5.22.2009, <http://www.albany.edu/sourcebook/pdf/t5222009.pdf>; SEAN ROSENMERKEL ET AL., DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2006-STATISTICAL TABLES 1 (Dec. 2009), <http://www.bjs.gov/content/pub/pdf/fssc06st.pdf> (last updated Nov. 22, 2010)).

<sup>11</sup> Shawn D. Bushway et al., *An Explicit Test of Plea Bargaining in the "Shadow of the Trial"*, 52 CRIMINOLOGY 723, 732, 733, 734 (2014).

<sup>12</sup> *Id.* at 740 tbl.3. Some comments on this study:

If one were to assume that the early years of a prison sentence have greater disutility than the later years and/or that conviction itself constitutes a significant part of an offender's punishment, the responses might not show that the sentence reduction obtained by pleading guilty routinely overbalances the likelihood of acquittal. At the same time, if one were to assume that uncertainty reduction constitutes an important part of a plea agreement's value, the responses might *understate* the extent to which offers overbalance the likelihood of acquittal. See Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1080–81 (1976).

In the table cited above, the responses reported by Bushway and his co-authors include those of judges, and judges were less sensitive than prosecutors and defense attorneys to changes in the likelihood of conviction. Bushway et al., *supra* note 11, at 744. The judges in fact "seem[ed] to be acting in a manner consistent with the fixed discount model." *Id.* at 746. If the responses of judges were excluded from the table, the extent to which offers appeared to overbalance the likelihood of acquittal undoubtedly would be even greater.

The difference between judges and the other respondents is unsurprising. Judges are likely to care as much or more about "moving" cases as prosecutors, but they are likely to care less about maximizing the number of convictions. See Alschuler, *supra*, at 1131; Bushway et al., *supra* note 11, at 748.

Although the study by Bushway and his co-authors indicates that a sentence following a guilty plea is likely to be less severe than the predicted post-trial sentence discounted by the likelihood of acquittal, a study by David Abrams based on Cook County data reached the opposite conclusion. See David S. Abrams, *Is Pleading Really a Bargain?*, 8 J. EMPIRICAL LEGAL STUD. 200, 220 (2011). But the Abrams study is the product of careless work. Its author apparently inflated the likelihood of acquittal by counting as acquittals four or five times as many dispositions as he should have. See Alschuler, *supra* note 6, at 689–91.

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A legal system in which a prosecutor could convict whomever he liked just by pointing could lead to conviction in cases in which the prosecutor had no evidence at all. This system would be even more effective than ours in producing wrongful convictions. Ours, however, is *nearly* perfect.

Officially, we profess adherence to the principle that guilt must be proven beyond a reasonable doubt. Our Supreme Court declares, "It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."<sup>13</sup> In almost every case, however, plea bargaining vaporizes the legal standard. Even the imagination of Franz Kafka never conjured up a system as strange as ours. What does the legal priesthood say to keep it afloat?

## II. IS IT WRONG TO CONVICT THE INNOCENT?

Here is the basic defense of this system: Bargaining may result in the conviction of "defendants who are in fact innocent (*and* would be acquitted [at trial])," but that does not mean it produces any *wrongful* convictions. It is better to be an innocent person on probation than an innocent person in prison. When an innocent defendant has been offered a beneficial deal, he should be permitted to take it. With friends who would block a wrongly accused defendant from entering an agreement that would reduce his expected sentence, he does not need enemies. Convicting the innocent is not wrongful when the innocent want it to happen.<sup>14</sup>

Defenders of plea bargaining can note that, rather than increase the aggregate amount of punishment inflicted on the innocent, odds bargaining simply distributes it differently. If ten innocent defendants were to stand trial, one might be wrongly convicted and sentenced to ten years. With odds bargaining, all ten may be convicted, but each may serve only one year. The number of wrongful convictions will increase, but not the number of years of wrongful imprisonment. Moreover, with costs bargaining added to the picture, the total quantum of punishment inflicted on the innocent may diminish.<sup>15</sup> A champion of plea bargaining should not

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<sup>13</sup> *In re Winship*, 397 U.S. 358, 364 (1970).

<sup>14</sup> See Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1123-24 (2008) ("[P]ermitting innocent defendants to offer false on-the-record admission of guilt . . . is wholly ethical if the system reconceives of false admissions as utilitarian legal fictions.").

<sup>15</sup> The total amount of punishment will fall, however, only if the sentences imposed following conviction at trial are no more severe than those that would be imposed in the absence of plea bargaining. See *infra* notes 20-31 and accompanying text (challenging this

hesitate to acknowledge that bargaining “convict[s] defendants who are in fact innocent (*and* would be acquitted [at trial]).” He should cheer their conviction as a mark of the freedom our great nation affords them.

The Supreme Court offered two cheers (but not three<sup>16</sup>) for the autonomy of innocent defendants when it ruled in *North Carolina v. Alford*<sup>17</sup> that the Constitution does not preclude accepting a guilty plea by a defendant who protests his innocence. *Alford* was a capital case. The defendant told the court, “I ain’t shot no man, but I take the fault for the other man. We never had an argument in our life and I just pleaded guilty because they said if I didn’t they would gas me for it . . . .”<sup>18</sup> You might be surprised to learn that the Due Process Clause does not preclude imprisoning people who have neither been tried nor admitted their guilt, but the Supreme Court explained, “An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.”<sup>19</sup>

The libertarian or “freedom of contract” defense of plea bargaining confronts some serious difficulties. An agreement produced by an improper threat (“your money or your life”) is involuntary,<sup>20</sup> and a threat to impose “extra” punishment for standing trial is surely wrongful. The Constitution affords a right to trial, which means at a minimum that the government may not make standing trial a crime.<sup>21</sup> If post-trial sentences are imposed

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assumption).

<sup>16</sup> See *infra* note 67 and accompanying text.

<sup>17</sup> 400 U.S. 25 (1970).

<sup>18</sup> *Id.* at 28 n.2.

<sup>19</sup> *Id.* at 37. John Blume and Rebecca Helm describe a case in which three defendants entered negotiated *Alford* pleas 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.” One of the three explained that he entered the agreement only because it led to the immediate release from custody of a co-defendant on death row, a defendant who would have remained under a death sentence unless all three of the defendants accepted the prosecutor’s proposal. John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 160 (2014); see *id.* at 176–79 (describing two other, similarly disturbing cases).

<sup>20</sup> ALAN WERTHEIMER, COERCION 126 (1987). See Albert W. Alschuler, *Constraint and Confession*, 74 DENVER U.L. REV. 957, 966 (1997); Scott Anderson, *Coercion*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2015), <http://plato.stanford.edu/entries/coercion/#ThrBas>; Einer Elhauge, *Contrived Threats v. Uncontrived Warnings: A General Solution to the Puzzles of Contractual Duress, Unconstitutional Conditions, and Blackmail*, 83 U. CHI. L. REV. 503, 512–13 (2016).

