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5 Stetson J. Advoc. & L. 99 (2018)

Plea Bargaining: A Practice of Convenience or a Line-Crossing System of Coercion?

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I. Introduction

99. In 1996, Rodney Roberts was arrested for assault. After being taken to the police station in Newark, New Jersey, Rodney believed he would be fingerprinted and released. However, after providing police with his fingerprints Rodney was informed that he was being charged with kidnapping and sexual assault. A seventeen-year-old girl had selected his photo from a line-up. Despite being “nowhere near the scene of the crime,” Rodney’s attorneys begged him to accept an offer and make a guilty plea. Rodney’s attorneys told him that if he did so he would be out of prison within two years, but if he opted to proceed to trial, the judge would likely give him a life sentence.

100. On July 16, 1996, Rodney pled guilty to kidnapping and was sentenced to seven years in prison. Following his release from prison in 2004, Rodney was committed to a treatment facility for violent sexual predators. Rodney maintained his innocence until 2014, when a rape kit provided DNA evidence clearing him of any wrongdoing.²

1 Casey Burns is a May 2018 graduate of Stetson University College of Law. Beginning in the fall of 2018, she will join O’Brien Hatfield, PA. She would particularly like to thank Professor Ellen Podgor for her comments and support throughout the writing of this article.

2 Ricky Riley, *This Man’s Heartbreaking Story Shows How Lawyers Coerce Too Many Innocent People To Plead Guilty*, [Atlanta Black Star](#) (Feb. 4, 2017).

101. Rodney's story, while tragic, is far from a rare occurrence, and the handling of Rodney's case represents a much broader problem across the justice system within the United States. In recent years, studies have determined that over ninety-five percent of criminal cases are resolved by plea agreements between defendants and the government, due in large part to the fact that defendants do not want to risk the consequence of failure at trial.³

102. Several methods utilized by prosecutors have been deemed “[some] of the most palpable injustices of plea bargaining”⁴ and such injustice within plea bargaining can only lead to injustice throughout the system as a whole. While plea agreements within the criminal justice system are vital to save on costs and time, and do serve the interests of justice in many ways, the system has evolved to the point where justice is being pushed aside in favor of convenience. In accepting a guilty plea, the court must inquire whether the defendant is pleading voluntarily, knowingly, and understandingly.⁵

103. The issue that arises is, where a defendant is being threatened with a higher sentence or, in some cases, threatened with a prison term for a crime he or she did not commit, where is the line? Threats of higher sentences or more charges negate the voluntariness, knowledge, and understanding required to find a plea agreement valid. Pressures from prosecution, and defense counsel in some instances, can sometimes do more harm than good. No justice is served when an innocent man sits in prison for seven years. The system failed Rodney Roberts, and will continue to fail under its current operations.

104. This article will explore the shift in attitudes towards plea agreements. Part II of this article will address the historical aspects of plea bargaining in the United States, up to the present day. Part III of this article will analyze where the blame lies in the conviction of innocent defenders. Specifically, are defense counsel failing their clientele, or have prosecutors become too drawn in by the promise of convictions, rather than retaining an interest in the service of justice? Part IV of this article will explore why, in the interests of justice, the current system requires improvement. As it operates today, the plea bargaining system in the United States is verging on being unconstitutional. When defendants plead guilty to crimes they did not commit because they are accepting leniency or succumbing to fear and pressure, no one wins the case. Justice cannot be served in this manner.

3 See UNITED STATES SENTENCING COMMISSION, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, [Figure C](#).

4 Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 *Harv. L. Rev.* 2463, 2495 (2001) (“Prosecutorial bluffing is likely to work particularly well against innocent defendants, who are on average more risk averse than guilty defendants.”)

5 See *Boykin v. Alabama*, 395 U.S. 238, 243–44 (1969) (explaining that “[w]hat is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequences.”)

II. History

105. Historically, the plea bargaining system has changed dramatically since the nation's founding. "[P]lea bargaining was probably nonexistent before 1800, began to appear during the early or mid-nineteenth century, and became institutionalized as a standard feature of American urban criminal courts in the last third of the nineteenth century."⁶ In fact, beginning around the time of the Civil War, most plea agreements were struck down as unconstitutional.⁷ Despite this, plea bargaining remained a tool used by prosecutors for corruption purposes.⁸ Yet, following the Civil War, courts continued to prohibit offers in exchange for guilty pleas, and would permit defendants to rescind such confessions on appeal.⁹

106. Around the close of the nineteenth century, overcriminalization¹⁰ moved plea bargaining from a corrupt, taboo practice to a mainstream solution.¹¹ With a flood of new statutes and, subsequently, new criminal cases and defendants, courts soon became overwhelmed and began to explore options to lighten the load.¹² Regardless of its prior status as a tool of corruption, plea deals came to be offered more frequently by prosecutors hoping to expedite their case loads and clear court dockets.¹³

107. Within only eight short years, convictions resulting from pleas rose nearly twenty-five percent.¹⁴ Coupled with an entirely new class of defendants in the prohibition era, it became clear to prosecutors that their only option was to

6 Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defender's Dilemma: Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 104 *J. Crim. L. & Criminology* 1, 7 (2013); see also Lucian E. Dervan, *Plea Bargaining's Survival: Financial Crimes Plea Bargaining, a Continued Triumph in a Post-Enron World*, 60 *Okla. L. Rev.* 451, 478 (2007).

7 Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defender's Dilemma: Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 104 *J. Crim. L. & Criminology* 1, 6 (2013).

8 See Albert W. Alschuler, *Plea Bargaining and Its History*, 79 *Colum. L. Rev.* 1, 19–24 (1979).

9 See Albert W. Alschuler, *Plea Bargaining and Its History*, 79 *Colum. L. Rev.* 1, 19–21 (1979).

10 Lucian E. Dervan, *Overcriminalization 2.0: The Symbiotic Relationship Between Plea Bargaining and Overcriminalization*, 7 *J. L. Econ. & Pol'y* 645, 646–47 (2011).

11 See Lucian E. Dervan, *Bargained Justice: Plea Bargaining's Innocence Problem and the Brady Safety-Valve*, 2012 *Utah L. Rev.* 51, 88 (2012); see also Donald A. Dripps, *Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies*, 109 *Penn. St. L. Rev.* 1155, 1156–61 (2005).

12 Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defender's Dilemma: Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 104 *J. Crim. L. & Criminology* 1, 6 (2013), citing George Fisher, *Plea Bargaining's Triumph*, 108 *Yale L. J.* 857, 859 (2000).

13 See Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defender's Dilemma: Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 104 *J. Crim. L. & Criminology* 1, 6 (2013).

14 See Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defender's Dilemma: Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 104 *J. Crim. L. & Criminology* 1, 6 (2013); see also Albert W. Alschuler, *Plea Bargaining and Its History*, 79 *Colum. L. Rev.* 1, 22, 33 (1979).

attempt to settle cases out of court as quickly and seamlessly as possible.¹⁵ Kicking off a trend which has continued to today's criminal justice system, by 1925 nearly ninety percent of cases were resolved by plea, almost as high a percentage as the ninety-five percent of cases which are likewise resolved today.¹⁶

108. Despite experiencing such a rapid rise throughout the twentieth century, plea bargaining did not hold up quite as well when addressed in appellate proceedings. In *Walker v. Johnston*, the Supreme Court found a defendant's conviction unconstitutional, reasoning that prosecutorial use of threats and inducements rendered a plea involuntary.¹⁷

109. Yet, over the course of the next twenty years, the Supreme Court consistently took further cases debating the constitutionality of plea bargaining and coercive tactics.¹⁸ In 1967, the American Bar Association gave its blessing to the plea bargaining process.¹⁹ Shortly thereafter, the Supreme Court finally faced the issue head-on in *Brady v. United States*, where — despite the then-recent trend of the Supreme Court frowning upon coercive plea deals — the Court designated only a very narrow class wherein certain conduct would render pleas involuntary:²⁰

As long as the plea was “voluntary,” which meant that it was not induced “by actual or threatened physical harm or mental coercion overbearing the will of the defendant,” the bargain would be permitted.²¹

110. While it is impossible to know exactly how many innocent defendants plead guilty following the *Brady* decision, certain estimates can be made to determine that number.²² Such estimates can be drawn from factors including, but not limited to:

15 See George Fisher, *Plea Bargaining's Triumph*, 108 *Yale L. J.* 857, 860 (2000); see also Albert W. Alschuler, *Plea Bargaining and Its History*, 79 *Colum. L. Rev.* 1, 22, 28 (1979).

16 See Albert W. Alschuler, *Plea Bargaining and Its History*, 79 *Colum. L. Rev.* 1, 22, 27 (1979); see also UNITED STATES SENTENCING COMMISSION, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, [Figure C](#).

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

18 See, e.g., *United States v. Jackson*, 390 *U.S.* 570 (1968); *Machibroda v. United States*, 368 *U.S.* 487 (1962).

19 AM. BAR. ASS'N, PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY 2 (Tentative Draft 1967) (“Negotiation practices are recognized as proper, and an attempt is made to set guidelines for, and limits upon, the roles of the prosecutor, the defense attorney, and the trial judge in the bargaining process (Standards 3.1–3.3).”)

20 *Brady v. United States*, 397 *U.S.* 742, 750, 755 (1970).

21 Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defender's Dilemma: Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 104 *J. Crim. L. & Criminology* 1, 13 (2013).

22 See Michael O. Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 *Harv. L. Rev.* 293, 295 (1975) (“This proportion, which I shall call the implicit rate of non-conviction, cannot be directly observed, but it can be estimated for groups of defendants on the basis of certain plausible assumptions.”)