<sup>21</sup> See *United States v. Medina-Cervantes*, 690 F.2d 715 (9th Cir. 1982) (citing *United*

simply for the purpose of inducing guilty pleas, the libertarian defense collapses. Some of the people who champion plea bargaining by the innocent acknowledge that, in a “defensible” plea bargaining system, “those cases that go to trial must be decided on the merits, without penalizing the defendant for not pleading guilty. In other words, trial sentences must be objectively deserved . . . . Plea bargaining should therefore result in sentences less than this theoretically correct sentence.”<sup>22</sup>

The American criminal justice system does not fit this benign description. It is doubtful that any polity would deliberately sentence 95 percent of all offenders to less than they deserve or to less than is necessary to protect the public. Officials seem far more likely to impose “extra” punishment on a small minority of offenders to discourage exercise of the right to trial.<sup>23</sup> Moreover, America imprisons a higher proportion of its population than any other nation in the world except the Republic of Seychelles.<sup>24</sup> Surely our

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States v. Capriola, 537 F.2d 319, 321 (9th Cir. 1976); United States v. Stockwell, 472 F.2d 1186, 1187 (9th Cir. 1973)). A defense of “plea bargaining as contract” by Robert Scott and William Stuntz ignores this difficulty and responds to a straw-man version of what it calls “the duress argument.” See Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1920 (1992) (declaring that “[t]he duress argument against plea bargaining is that the large differential between post-trial and post-plea sentences creates a coercive environment in which the criminal defendant has no real alternative but to plead guilty” and dismissing the argument because it “reduces to the claim that the choice to plead guilty is too generous to defendants” and because “coercion in the sense of few and unpalatable choices does not necessarily negate voluntary choice”).

<sup>22</sup> Thomas W. Church, Jr., *In Defense of “Bargain Justice”*, 13 LAW & SOC’Y REV. 509, 520 (1979); see Elhauge, *supra* note 20, at 570–71.

<sup>23</sup> See Alschuler, *supra* note 6, at 700, 701. Although people disagree about the goals of criminal punishment, almost everyone agrees that legitimate punishment must be limited by a principle of parsimony. See Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 68 (2005) (noting that parsimony requires the state to impose no more punishment than is necessary to achieve the legitimate objectives of punishment); Michael Tonry, *Intermediate Sanctions in Sentencing Guidelines*, 23 CRIME & JUST. 199, 206–07 (1998) (indicating that the principle of parsimony is widely accepted). Depending on one’s penology, the principle of parsimony may require that an offender be punished no more severely than he deserves, or no more severely than necessary to ensure that the gains of crime will not exceed the costs, or no more severely than necessary to accomplish some other penological goal. See Frase, *supra*, at 77. When the sentences imposed on defendants convicted at trial are limited by a principle of parsimony, the lower sentences imposed on offenders who strike bargains and plead guilty necessarily will fail to accomplish the purposes of the criminal law, whatever these purposes may be. These punishments will fall short of what offenders deserve, or will leave crime a profitable enterprise, or will fail to incapacitate dangerous offenders, or will leave salvageable wrongdoers un-rehabilitated. It seems unlikely that officials would deliberately leave the public inadequately protected and the great majority of offenders inadequately punished when these officials could as easily discourage trials by punishing a small minority offenders more severely than their crimes warranted.

<sup>24</sup> See ROY WALMSLEY, *WORLD PRISON POPULATION LIST 1* (11th ed. 2015), [http://www.prisonstudies.org/sites/default/files/resources/downloads/world\\_prison\\_population\\_list\\_11th\\_edition.pdf](http://www.prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_11th_edition.pdf) (“The countries with the highest prison population rate—that is, the



nation did not achieve its record for mass incarceration while sentencing 95 percent of all offenders to less than they deserve.<sup>25</sup> A Chicago judge explained our trial tariff this way: “He takes some of my time—I take some of his. That’s the way it works.”<sup>26</sup>

Even the legal priesthood seems to have abandoned the fiction that today’s post-trial sentences are those that would be imposed in the absence of plea bargaining. Quoting Professor Bibas, the Supreme Court noted in *Lafler v. Cooper*,<sup>27</sup> “The expected posttrial sentence is imposed in only a few percent of cases. It is like the sticker price for cars: only an ignorant, ill-advised consumer would view the full price as the norm and anything less a bargain.”<sup>28</sup> Quoting Professor Barkow, the Court added in *Missouri v. Frye*,<sup>29</sup> “[Defendants] who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes.”<sup>30</sup> These observations decimate the “voluntariness,” “personal autonomy,” “libertarian,” or “freedom of contract” defense of plea bargaining.<sup>31</sup>

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number of prisoners per 100,000 of the national population—are Seychelles (799 per 100,000), followed by the United States (698), St. Kitts & Nevis (607), Turkmenistan (583), U.S. Virgin Islands (542), Cuba (510), El Salvador (492), Guam – U.S.A. (469), Thailand (461), Belize (449), Russian Federation (445), Rwanda (434) and British Virgin Islands (425).”).

<sup>25</sup> How odd it is that the nation most dependent on plea bargaining is also the nation that imprisons the highest proportion of its population apart from Seychelles. Could it be that, by reducing the cost of imposing criminal punishment, plea bargaining has given us more of it? Is it possible that, rather than reducing what taxpayers must pay for criminal justice, plea bargaining has caused them to pay much more?

<sup>26</sup> Alschuler, *supra* note 12, at 1089.

<sup>27</sup> *Lafler v. Cooper*, 132 S. Ct. 1376 (2012).

<sup>28</sup> *Id.* at 1387 (quoting Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1138 (2011)).

<sup>29</sup> *Missouri v. Frye*, 132 S. Ct. 1399 (2012).

<sup>30</sup> *Id.* at 1407 (alteration in original) (quoting Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1034 (2006)).

<sup>31</sup> The Supreme Court, however, seemed oblivious to the implications of its empirical observations. It wrote. “To 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.” *Frye*, 132 S. Ct. at 1407. If post-trial sentences are unjust and are imposed simply for the purpose of inducing guilty pleas, however, plea bargaining benefits both parties only in the sense that a gunman’s demand for your money or your life benefits you as well as the gunman. Compared to death at the hands of the gunman, “your money or your life” is a very attractive offer.