1. The number of criminal cases disposed in the district;
2. Probability of conviction; and
3. Percentage of non-convictions.²³

111. The Supreme Court signaled a further shift in its attitude towards plea agreements with its decision in *Bordenkircher v. Hayes*.²⁴ Therein, the Court was faced with the issue of whether the Due Process Clause of the Fourteenth Amendment was violated when a prosecutor carried out threats made during negotiations to re-indict the defendant on more serious charges, should he not accept the plea offer. Specifically, the prosecution offered Mr. Hayes, the defendant, the prospect of a five-year recommendation to the court if Mr. Hayes pled guilty to the charges on the indictment. The prosecution then threatened that, should Mr. Hayes not accept their offer, it would seek an indictment under an alternate statute which carried with it a mandatory life sentence. Mr. Hayes did not accept the prosecution's offer, and was subsequently found guilty by a jury. By following the decision in *Brady*, the Court reasoned that plea bargaining is mutually beneficial to both prosecutors and defendants,²⁵ and thus reasoned that the actions by the prosecution in the instant case were within the bounds of prosecutorial discretion.²⁶

112. Following the events of September 11, 2001, two theories regarding plea bargaining have been critiqued and utilized by both prosecutors and defense counsel. They are known as the Administrative Theory and the Shadow-of-Trial Theory.²⁷

113. The Administrative Theory reasons that the shift in attitude towards favoring plea agreements resulted from a rise in prosecutorial power.²⁸ Specifically, the theory places the prosecutor and defendant in two separate corners of the boxing ring, where the prosecutor is in charge — mandating terms and conditions.

114. Conversely, the defendant in the other corner wields little to no power, and becomes a passive party whose “only power rests in the ability to accept or reject the government's offer.”²⁹ One suggested reason for the roles the parties play under this theory is that plea bargaining is not a “bargain” at all, but instead is a

23 Michael O. Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 *Harv. L. Rev.* 293, 297–98 (1975)

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

25 *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978), citing *Brady v. United States*, 397 U.S. 742, 751 (1970).

26 *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978).

27 Lucian E. Dervan, *The Surprising Lessons from Plea Bargaining in the Shadow of Terror*, 27 *Ga. St. U. L. Rev.* 239 (2011).

28 Lucian E. Dervan, *The Surprising Lessons from Plea Bargaining in the Shadow of Terror*, 27 *Ga. St. U. L. Rev.* 239, 242 (2011).

29 Lucian E. Dervan, *The Surprising Lessons from Plea Bargaining in the Shadow of Terror*, 27 *Ga. St. U. L. Rev.* 239, 246 (2011).

chance for the prosecutor to lay down an appropriate punishment for a defendant, which can ultimately save on court costs. Under this theory, most scholars seem to opine that defendants are inherently placed in a submissive position, in contrast to the domination rendered by prosecutors in dictating the outcome of cases from the outset.³⁰ In its most extreme construction, the theory reasons that plea bargaining places prosecutors in a position to become so powerful that defendants lose all autonomy when deciding whether or not to accept a plea offer.³¹

115. Conversely, the Shadow-of-Trial Theory reasons that plea bargaining is a mutually beneficial process, whereby the parties essentially contract with one another for a favorable outcome. Some scholars assert that plea bargaining has grown from a one-sided process, whereby the prosecutor holds all cards, to a balancing act where prosecutors and defendants can bargain and reach an agreement.³² One major benefit cited for both prosecutors and defendants lies in cost. Specifically, it is reasoned that both prosecutors and defendants face enormous costs by the time a case goes entirely through the criminal system. It follows that if those costs can be avoided, the incentive to bargain and reach an agreement becomes clear and mutually beneficial for both parties.³³ According to this theory, there are three questions that will determine the terms of the bargained-for agreement.³⁴ Specifically, scholars look to:

1. The trial sentence anticipated if the case were tried and resulted in a conviction;
2. The likelihood that a trial will result in a conviction; and
3. The resource costs of trying the case.³⁵

116. Proponents of the Shadow-of-Trial Theory believe it is more balanced and provides defendants with a more active role in their own plea bargaining process.

30 Lucian E. Dervan, *The Surprising Lessons from Plea Bargaining in the Shadow of Terror*, 27 *Ga. St. U. L. Rev.* 239, 247 (2011), quoting Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 *U. Ill. L. Rev.* 37 (1983). See also Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 *Stan. L. Rev.* 1409, 1409 (2003).

31 John H. Langbein, *Torture and Plea Bargaining*, 46 *U. Chi. L. Rev.* 3, 12–13 (1978).

32 Lucian E. Dervan, *The Surprising Lessons from Plea Bargaining in the Shadow of Terror*, 27 *Ga. St. U. L. Rev.* 239, 242, 250 (2011); see also Russell D. Covey, *Signaling and Plea Bargaining's Innocence Problem*, 66 *Wash & Lee L. Rev.* 73, 74 (2009).

33 See Robert E. Scott & William J. Stuntz, *Plea Bargaining as a Contract*, 101 *Yale L. J.* 1909, 1948 (1992) (“Criminal trials are costly for defendants, and even more so for prosecutors.”)

34 Russell D. Covey, *Signaling and Plea Bargaining's Innocence Problem*, 66 *Wash & Lee L. Rev.* 73, 77 (2009).

35 Russell D. Covey, *Signaling and Plea Bargaining's Innocence Problem*, 66 *Wash & Lee L. Rev.* 73, 77 (2009), citing Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 *Harv. L. Rev.* 2463, 2464 (2001); Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 *U. Chi. L. Rev.* 50, 58 (1966); and Robert E. Scott & William J. Stuntz, *Plea Bargaining as a Contract*, 101 *Yale L. J.* 1909, 1941 (1992).

117. Under both theories, defense counsel, prosecutors, and judges alike favor one goal — avoiding “the price of the plea.”³⁶ The price of plea, when calculated correctly, should be a combination of the three factors mentioned above; the anticipated trial sentence and the likelihood of conviction during a trial, apart from resources that are saved by not proceeding to trial.³⁷

III. Reasons for the Issue — Who Is to Blame?

118. Discretion and the ability to extend plea offers are only two of the many powers exercised by prosecutors in the United States.³⁸ By that standard, it would be easy to simply place blame on the prosecutorial system as a whole, write a new rule which further curtails how far prosecutors can go when engaging in plea negotiations, and call it a problem solved. Unfortunately, as we see in cases like that of Rodney Roberts, the problem of involuntary or coerced pleas goes far beyond the power of the prosecutor.

Defense Attorneys and Their Clients

119. The right to counsel is the right to the effective assistance of counsel.³⁹ The Supreme Court recognized in 1985 that trial counsel can be ineffective even if the defendant opts to not go to trial.⁴⁰ It appears, however, that much of the time the interests of the defense attorney may not be the best interest of the client. A dichotomy arises wherein guidance through the plea process can become compromised in favor of other benefits.⁴¹

120. A study suggested certain factors that weigh more heavily on the defendant’s mind when deciding to accept a plea offer. Such factors included length of sentence, evidence strength, and the defendant’s preference in the instant case. Similarly, the study found that defense attorneys focus on the strength of evidence, the length of potential sentence, and the defendant’s indication regarding

36 Russell D. Covey, *Signaling and Plea Bargaining’s Innocence Problem*, 66 *Wash & Lee L. Rev.* 73, 77 (2009).

37 Russell D. Covey, *Signaling and Plea Bargaining’s Innocence Problem*, 66 *Wash & Lee L. Rev.* 73, 77–78 (2009).

38 28 U.S.C. § 594 (a).

39 *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970), applying *Gideon v. Wainwright*, 372 U.S. 335 (1963).

40 *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (“[The focus is] on whether counsel’s constitutionally ineffective performance affected the outcome of the plea process.”)

41 Vanessa A. Edkins, *Defense Attorney Recommendations and Client Race: Does Zealous Representation Apply Equally to All?* 35 *Law & Hum. Behav.* 413, 416 (2011) (“More recent research looking at criminal defense attorneys focused on not just severity of sentence and likelihood of conviction but also included the most legally relevant factor in any plea agreement: the defendant’s preference.”)

whether he would like to take his case to trial.⁴² Because both the defense attorney and her client value three vital balancing factors when determining whether to proceed to trial, one could assume that the solution would be clear for each defendant based on the circumstances surrounding each individual case. Specifically, it would be easy for an innocent defendant and his counsel to decide to proceed to trial:

1. Any evidence against him will be weak because he is innocent;
2. Sentencing thereby becomes irrelevant; and
3. The innocent defendant will clearly prefer to not plead guilty to a crime he did not commit.

121. However, “innocence becomes irrelevant as the real question becomes whether it is worth the risk of testing an innocent claim.”⁴³

122. The crux of the issue lies in fear. Defendants are afraid of the unknown, and defense attorneys are afraid of letting their clients down. Rather than fight for a defendant who is adamant about his innocence, attorneys and their clients weigh the factors, look at the lay-person status of jury members, and decide, more often than not, that the risk of a trial is not worth the reward.⁴⁴ It is almost impossible to know what standard of evidence jurors apply in each individual case, making such risk very difficult to calculate.⁴⁵ Several tests, such as the experiment conducted by ERID researchers, as well as The Innocence Project, seek to understand why the system works the way it does.⁴⁶ Unfortunately, it is nearly impossible to recreate “the same mentally anguishing decision defendants in the criminal justice system must make every day.”⁴⁷

123. One factor which tends to motivate most players in the plea bargaining game is finance. It is plain to see why a defense attorney may wish for his client

42 Vanessa A. Edkins, *Defense Attorney Recommendations and Client Race: Does Zealous Representation Apply Equally to All?* 35 *Law & Hum. Behav.* 413, 416 (2011); G.M. Kramer *et al.*, *Plea Bargaining Recommendations by Criminal Defense Attorneys: Evidence Strength, Potential Sentence, and Defendant Preference*, 25 *Behav. Sci. & L.* 573 (2007).

43 Ellen S. Podgor, *White Collar Innocence: Irrelevant in the High Stakes Risk Game*, 85 *Chi-Kent L. Rev.* 77, 84 (2010).

44 Shamina Anwar *et al.*, *Jury Discrimination in Criminal Trials*, ECONOMIC RESEARCH INITIATIVES AT DUKE (ERID) *Working Papers Series No. 55*; UNITED STATES SENTENCING COMMISSION, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, *Figure C*.

45 Shamina Anwar *et al.*, *Jury Discrimination in Criminal Trials*, ECONOMIC RESEARCH INITIATIVES AT DUKE (ERID) *Working Papers Series No. 55 at 5* (“In fact, proving that jurors apply different standards of evidence to heterogeneous groups of defendants is incredibly difficult.”)