Josh Bowers’ defense of plea bargaining by the innocent appears to acknowledge that their pleas are often the result of “overcharging” and are involuntary, but he comments, “The problem affects all defendants; it is not exclusive to the innocent.” Bowers, *supra* note 14, at 1123. Bowers maintains that it is “wrongheaded and even unjust to allow a factually guilty defendant to make a rational choice in the face of . . . trial’s potential penalties . . . but to force an innocent defendant . . . to risk, against her will, an uncertain trial with significant

The “autonomy” defense might leave one cold even if post-trial sentences were not inflated to generate guilty pleas. On this generous (and far-fetched) hypothesis, guilty defendants would receive sentences in exchange for their pleas that left them inadequately punished and the public inadequately protected.<sup>32</sup> The defenders of plea bargaining would land on the other horn of a dilemma. Although the champions of plea bargaining maintain that, in theory, avoiding the cost of trials could justify the penological sacrifice, no analysis of real-world costs and benefits has begun to make this claim plausible. Can the benefits society would gain by imprisoning an offender for the five or ten additional years his conduct warrants truly be offset by the cost of operating a courtroom for a day or two?

In addition, “bargaining down” from a baseline of “deserved” or “appropriate” sentences is objectionable for non-utilitarian reasons. Would defenders of this practice allow defendants to offer cash in exchange for leniency? Would they favor an auction in which defendants could bid for undeserved leniency while their enemies could bid for restoring their punishments to an appropriate level?<sup>33</sup>

Finally, some defendants may be innocent and may need no punishment. A decent legal system should want to hear what they can say in their defense. It should neither threaten nor bribe them not to say it.

In the eighteenth, nineteenth, and early twentieth centuries, courts wanted to hear what defendants could say in their defense.<sup>34</sup> Although the distinction between threats to worsen a person’s situation and promises to better his situation may separate involuntary from voluntary choices in other contexts,<sup>35</sup> courts did not draw this distinction in evaluating confessions and guilty pleas.

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downside.” *Id.* at 1159.

If that is Bowers’ only point, I concur. See Alschuler, *supra* note 7, at 1413–14. The remedy for a gunman’s improper threat is not to inform his victims that they may not yield to the threat and must suffer the consequences. But that proposition does not justify Bowers’ conclusions that “inaccurate guilty pleas are merely symptomatic of errors at the points of arrest, charge, or trial” and that “many innocent defendants are better off in a world with plea bargaining than one without it.” Bowers, *supra* note 14, at 1119. In an article that followed his defense of allowing the innocent to plead guilty, Bowers suggested an approach to limiting the threats that prosecutors and other officials may make in plea bargaining. See Josh Bowers, *Plea Bargaining’s Baselines*, 57 WM. & MARY L. REV. 1083 (2016).

<sup>32</sup> See Alschuler, *supra* note 6, at 702; *supra* note 23.

<sup>33</sup> See Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652, 673–80 (1981).

<sup>34</sup> See Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 5-6, 7–9, 19–24 (1979).

<sup>35</sup> See the sources cited in note 20 *supra*.

Instead they forbade both threats and promises.<sup>36</sup> The Supreme Court said that a confession must be “uninfluenced by hope of reward or fear of punishment”<sup>37</sup> and that it cannot be admitted “if made under any threat, promise, or encouragement of any hope or favor.”<sup>38</sup> It added that a court may not receive a confession unless it is “free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight.”<sup>39</sup>

It was the danger of wrongful conviction that prompted these declarations. The Supreme Court wrote in 1884:

[T]he presumption upon which weight is given to [confessions], namely, that one who is innocent will not imperil his safety or prejudice his interests by an untrue statement, ceases when the confession appears to have been made either in consequence of inducements of a temporal nature, held out by one in authority, touching the charge preferred, or because of a threat or promise by or in the presence of such person.<sup>40</sup>

A century earlier, in 1783, the Court of Kings Bench observed, “[A] confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape . . . that no credit ought to be given to it.”<sup>41</sup>

### III. FEEBLE BRAKES

In words that Karl Marx employed in a different context, the champions of plea bargaining seem to regard the entry of guilty pleas by innocent defendants as an “Eden of the innate rights of man [where] alone rule Freedom, Equality, Property and Bentham.”<sup>42</sup> Perhaps because even these champions find it difficult

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<sup>36</sup> See Alschuler, *supra* note 20, at 967-69.

<sup>37</sup> *Hopt v. Utah*, 110 U.S. 574, 584 (1884).

<sup>38</sup> *Wilson v. United States*, 162 U.S. 613, 622 (1896) (citing 1 SIMON GREENLEAF, A TREATISE ON THE EVIDENCE OF LAW §§ 214, 215, 219 (15th ed., Boston, Little, Brown, and Co. 1892)).

<sup>39</sup> *Bram v. United States*, 168 U.S. 532, 542-43 (1897) (quoting 3 WM. OLDNALL RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS 478 (6th ed., London, Stevens and Sons 1896)).

<sup>40</sup> *Hopt*, 110 U.S. at 585.

<sup>41</sup> *R v. Warickshall* (1783) 168 Eng. Rep. 234, 235; 1 Leach 263, 263-64; see also *State v. Bostick*, 4 Del. (4 Harr.) 563, 564 (1845) (“[W]here promises of favor or threats are used, the great danger is, that the confession, whether verbal or written, may be untrue; proceeding, not from a sense of guilt, but from the influence of hope or fear. . . . However slight the promise or threat may have been, the confession cannot be received.”).

<sup>42</sup> 1 KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY 176 (Frederick Engels ed., Samuel Moore & Edward Aveling trans., International Publishers 7th prtg. 1975) (1867).

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to cheer conviction of the innocent, however, many of them contend that it doesn't happen often.

Not long ago, people simply denied that there were any innocent defendants. They quoted Judge Learned Hand: "Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream."<sup>43</sup> Since the first DNA exoneration in 1989, however, more than 1900 prisoners have been exonerated by pardon, dismissal, or acquittal,<sup>44</sup> and their cases have made smug pronouncements like Hand's a thing of the past.

The defenders of plea bargaining now point to psychological phenomena, legal safeguards, and professional practices that they suggest may limit conviction of the innocent. The possible brakes on wrongful conviction by guilty plea include (1) the reluctance of wrongly accused defendants to plead guilty, (2) court rules requiring judges to find a "factual basis" for a guilty plea, (3) the ethics of prosecutors who say that they do not prosecute defendants unless they are personally convinced of the defendants' guilt, (4) the ethics of defense attorneys who say that they do not permit guilty pleas when clients maintain their innocence, and (5) the fact that real-world bargains can occur even when these bargains do not reduce a defendant's "expected" sentence.

#### A. Defendants

Both direct observations of the criminal justice system and laboratory experiments by psychologists support two propositions: (1) Plea bargaining induces many innocent defendants to convict themselves; and (2) plea bargaining does not induce innocent defendants to convict themselves at the same rate as guilty defendants. When innocent and guilty defendants in similar circumstances receive identical offers, the guilty are more likely to accept them.<sup>45</sup>

Scholars have offered three possible explanations for the fact that innocent defendants sometimes turn down offers that guilty

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<sup>43</sup> *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923).