46 Melissa B. Russano, *Investigating True and False Confessions with a Novel Experimental Paradigm*, 16 *Psychol. Sci.* 481 (2005).

47 Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defender’s Dilemma: Innovative Empirical Study of Plea Bargaining’s Innocence Problem*, 104 *J. Crim. L. & Criminology* 1, 33 (2013).

to enter into a plea agreement — trials are incredibly costly.⁴⁸ On the other hand, depending on the contract between client and counsel, an attorney may have more of an incentive to encourage his client to proceed to trial for merely selfish and financial reasons.⁴⁹ Further, regardless of the cost to the attorney, most defendants are not in a position to pay an unlimited amount for their defense. In that instance, accepting a plea offer from the prosecution can look even more appealing.⁵⁰

124. When a defendant such as Rodney Roberts is faced with increasing costs and charges which, to him, seem to be appearing out of nowhere, not to mention an attorney who is pushing him to accept a plea offer for a shorter sentence, shying away from a trial appears to be the only logical option. The question then arises, why is the court system the legal safeguard of this nation, not taking steps to protect these types of defendants?

125. As it is built today, the plea negotiation process is almost exclusively reliant upon the willingness of the prosecutor to extend an offer, fair or otherwise. Beyond that, there are factors weighing heavily on defense attorneys which often leave the defendant worse off.⁵¹ All of which raises the question of what are the courts doing about this? A deeper look at the issue appears to show that courts have tasked defense attorneys with the important duty of acting as the only safeguard to protect defendants from being coerced into accepting plea offers.

The Court

126. As highlighted previously, United States courts spent more than a century fighting against plea bargaining as a common tool for prosecutors. After all, the Sixth Amendment seeks to protect, specifically, the right to a trial by jury:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed[.]

48 Gregory M. Gilchrist, *Trial Bargaining*, 101 *Iowa L. Rev.* 609, 611 (2016) (“Extensive procedural protections make trials expensive, while prosecutorial discretion and negotiation tactics are cheap and unregulated.”)

49 Peter Lushing, *The Fall and Rise of the Criminal Contingent Fee*, 82 *J. Crim. L. & Criminology* 498, 500 (1991) (“Contingent fees for criminal defense attorneys — agreements under which the attorney’s fee depends upon the result obtained in the case — are almost uniformly considered unethical and illegal.”)

50 Robert E. Scott & William J. Stuntz, *Plea Bargaining as a Contract*, 101 *Yale L. J.* 1909, 1935 (1992) (“Criminal trials are costly for defendants ... these costs can be saved, and the gains split between the parties, by reaching a bargain early in the process.”)

51 Lucian E. Dervan, *The Surprising Lessons from Plea Bargaining in the Shadow of Terror*, 27 *Ga. St. U. L. Rev.* 239, 252 (2011), citing Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 *Harv. L. Rev.* 2463, 2464 (2001) (“Poor lawyering, agency costs, and lawyers’ self interest are prime examples, as are bail rules and pretrial detention.”)

127. The departure from these principles appears to stem from the *Brady* decision, but even so, the Supreme Court still rendered its decision in *Brady* hesitantly:

This is not to say that guilty plea convictions hold not hazards for the innocent or that the methods of taking guilty pleas presently employed in this country are necessarily valid in all respects. This mode of conviction is no more foolproof than full trials to the court or to the jury.⁵²

128. Recognizing that plea negotiations are not a better solution than proceeding to a trial for a defendant, it appears odd that the Court would continue to proscribe such actions. In accordance, the Court mandated that it would “continue to [take great precautions], whether conviction is by plea or trial.”⁵³ The Court further went on to mandate that should prosecutors take advantage of its ruling and begin to make plea negotiations the norm, the system has failed, and “the plea-bargaining machine will have ventured into the realm of unconstitutionality.”⁵⁴

129. So, what happened? It appears that the promise by the Supreme Court to continue to scrutinize such arrangements has been long forgotten and fallen into the shadows in favor of a lighter docket and cheaper criminal process. A main goal of judges today is to accept plea agreements, wrap up cases, and clear out their dockets. An explanation offered frequently as to why judges are straying from *Brady* guidance may lie in their desire to please the public. However, as is to be expected, the public is never pleased. A major reason why federal courts did away with mandatory sentencing guidelines related to the immense public outcry against such mandates.⁵⁵ Every case is different, every defendant is different, and the entire scheme appears unjust and in direct contrast to the values of the Constitution.

130. The shifting attitude of the courts towards commonplace plea bargaining can come with benefits. Again, costs are greatly decreased if defendants are not going through the entire trial process. The court is spared the cost and time of going through each pretrial hearing, voir dire, and a full trial, plus, in some instances, a separate sentencing hearing. Attorneys are free to focus their attention on other cases once earlier cases are resolved with a plea. But courts cannot become neglectful. It appears as though courts put too much trust on defense counsel, who are often overworked, underpaid, underqualified, and have undeveloped records.⁵⁶

52 *Brady v. United States*, 397 U.S. 742, 757 (1970).

53 *Brady v. United States*, 397 U.S. 742, 757 (1970).