<sup>44</sup> See *The National Registry of Exonerations*, UNIV. OF MICH. LAW SCH., <http://www.law.umich.edu/special/exoneration/Pages/browse.aspx> (last visited Nov. 12, 2016).

<sup>45</sup> See Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 *CARDOZO L. REV.* 2295, 2328 & n.106 (2006) (citing authorities). Although the empirical evidence uniformly supports the propositions in text, Scott and Stuntz suggest that innocent defendants are more likely than guilty defendants to accept offers that fail to reduce their expected punishment because the innocent defendants are likely to be more risk averse. See Scott & Stuntz, *supra* note 21, at 1943.

defendants would accept: (1) Innocent defendants are overly optimistic. More than guilty defendants, they tend to overestimate their chances of acquittal at trial.<sup>46</sup> (2) Innocent defendants have valuable information that prosecutors lack—namely, that they are innocent.<sup>47</sup> This information enables them to evaluate the likelihood of success at trial better than the prosecutors.<sup>48</sup> (3) Just as the participants in ultimatum games may not seek to maximize their personal wealth,<sup>49</sup> innocent defendants may not seek to minimize their expected sentences. They may decline apparently beneficial offers simply because they view these offers (or the bargaining process itself) as unfair.<sup>50</sup>

The academic literature has largely neglected a fourth possible explanation—one that once loomed large in discussions of plea bargaining. This explanation focuses on the other half of the comparison between innocent and guilty defendants: (4) Some guilty pleas by guilty defendants are prompted in whole or in part by their

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<sup>46</sup> See, e.g., STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 54–55 (2012) (declaring that criminal defendants tend to be overly optimistic and that first offenders and innocent defendants tend to be particularly so); Saul M. Kassin, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?*, 60 *AM. PSYCHOLOGIST* 215, 224 (2005) (suggesting that innocence places suspects at risk because they naively believe that their innocence will be apparent to others and that the truth will set them free); Avishalom Tor et al., *Fairness and the Willingness to Accept Plea Bargain Offers*, 7 *J. EMPIRICAL LEGAL STUD.* 97, 98 (2010) (“Experimental evidence . . . suggests that innocents are systematically more optimistically biased about acquittal odds than their guilty counterparts.”) (citing Kenneth S. Bordens, *The Effects of Likelihood of Conviction, Threatened Punishment, and Assumed Role on Mock Plea Bargaining Decisions*, 5 *BASIC & APPLIED SOC. PSYCHOL.* 59, 69, 70 (1984)); W. Larry Gregory et al., *Social Psychology and Plea Bargaining: Applications, Methodology, and Theory*, 36 *J. PERSONALITY & SOC. PSYCHOL.* 1521, 1525 (1978)).

<sup>47</sup> See Gene M. Grossman & Michael L. Katz, *Plea Bargaining and Social Welfare*, 73 *AM. ECON. REV.* 749 (1983); Gregory et al., *supra* note 46, at 1525; Scott & Stuntz, *supra* note 21, at 1937.

<sup>48</sup> This explanation is obviously in tension with the first: Does innocence make defendants better or worse at predicting trial outcomes? But either explanation might be accurate in a particular case. Sometimes innocent defendants may decline prosecutorial offers because these defendants are too optimistic, and sometimes they may decline offers because they understand better than the prosecutors the likelihood of acquittal at trial. In other words: When innocent defendants estimate their chances of acquittal more highly than the prosecutors do, sometimes they’re right, and sometimes they’re wrong.

<sup>49</sup> See J. Neil Bearden, *Ultimatum Bargaining Experiments: The State of the Art* 3, 43 (Dec. 21, 2001) (unpublished manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=626183](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=626183).

<sup>50</sup> See Tor et al., *supra* note 46, at 98. See also Samuel R. Gross, *Exonerating the Innocent: Pretrial Innocence Procedures: Pretrial Incentives, Post-Conviction Review, and Sorting Criminal Prosecutions by Guilt or Innocence*, 56 *N.Y.L. SCH. L. REV.* 1009, 1019 (2012) (“[Defendants’] private knowledge that they are innocent may legitimately affect their assessment of the likely outcome at trial; they may be unduly optimistic out of a misplaced faith that the truth will out; and they may maintain their innocence against all odds as a matter of principle.”).

remorse or their willingness to accept responsibility for their crimes. Innocent defendants lack this motivation. Of course none of the four possible explanations fits every case. Indeed, the favorite explanation of economists—that defendants’ knowledge of whether they are guilty or innocent enables them to predict trial outcomes better than prosecutors—probably fits very few.<sup>51</sup>

Although more than 90 percent of all felony convictions follow guilty pleas, only 333 of the 1916 convicts exonerated between 1989 and November 2016 had pleaded guilty (17%).<sup>52</sup> The disparity

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<sup>51</sup> A jury bases its verdict, not on what a defendant knows or believes, but on the evidence before it. It is only when a defendant’s knowledge of his innocence enables him to better estimate either the availability or the force of some evidence that this knowledge may aid him in deciding how to plead. In some cases, knowledge of innocence that a defendant cannot effectively convey to the prosecutor may lead him wisely to reject an offer. Gene Grossman and Michael Katz, however, leap from this observation to the conclusion that “the optimal plea bargain acts as a screening device, such that only those who are actually guilty so plead, while the innocent choose instead to engage in trial.” Grossman & Katz, *supra* note 47, at 750. The authors qualify their conclusion only by noting its inapplicability when the parties have different attitudes toward risk. *See id.* They ignore the fact that, even when the innocent have a slight advantage in assessing one element of the bargaining calculus, they may differ from prosecutors in assessing other elements. They also ignore the fact that innocent defendants may be unduly optimistic. And they ignore the fact that an “optimal” plea agreement is one calculated to *overbalance* the defendant’s chances of acquittal. *See* Grossman & Katz, *supra* note 47, at 750, 756. An agreement remains advantageous from the prosecutor’s perspective as long as *both* the costs it saves *and* the certainty of conviction it buys exceed the economic value of the punishment it sacrifices.

Grossman and Katz write, “The legal system is fundamentally characterized by asymmetric information; the accused know whether they are guilty, while the prosecutor never can be certain . . .” Grossman & Katz, *supra* note 47, at 749–50. This asymmetry is the only one they note, but there are many others. Prosecutors probably have the overall edge in estimating trial outcomes. Alschuler, *supra* note 6, at 696 n.88. For one thing, professional estimates are likely to be superior to amateur estimates, and, unlike defense attorneys, prosecutors need not take account of the wishes of amateur clients. For another, prosecutors typically know more than defendants and their lawyers about the most important determinant of trial outcomes, the strength or weakness of the state’s evidence.

Grossman and Katz deny that this second asymmetry exists. They write, “The Supreme Court has ruled in *U.S. v. Agurs*, 427 U.S. 97 (1976) and *Brady v. Maryland*, 373 U.S. 83 (1963) that the defendant must be fully informed of all evidence available to the state, and of the facts needed by the state to establish the case against him, prior to the arraignment and choice of a plea.” Grossman & Katz, *supra* note 47, at 752 n.11. The authors, however, grossly misstate these decisions. *Brady* and *Agurs* do not require prosecutors to inform defendants of “all evidence available to the state.” They require the disclosure only of exculpatory evidence. Moreover, these decisions do not require even the disclosure of exculpatory evidence prior to the negotiation and entry of a plea of guilty. *See* United States v. Ruiz, 536 U.S. 622, 629 (2002) (holding that the due process clause does not require “preguilty plea disclosure of impeachment information” while leaving open the question whether the clause may require the disclosure of other *Brady* material); Russell D. Covey, *Plea Bargaining Law After Lafler and Frye*, 51 DUQ. L. REV. 595, 601 (2013) (“It is . . . unclear whether a prosecutor has a constitutional duty to produce exculpatory evidence . . . before a guilty plea is entered.”).

<sup>52</sup> *See The National Registry of Exonerations*, UNIV. OF MICH. LAW SCH., [http://  
http://www.law.umich.edu/special/exoneration/Pages/detailist.aspx?View={FAF6EDDB-](http://http://www.law.umich.edu/special/exoneration/Pages/detailist.aspx?View={FAF6EDDB-)

between the percentage of all convicts convicted by guilty plea and the percentage of exonerated convicts convicted by plea probably reflects in part the reluctance of innocent defendants to accept offers that guilty defendants would accept. But it also reflects the fact that innocent defendants who plead guilty are very unlikely to be exonerated.

The legal barriers to exoneration following a guilty plea are high. Even when a wrongly convicted defendant can establish that his guilty plea resulted from a coerced confession, the courts will refuse to listen.<sup>53</sup> In addition, some states bar a convict who has pleaded guilty from obtaining and presenting DNA evidence.<sup>54</sup> As one federal court explained, “A guilty plea is normally understood as a lid on the box, whatever is in it . . . .”<sup>55</sup>

The practical barriers to exoneration are high as well. In the absence of a trial record, it is extraordinarily difficult to know what evidence a prosecutor might have presented to a court or jury.<sup>56</sup> Moreover, exoneration usually requires the assistance of an innocence project, a journalist, or a volunteer lawyer,<sup>57</sup> and in deciding which professedly innocent convicts to help, these gatekeepers may concentrate on those who have consistently denied their guilt.<sup>58</sup> The scrutiny of gatekeepers and of courts and governors’ offices focuses particularly on death row inmates, none of whom have pleaded guilty,<sup>59</sup> and on inmates serving long sentences,

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<sup>53</sup> See *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

<sup>54</sup> See, e.g., OHIO REV. CODE ANN. § 2953.72(C)(2) (West 2016) (“An offender is not an eligible offender . . . regarding any offense to which the offender pleaded guilty or no contest.”); *People v. O’Connell*, 879 N.E.2d 315, 319 (Ill. 2007); *Williams v. Erie Cnty. Dist. Attorney’s Office*, 848 A.2d 967, 968, 973 (Pa. Super Ct. 2004); *People v. Byrdsong*, 820 N.Y.S.2d 296, 296 (N.Y. App. Div. 2006). For an argument that DNA testing should not be available to defendants who have pleaded guilty, see JH Dingfelder Stone, *Facing the Uncomfortable Truth: The Illogic of Post-Conviction DNA Testing for Individuals Who Pleaded Guilty*, 45 U.S.F. L. REV. 47 (2010).

<sup>55</sup> *United States v. Bluso*, 519 F.2d 473, 474 (4th Cir. 1975).

<sup>56</sup> When, for example, the only witness ever to implicate an innocent convict has recanted, it may be impossible to establish that the prosecutor lacked other evidence. See, e.g., *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 550 (Mo. 2003) (Wolff, J., concurring). And even when an innocent convict can show that the prosecutor had no other evidence, the prosecutor may note that he had no reason to seek further evidence once the convict agreed to plead guilty. See Stone, *supra* note 54, at 56.

<sup>57</sup> See Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, xv (2015).

<sup>58</sup> David Protess, whose journalism seminar at Northwestern University helped exonerate many wrongly convicted inmates, once told me that, in order to focus on the most promising requests for assistance, he automatically rejected requests from convicts who had confessed or pleaded guilty.

<sup>59</sup> See Albert W. Alschuler, *Plea Bargaining and the Death Penalty*, 58 DEPAUL L. REV.

relatively few of whom have pleaded guilty.<sup>60</sup>

Psychological experiments seem likely to overstate the extent to which guilty and innocent defendants differ in their willingness to enter plea agreements. Researchers typically present a hypothetical criminal or academic disciplinary case to a group of students and instruct the students to imagine that they are either guilty or innocent of the offense described. Then the experimenters ask whether the students would accept a hypothetical offer—one that usually does not seem either clearly advantageous or clearly disadvantageous.<sup>61</sup> Well-bred students are likely to consider it virtuous to accept responsibility when one has done something wrong and virtuous to resist when one has been falsely accused. These students may view their hypothetical guilt or innocence as at least a tiebreaker when they are uncertain whether a hypothetical offer will reduce their expected sentence. Their responses may not reveal much about the choices made by wrongly accused defendants whose social backgrounds differ from theirs, who receive offers clearly calculated to overbalance their chances of acquittal, who are advised by lawyers with strong personal interests in persuading them to plead guilty,<sup>62</sup> and who may pay with real years of imprisonment for making seemingly virtuous choices.

The most revealing of the psychological studies may be one conducted by Lucian Dervan and Vanessa Edkins.<sup>63</sup> Rather than simply pose a hypothetical case, these researchers gave students an opportunity to cheat on an academic exercise by giving improper

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671, 671–72 (2009).

<sup>60</sup> Defendants serving long sentences are more likely to be exonerated than other defendants for several reasons: (1) Long sentences aggravate the injustice of wrongful convictions and help to attract attention and assistance. (2) Long sentences are likely to be imposed in prominent cases that attract attention and assistance for other reasons. (3) Long sentences enable convicts to make repeated pleas for help. And (4) long sentences allow the lengthy process of exoneration to occur. The website of Innocence Project New Orleans declares that it accepts applications only from people “serving a life sentence or a near life sentence with at least 10 years left to be served.” *How We Take Cases*, INNOCENCE PROJECT NEW ORLEANS, <http://www.ip-no.org/how-we-take-cases> (last visited Feb. 22, 2016). Many other projects accept applications only from convicts with three, five, seven, eight, or ten years still to serve. See *Innocence Projects Contact List*, TRUTH IN JUSTICE <http://www.truthinjustice.org/ipcontacts.htm> (last visited Nov. 17, 2016).