54 *Brady v. United States*, 397 U.S. 742, 757 (1970). See also *Bargained Justice: Plea Bargaining's Innocence Problem and the Brady Safety-Valve*, 2012 Utah L. Rev. 51, 88 (2012).

55 See Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U.L. Rev. 911, 939 (2006) (“[J]udges can induce quick pleas and clear their dockets.”)

56 See Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 Cal. L. Rev. 1117, 1126 (2011) (“The Court put great faith in competent defense

131. In Rodney Roberts' case, Rodney attributed his guilty plea to a crime he did not commit in part to his defense attorney.⁵⁷ Specifically, Rodney felt that “[o]ne of the biggest problems was that my attorney — my public defender — who at the time had maybe 70 or 80 cases. And like 25 or 30 of those clients were in the bullpen — the holding area before you go to court — with me. He is seeing everyone of us like an assembly line process . . . all he was just trying to do was reduce his case load.”⁵⁸

132. As courts more frequently ignore the mandated safeguards of *Brady*, the aversion to plea agreements will become even more obsolete. Without the defense counsel to protect them, defendants are left to plead guilty out of fear, or hope for a better sentence.⁵⁹ For Rodney, he felt “that the lawyer was the one person there to help me — he was my lawyer — and that everyone else was against me, not realizing how much the lawyer was a part in the whole coercion.”⁶⁰ If the court does not protect defendants, both prosecutors and neglectful defense attorneys will play right into the prohibited actions of *Brady*: providing irresistible plea offers not to serve justice, but to simply clear the case.

Prosecutors — The Power Players

133. While the courts have left defense counsel as the only line of defense between their clients and unconstitutional plea bargaining, prosecutors are arguably the most important and powerful players in the pleading process.

Plea bargains are not consensual agreements entered into by defendants after adversarial negotiation. Rather, the prosecutor substantially dictates the terms of the plea agreements in most cases. ‘Plea bargaining’ is in reality the prosecutor’s unilateral administrative determination of the level of the defendant’s criminal culpability and the appropriate punishment for him.⁶¹

134. As articulated above, following *Brady*, prosecutors were given the express task of extending plea offers while keeping sure that the pleas themselves were given freely and voluntarily. While the cost of a trial is notoriously expensive

counsel as the only substantial safeguard.”)

57 Carlita Salazar, *Rodney Roberts Talks About Pleading Guilty Out of Fear, Not Guilt: ‘My Life Was on the Line’*, [The Innocence Project](#).

58 Carlita Salazar, *Rodney Roberts Talks About Pleading Guilty Out of Fear, Not Guilt: ‘My Life Was on the Line’*, [The Innocence Project](#).

59 Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 *Calif. L. Rev.* 652, 652–53 (1981) (“Criminal defendants today plead guilty in overwhelming numbers primarily because they perceive that this action is likely to lead to more lenient treatment than would follow conviction at trial.”)

60 Carlita Salazar, *Rodney Roberts Talks About Pleading Guilty Out of Fear, Not Guilt: ‘My Life Was on the Line’*, [The Innocence Project](#).

61 Lucian E. Dervan, *The Surprising Lessons from Plea Bargaining in the Shadow of Terror*, 27 *Ga. St. U.L. Rev.* 239, 247 (2011).

and time-consuming, critics are now beginning to question whether those benefits outweigh the costs they themselves spur. The duty of the prosecutor is to seek justice, not merely to convict.⁶² The system, as it exists today, incentivizes prosecutors to seek only convictions. By extending plea offers to virtually every defendant, and by settling ninety-six percent of criminal cases through plea bargaining, suffice it to say prosecutors are favoring low costs as opposed to justice.

135. Beyond this, prosecutors have begun to utilize the plea process as a method of checking convictions off on a list, rather than weighing evidence. As Stephanos Bibas has argued, prosecutors are concerned about their reputations. As such, rather than trying cases where the evidence is weak and a defendant has a fighting chance, prosecutors will seek to reach a plea agreement and call it a win:

This dynamic is the opposite of what one might expect: strong cases should plead guilty because trial is hopeless, while weak cases have genuine disputes that merit resolution at trial.⁶³

136. This further tilts against the favor of the defendant because prosecutors are in turn motivated to win by a landslide in a public setting, like a high-profile court case complete with a jury trial.⁶⁴

137. At this point in time, prosecutors appear to be stuck between a rock and hard place. With ever-increasing charges being laid against criminal defendants, the system is flooded. It is practically impossible for every defendant to go through an entire trial.⁶⁵ As such prosecutors, needing to close out their cases, are incentivized to offer deals. In turn, defendants are given an offer they cannot refuse. Juries become, more or less, irrelevant.⁶⁶ While cutting such corners has not only been deemed an acceptable practice of prosecutors, it has become necessary. The issue lies in determining at which point these practices cross the line from acceptable to coercive, and therefore unconstitutional.

138. Imagine, after going on a crime spree, a defendant is arrested and charged with six counts of mail fraud.⁶⁷ While meeting with the prosecutor, he offers a deal: plead guilty to one count and the prosecutor will recommend a sentence of twenty years. If the defendant refuses the offer, the prosecutor will seek to convict the defendant on all six counts and recommend a twenty-year sentence for each individual charge.