<sup>61</sup> See, e.g., Bordens, *supra* note 46, at 63; Gregory et al., *supra* note 46, at 1522, 1526; Tor et al., *supra* note 46, at 104. One of the studies cited above indicated that, when an offer becomes clearly advantageous, the willingness of “innocent” role-playing students to accept it notably increases. See Bordens, *supra* note 46, at 67.

<sup>62</sup> See *infra* Part III.E.

<sup>63</sup> See Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant’s Dilemma: An Innovative Empirical Study of Plea Bargaining’s Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1 (2013).



help to another student who asked for it. The researchers then compared the behavior of the students who had cheated with that of students who performed the same exercise without being asked to cheat. When accused of misconduct and offered a favorable bargain, 33 of the 37 cheaters (89%) accepted the bargain and acknowledged their guilt—and so did 22 of the 39 falsely accused students (56%).<sup>64</sup> Offers apparently can be made so advantageous that a *majority* of innocent defendants will accept them.<sup>65</sup>

When plea bargaining does only what its champions say it should do, prosecutors make it expedient for almost every defendant to plead guilty whether he is guilty or innocent. The claim that egocentric and other cognitive biases will keep many innocent defendants from doing what prosecutors have made it advantageous for them to do isn't very comforting. Although some wrongly accused defendants may not seek rationally to minimize their expected sentences, many others may behave like the *homines economici* of economic studies.<sup>66</sup>

### B. Courts

When the Supreme Court held in *Alford* that a court may accept a guilty plea from a defendant who claims to be innocent, it noted that strong evidence contradicted the defendant's claim, and it said, "[V]arious state and federal court decisions properly caution that pleas coupled with claims of innocence should not be accepted

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<sup>64</sup> *Id.* at 34 fig.1.

<sup>65</sup> In an earlier study comparing the behavior of cheaters on an academic exercise with the behavior of students falsely accused of cheating, six of eight students who had cheated accepted a proposed bargain, while none of eight wrongly accused students accepted it. See Gregory et al., *supra* note 46, at 1526 (describing the second of the authors' two experiments). Not only was the number of subjects in Gregory's study small, but the proposed bargain was less favorable to the subjects than the bargain proposed in the Dervan study. Moreover, it seemed likely that Gregory's innocent subjects turned down the proposed bargain because they saw little or no likelihood of conviction at the threatened disciplinary hearing. The only evidence of cheating the accuser proposed to present was that the subjects had done exceptionally well on the test. *Id.* at 1527.

The accuser told the cheaters as well as the wrongly accused students that he would be the only witness at their hearings, and he threatened them with the same feeble evidence. *Id.* Unlike the innocent students, however, the cheaters knew that other witnesses with more damaging testimony existed—the people who had given them advance information concerning the test. See *id.* at 1526. They might have feared that the accuser would not in fact be the only witness.

<sup>66</sup> Cf. Ward Farnsworth, *The Economics of Enmity*, 69 U. CHI. L. REV. 211 (2002) (noting that, although the parties to civil disputes sometimes bargain to maximize their personal wealth, personal enmity often keeps them from bargaining).

unless there is a factual basis for the plea.”<sup>67</sup> Whether or not a defendant acknowledges his guilt, Rule 11 of the Federal Rules of Criminal Procedure requires a court to “determine that there is a factual basis for the plea.”<sup>68</sup> Many states have similar rules.<sup>69</sup>

As this Article has noted, a prosecutor may be unable to make an offer that will overbalance a defendant’s chances of acquittal when the prosecutor has no evidence whatever of the defendant’s guilt,<sup>70</sup> and when a prosecutor has some evidence of guilt, a court can easily find that this evidence constitutes a “factual basis.”<sup>71</sup> A defendant’s one-word answer to the question whether he engaged in the conduct described in the indictment establishes a sufficient basis,<sup>72</sup> and “inquiry of the prosecutor, or defense counsel, examination of the plea agreement, presentence report or preliminary hearing transcript, [or] testimony by the police” suffices as well.<sup>73</sup> Courts occasionally hold that a guilty plea lacked a factual basis because the conduct a defendant admitted did not establish the crime to which he pleaded guilty,<sup>74</sup> but the “factual basis” requirement rarely poses a significant barrier to the conviction of an innocent defendant who has been induced by a favorable offer to plead guilty.<sup>75</sup>

### C. Prosecutors

Many prosecutors say they must be firmly convinced of a defendant’s guilt before they prosecute.<sup>76</sup> Others say that judging guilt or innocence is not their job.<sup>77</sup> Even prosecutors who declare

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<sup>67</sup> North Carolina v. Alford, 400 U.S. 25, 38 n.10, 39 (1970) (citing Griffin v. United States, 405 F.2d 1378, 1380 (D.D.C. 1968); Bruce v. United States, 379 F.2d 113, 119 (D.D.C. 1967); Commonwealth v. Cottrell, 249 A.2d 294, 294 (Pa. 1969)).

<sup>68</sup> FED. R. CRIM. P. 11(b)(3).

<sup>69</sup> See WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 1049 (5th ed. 2009).

<sup>70</sup> See *supra* text accompanying note 8.

<sup>71</sup> See LAFAVE ET AL., *supra* note 69, at 1049 (“[The rules fail to] establish a precise quantum of evidence that must be met”); Allison D. Redlich & Asil Ali Özdoğru, *Alford Pleas in the Age of Innocence*, 27 BEHAV. SCI. & L. 467, 470 (2009) (noting that, although a judge must determine that sufficient evidence supports an *Alford* plea, “sufficient” has been left undefined).

<sup>72</sup> See, e.g., *People v. Holmes*, 84 P.3d 366, 369 (Cal. 2004).

<sup>73</sup> LAFAVE ET AL., *supra* note 69, at 1049.

<sup>74</sup> See, e.g., *United States v. Garcia-Paulin*, 627 F.3d 127, 133 (5th Cir. 2010).

<sup>75</sup> See Redlich & Özdoğru, *supra* note 71, at 470 (noting that confessions, eyewitness identifications, and other seemingly powerful evidence have supported the convictions of most subsequently exonerated convicts).

<sup>76</sup> See Alschuler, *supra* note 2, at 63 & n.40; Alafair S. Burke, *Prosecutorial Agnosticism*, 8 OHIO ST. J. CRIM. L. 79, 83–86 (2010).

<sup>77</sup> See Alschuler, *supra* note 2, at 63 (“[M]y job is to prosecute, not persecute; equally,

that they must be personally convinced of a defendant's guilt sometimes qualify their position—for example, by saying that they make no judgment about whether the defendant acted in self-defense or had the mental state required for conviction.<sup>78</sup>

One individual's opinion is a weak safeguard against conviction of the innocent, especially when this individual is a prosecutor and especially when he has engaged in odds bargaining because he knows that a jury may disagree.<sup>79</sup> Laurie Levenson has encountered prosecutors who maintained that every defendant who invokes his *Miranda* rights must be guilty.<sup>80</sup> Daniel Medwed observes that many prosecutors have vigorously resisted exoneration even when prisoners have presented overwhelming proof of their innocence.<sup>81</sup> As a general rule, one should not trust a prosecutor who says, "Trust me."<sup>82</sup>

#### D. Defense Attorneys

As best I can tell, no recent study examines what advice defense attorneys give clients who claim to be innocent but who could reduce their expected punishment by pleading guilty. When I examined this question in the late 1960s and again shortly after the *Alford* decision in 1973, however, some attorneys reported that they would not permit clients who said they were innocent to plead guilty.<sup>83</sup> Some of these attorneys qualified this position in various ways;<sup>84</sup> some made exceptions;<sup>85</sup> and some evidently did not mean what they said.<sup>86</sup> Many of these lawyers rested their refusal to allow assertedly innocent clients to plead guilty, not on ethical

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however, my job is to prosecute, not judge.”).

<sup>78</sup> See *id.* at 64 n.42; Burke, *supra* note 76, at 86–91.

<sup>79</sup> See Alschuler, *supra* note 2, at 64.

<sup>80</sup> See Laurie L. Levenson, *The Problem with Cynical Prosecutors' Syndrome: Rethinking a Prosecutor's Role in Post-Conviction Cases*, 20 BERKELEY J. CRIM. L. 335, 340 (2016).

<sup>81</sup> Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 129 (2004).

<sup>82</sup> See Alex Kozinski, *Foreword*, in SIDNEY POWELL, LICENSED TO LIE: EXPOSING CORRUPTION IN THE DEPARTMENT OF JUSTICE, at XII–XIII, XV, XVI–XVII (2014).

<sup>83</sup> Alschuler, *supra* note 12, at 1299.

<sup>84</sup> See *id.* at 1281 (“Many lawyers said that although they would not countenance a guilty plea when a client maintained that he was entirely uninvolved in an alleged criminal incident, they did not apply the same principle when the client asserted a claim of self-defense, entrapment, lack of criminal intent, or the like.”).

<sup>85</sup> See *id.* at 1280–81 (describing exceptions that lawyers made when prosecutorial offers were unusually favorable or when clients were charged with certain crimes).

<sup>86</sup> See *id.* at 1285 (describing a lawyer who told me that he did not permit assertedly innocent clients to plead guilty although I had seen him mention and disparage his clients' claims of innocence while bargaining with a prosecutor).

grounds, but on their apprehension that the clients ultimately might challenge their guilty pleas and allege the lawyers' ineffectiveness.<sup>87</sup>

Other lawyers in the late 1960s and early 1970s took the view that "the truth has nothing to do with a guilty plea."<sup>88</sup> Some of these lawyers had advised clients to plead guilty even when they had no doubt that their clients' protestations of innocence were true.<sup>89</sup> Although judges routinely asked defendants whether they were pleading guilty because they were guilty and for no other reason, some lawyers maintained that clients had "a right to lie for probation—at least so long as the courts surround the acceptance of a guilty plea with such outrageous bullshit."<sup>90</sup>

I suspect that few lawyers today refuse to allow assertedly innocent clients to plead guilty.<sup>91</sup> Although states need not allow *Alford* pleas (pleas of "guilty but not guilty"<sup>92</sup>), forty-seven states and the District of Columbia do allow them,<sup>93</sup> and it would be unconscionable for a lawyer to block his client from exercising a beneficial option the courts have made available. Individual judges, however, still refuse to accept *Alford* pleas,<sup>94</sup> and when they do, defense attorneys confront challenging ethical issues.<sup>95</sup>

The attorneys who formerly did not permit clients to plead guilty if the clients said they were innocent rarely advised these clients to stand trial.<sup>96</sup> Instead, after obtaining apparently beneficial offers and describing the advantage of pleading guilty to their clients, the attorneys told these clients that the attorneys would not allow them to plead unless they admitted their guilt.<sup>97</sup> Many clients then said what the attorneys apparently needed to hear in order to represent them effectively.<sup>98</sup> Moreover, when the proposed bargains failed to produce confessions, some attorneys went "almost to the point of coercion" in obtaining them.<sup>99</sup> When clients nevertheless refused to

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<sup>87</sup> See *id.* at 1283–84.

<sup>88</sup> See *id.* at 1287.

<sup>89</sup> See *id.* at 1296.

<sup>90</sup> *Id.* at 1306.

<sup>91</sup> See Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1379 (2003) ("Every defense lawyer whom I interviewed approved of [*Alford*] pleas.")

<sup>92</sup> See *supra* text accompanying notes 16-19.

<sup>93</sup> Bibas, *supra* note 91, at 1372 n.52.

<sup>94</sup> *Id.* at 1379.

<sup>95</sup> See Joel Cohen, 'Counseling' an Innocent's Guilty Plea, N.Y.L.J., Dec. 14, 2010, at 1.

<sup>96</sup> See Alschuler, *supra* note 12, at 1286.

<sup>97</sup> See *id.* at 1286–87.

<sup>98</sup> See *id.* at 1286.

<sup>99</sup> See, e.g., *id.* at 1287.

admit their guilt, the attorneys commonly advised them, not that the attorneys would take their cases to trial, but that the clients should find new lawyers.<sup>100</sup> Most public defender offices, for example, refused to enter guilty pleas on behalf of clients who claimed to be innocent, but when these clients persisted in protesting their innocence, the offices sought permission to withdraw from their cases so that the court could appoint counsel from outside the public defender office.<sup>101</sup> The refusal of some lawyers to enter guilty pleas on behalf of clients who claimed to be innocent rarely led to trials at which these clients might have been acquitted.

### *E. Departures from the Economic Model*

In the economic model described above, offers become acceptable to both parties only when they overbalance the defendants' chances of acquittal. Although many real-world plea agreements fit this model, many do not.<sup>102</sup>

Lawyers sometimes toss the economic vision of plea bargaining to the winds. A prosecutor explained:

When I sit down with a defense attorney who knows how to be reasonable, we judge the whole man. Neither of us cares what evidence would be admissible and what would not, or which one of us would win at trial. We simply try to do the fair thing with each case.<sup>103</sup>

Josh Bowers maintains that prosecutors in misdemeanor cases have little interest in maximizing the punishment of offenders.<sup>104</sup> These prosecutors "provide bargain concessions that far exceed what is necessary to motivate pleas. Prosecutors make such lenient offers because they can. They enjoy little public or official scrutiny in low-stakes cases."<sup>105</sup> Although bargaining in accordance with the economic model makes it advantageous for almost every defendant to plead guilty whether he is guilty or innocent, the pressures on

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<sup>100</sup> See *id.* at 1306–07.