62 Am. Bar. Ass'n, *Functions and Duties of the Prosecutor*, ABA Standards for Criminal Justice Standard 3-1.2.

63 Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 *Harv. L. Rev.* 2463, 2472 (2001) ("Prosecutors are particularly concerned about their reputations because they are a politically ambitious bunch.")

64 Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 *Harv. L. Rev.* 2463, 2472 (2001) ("Prosecutors are particularly concerned about their reputations because they are a politically ambitious bunch.")

65 Gregory M. Gilchrist, *Trial Bargaining*, 101 *Iowa L. Rev.* 609, 611 (2016) ("Right now, there are simply more defendants than the system can afford to give trials.")

66 Gregory M. Gilchrist, *Trial Bargaining*, 101 *Iowa L. Rev.* 609, 611 (2016).

67 18 U.S.C. § 1341.

139. In the criminal system today, this practice is not only accepted, but encouraged and utilized frequently. To researchers and defendants alike the choice can seem obvious: accept the deal, move on with the lesser sentence. However, pleas are meant to be given freely and voluntarily, away from any influence or coercion. By offering such an irresistible deal, while at the same time attaching a veiled threat of a harsher sentence should the defendant refuse, it appears the system has failed. Prosecutors have forsaken their oath to seek justice by taking advantage of leniencies the plea system has afforded them. Such corrupt practices cannot be deemed constitutional.

IV. Is This Actually Problematic?

140. Perhaps, if the system has operated the way it does since the *Brady* decision, for nearly fifty years, this cannot be considered a problem. Unfortunately, statistics show us that far too often, innocent defendants are sentenced for crimes they did not commit. To date, the National Registry of Exonerations has listed ninety-seven individuals who have been exonerated in 2017 alone.⁶⁸

141. In 2016, of the sixty-one convictions of defendants who were prosecuted for drug crimes, fifty-nine individuals pled guilty, only to be exonerated. A study conducted by the University of Michigan demonstrates that the number of exonerations in drug cases has been increasing significantly in the past three years alone, with nearly twenty more individuals exonerated in 2016 than in 2014. The same study highlights that while a smaller proportion of exonerated defendants accepted plea offers, a significant number of such cases do appear.⁶⁹

Sexual Assault	8% (37/466)
Drug Crimes	66% (105/159)
Robbery	12% (11/94)
Sex Offender Registration	78% (7/9)
All Exonerations	15% (261/1,700)

142. The table above, drawn from data taken from a 2015 study, depicts exonerations in cases strictly resulting from guilty pleas. As shown, nearly eighty percent of registered sex offenders who were exonerated in 2015 alone had pled guilty to a crime which science could prove they did not commit. While the percentages for crimes such as murder or child sex abuse are much lower, the study offers a reason for this phenomenon:

⁶⁸ *Current Exonerations*, [The National Registry of Exonerations](#) (Nov. 9, 2017).

⁶⁹ *Drug Crimes in 2016* (March 7, 2017) [The National Registry of Exonerations](#).

Innocent defendants who plead guilty almost always get lighter sentences than those who are convicted at trial — that’s why they plead guilty — so there is less incentive to pursue exoneration. In many cases, they would rather put the injustice behind them than engage in prolonged legal battles to prove their innocence.⁷⁰

143. While the study related only to innocent defendants, the same reasoning can easily be applied to any defendant who accepts a plea offer — defendants who plead guilty almost always get lighter sentences than those who are convicted at trial. The question must be addressed of what justice is being served. Innocent men and women are sitting in prison for decades on end, and in several instances those sentences are a direct result of a plea agreement. Regardless of innocence, defendants are opting for plea agreements rather than battling to mitigate circumstances or exercising their constitutional right to a full trial by a jury of their peers.⁷¹

144. It cannot be argued that the harshest sentence a defendant can face is the death penalty. Four-point one percent of defendants who are sentenced to death are later proven innocent. This percentage equates to roughly one in twenty-five persons on death row.⁷² Professor Samuel Gross asked, why do innocent defenders plead guilty? His explanation:

When they were brought to court for the first time, they were given a take-it-or-leave-it, for-today-only offer: Plead guilty and get probation or weeks to months in jail. If they refused, they’d wait in jail for months, if not a year or more, before they got to trial, and risk additional years in prison if they were convicted. That’s a high price to pay for a chance to prove one’s innocence.⁷³

145. Professor Gross also offers a solution, but one which will likely prove to be vastly unpopular: spend money, investigate each case more carefully, take fewer quick guilty pleas, conduct more trials, and ensure that the trials that are conducted are conducted well. He concludes his article with a thought which summarizes the criminal justice system perfectly: what we do now is not good enough.⁷⁴

146. Proponents of the system as it stands now will no doubt argue that plea bargaining is just that — a bargain. Specifically, the process of plea bargaining is meant to be a back-and-forth between prosecution and defense, where ultimately an agreement is reached which serves the best interests of both the public

70 *Innocents Who Plead Guilty*, [National Registry of Exonerations](#).