<sup>101</sup> See *id.* at 1284 ("We have no 'rule' against permitting defendants to plead guilty when they claim to be innocent. Our only 'rule' is that they may not do so when they are represented by our office.")

<sup>102</sup> I confess to being surprised that the responses reported by Bushway, Redlich, and Norris matched the economic model as closely as they did. See Bushway et al., *supra* note 11, at 740 tbl.3; *supra* text accompanying notes 11–12.

<sup>103</sup> Alschuler, *supra* note 2, at 54.

<sup>104</sup> See Bowers, *supra* note 14, at 1122–23.

<sup>105</sup> *Id.* at 1122.

innocent defendants to plead guilty in misdemeanor courts may be even greater than those envisioned by this model.<sup>106</sup>

In felony cases, the story is likely to be the reverse: Many defendants may accept offers that do *not* overbalance their chances of acquittal. The actors most responsible for scrapping the economic model may be defense attorneys, not prosecutors. Prosecutors need not make offers that will overbalance the defendants' chances of acquittal when their lawyers do not insist on such offers and back their demands with creditable threats of trial.<sup>107</sup> And defense attorneys may not demand offers overbalancing their clients' chances of acquittal because the lawyers' personal interests strongly favor the entry of pleas of guilty.

For many private defense attorneys, a guilty plea is a quick buck. These attorneys collect their fees in advance, and once they have obtained their fees, their interests lie in disposing of their cases rapidly. This financial conflict of interest influences even well paid, conscientious lawyers, and the bar includes some lawyers who are not well paid and conscientious. These lawyers handle a high volume of cases for small fees and rarely take a case to trial.<sup>108</sup>

Plea negotiation also minimizes work and reduces conflict within what organizational theorists call the "courtroom workgroup."<sup>109</sup> Bargaining promotes cordial and comfortable relationships with prosecutors and judges. These interests may influence public defenders even more than they do private lawyers.

Advising a client to enter a plea agreement can never be proven wrong. Taking a case to trial can look like a mistake, especially when this decision results in a sentence far more severe than the one the prosecutor offered before trial. When a lawyer has persuaded his client to plead guilty, however, he can always imagine that things would have been worse if the client had been

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<sup>106</sup> In Malcolm Feeley's study of the Court of Common Pleas in New Haven, not one defendant in a sample of 1640 cases exercised the right to trial. See MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 8, 9, 10 (1979). I have suggested, however, that most plea bargaining in misdemeanor courts is overkill and that the "process costs" of misdemeanor justice would lead nearly all defendants to plead guilty even if their exercise of the right to trial did not lead to harsher punishment. See Alschuler, *supra* note 8, at 955.

<sup>107</sup> The distinction I make here between felony and misdemeanor cases is rough. Lawyers' personal interests may lead them to approve offers that do not truly overbalance their clients' chances of conviction in misdemeanor as well as felony cases, and busy or lazy prosecutors may offer greater concessions than the economic model says they should in felony as well as misdemeanor cases.

<sup>108</sup> See Alschuler, *supra* note 12, at 1181-1206.

<sup>109</sup> See, e.g., JAMES EISENSTEIN & HERBERT JACOB, *FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS* 294 (1991).

tried. Advising a guilty plea is nearly always the safe, secure, comfortable, and profitable course. Everything in our criminal justice system pushes lawyers in that direction. Without explaining the economic model to their clients or even pausing to consider it themselves, they may persuade both their clients and themselves that a guilty plea is a good deal.

When offers do not overbalance a defendant's chances of acquittal, the pressure on him to plead guilty may not lessen, for the greatest pressure to plead guilty may come from his attorney rather than the prosecutor. In their efforts to persuade clients to plead guilty, defense attorneys sometimes browbeat them,<sup>110</sup> emphasize or exaggerate the strength of the prosecutor's evidence,<sup>111</sup> emphasize or exaggerate the sentences likely to follow conviction at trial,<sup>112</sup> enlist family members to urge the clients to see reality,<sup>113</sup> threaten to withdraw from the clients' cases,<sup>114</sup> and lie.<sup>115</sup>

All in all, the American legal system is brilliant. This system makes it in the interest of defense attorneys as well as prosecutors and judges to convince defendants to plead guilty. As I told you, this system is nearly perfectly designed to convict the innocent.

#### IV. CONCLUSION

When the Supreme Court upheld the constitutionality of plea bargaining in 1970, it wrote:

We would have serious doubts about this case if the encouragement of guilty pleas by offers of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn

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<sup>110</sup> See, e.g., Alschuler, *supra* note 12, at 1288 (describing a lawyer who persuaded a client to plead guilty by calling her "a lousy, lying bitch," telling her "she would go to the gas chamber," threatening to withdraw from her case, and advising her that the police had found evidence they had not found).

<sup>111</sup> See, e.g., *id.* at 1309 ("What about this fact? Is it going to go away? How the hell would you vote if you were a juror in your case?").

<sup>112</sup> See, e.g., *id.* at 1195 ("[I]f you are convicted at trial, [that judge] is going to *lose* you.").

<sup>113</sup> See, e.g., *id.* at 1193 (quoting United States ex rel. Brown v. LaVallee, 424 F.2d 457, 459 (2d Cir. 1970)) ("I brought out the fact that it would be awfully hard on the family to come here and have to claim a body that had been electrocuted, for a mother to have to do something like that."); Albert W. Alschuler, *The Supreme Court, the Defense Attorney, and the Guilty Plea*, 47 U. COLO. L. REV. 1, 57 (1976) (quoting Brief for Petitioner, Brady v. United States, 397 U.S. 742 (1970) (No. 270), 1969 WL 119963, at \*45) ("So then Brady came to the [jail] window. It was upstairs. I don't know how many floors. Brady came to the window and he said, 'Mom what are you doing? You are going to get yourself in trouble,' and I just said, 'For God's sake, plead guilty. They are going to give you the death sentence.'").

<sup>114</sup> See, e.g., Alschuler, *supra* note 12, at 1192, 1247.

<sup>115</sup> See, e.g., *id.* at 1195.

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themselves. But our view is to the contrary and is based on our expectations that courts will satisfy themselves that pleas of guilty are voluntarily and intelligently made by competent defendants with adequate advice of counsel and that there is nothing to question the accuracy and reliability of the defendants' admissions that they committed the crimes with which they are charged.<sup>116</sup>

As this Article has shown, bargaining almost certainly multiplies the number of wrongful convictions. The view of plea bargaining the Supreme Court took in 1970 rested on wishful thinking, but I do not imagine the Court will change its mind.

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<sup>116</sup> *Brady v. United States*, 397 U.S. 742, 758 (1970).