71 See *DNA Exonerations in the United States*, [Innocence Project Anniversary](#).

72 Samuel R. Gross, *The Staggering Number of Wrongful Convictions in America*, [The Washington Post](#) (July 24, 2015).

73 Samuel R. Gross, *The Staggering Number of Wrongful Convictions in America*, [The Washington Post](#) (July 24, 2015).

74 Samuel R. Gross, *The Staggering Number of Wrongful Convictions in America*, [The Washington Post](#) (July 24, 2015).

and the defendant. Unfortunately, the process has become so one-sided that today it can hardly be considered plea “bargaining” at all. Instead, defendants are given two bleak options: accept what the prosecutors offer now or face worse later.⁷⁵

147. This method leaves defendants with very few options, particularly for those cases of innocent defendants. Although proponents of the current operation will reason that the Supreme Court in *Brady* meant, quite literally, physical and mental torture or manipulation must be avoided, the system is not far off today. The threats utilized by prosecutors today, while not physical, are still very much present. “We threaten him with a materially increased sanction if he avails himself of his right.” While it may be of a different kind, “[p]lea bargaining, like torture, is coercive.”⁷⁶

148. So, what can be done? First, it must be universally recognized that defendants are not accepting plea offers because they are guilty of the underlying crimes. They are not accepting plea offers to accept responsibility for their actions. Defendants, in most instances, accept plea offers because they are afraid that if they do not the end result will be much worse. Defendants who accept plea offers out of fear are not entering into “voluntary” agreements, as mandated by the Supreme Court throughout its history. Such pressures from prosecution, such as “take-it-or-leave-it” offers capitalize on the exact mental coercion the Court in *Brady* warned against.

149. One possible solution to the defendant’s predicament is to place caps on what prosecutors can offer. Specifically, courts can regulate to ensure that plea offers are not so lucrative that a defendant could not possibly turn them down. Unfortunately, there are risks associated with being so stringent. In *United States v. Booker*, the Supreme Court recognized that mandatory sentencing guidelines, regardless of potential departures, violated the Sixth Amendment.⁷⁷ Specifically, the Court reasoned that while mandatory guidelines may be convenient, convenience could not outweigh justice.⁷⁸ Assuming the Court today follows the decision in *Booker*, the Court will be hesitant to place strict caps on prosecutorial exercises of power.

150. Instead, a solution to the defendant’s predicament could lie in willingness. Parties must accept that it will take time to go through each case fairly and accurately, and be willing to do so. Courts must be willing to hear every case, check the work of every prosecutor and defense attorney, and ensure that justice

75 Michael M. O’Hear, *Plea Bargaining and Procedural Justice*, 42 *Ga. L. Rev.* 407, 425 (2008) (“[W]hen prosecutorial lenience is the only reliable means to avoid a draconian sentence, the prosecutor can effectively dictate the terms of the ‘deal’”).

76 John H. Langbein, *Torture and Plea Bargaining*, 46 *U. Chi. L. Rev.* 3, 12–13 (1978).

77 *United States v. Booker*, 543 U.S. 220, 244 (2005).

78 *United States v. Booker*, 543 U.S. 220, 244 (2005), quoting *Blakely v. Washington*, 542 U.S. 296, 313 (2004) (“However convenient these new methods of trial may appear at first . . . let it be again remembered that delays, and little inconveniences in the form of justice, are the price that all free nations must pay for their liberty in more substantial matters.”)

is being served in the appropriate manner in each and every case. Beyond that, it must be understood that the cost of a trial is not more dire than the cost of spending countless years in prison. Taxpayer money is vital and precious, but ensuring that legal operations follow the letter of law is more vital.

151. Regardless of which solution is ultimately implemented, something must change. The first step to achieving such a change is recognizing the existence of a problem. *Brady* has been forsaken in the interest of saving money and time, and such digression from the Court's warning against such action must be rectified immediately.

V. Conclusion

152. The plea bargaining system in the United States is verging on unconstitutional as it operates today. When defendants plead guilty to crimes they did not commit because they are accepting leniency or succumbing to fear and pressure, no one wins the case. Justice cannot be served in this manner. Historically, the United States has strayed from key values it fought for over the course of two centuries.

153. The blame for such strays is threefold. Prosecutors have taken advantage of the power granted to them in their capacities as ministers of justice. Defense attorneys, too often, give up on their clients for what is convenient, or in some cases for what will make them more money. Courts have become too comfortable, trying to clear their dockets rather than ensuring that each defendant is treated fairly and equally. Solutions are available for implementation, but are unappealing to too many parties.

154. Today, Rodney Roberts is a free man.⁷⁹ In 2015, he filed a federal civil rights lawsuit, wherein he is seeking damages from the Newark Police Department, the Essex County Prosecutor's Office, and other unnamed parties.⁸⁰ However, when asked about his ordeal, Rodney does not place blame with the police, the prosecutors, his attorneys, or the judge, but instead focuses his resentment on the system as a whole. "[T]o Roberts, the system that by design deprives the vast majority of defendants of their right to a trial — not its foot soldiers — is the guilty party."⁸¹

79 Antoine Goldet, *This Innocent Man Pleaded Guilty to a Crime He Didn't Commit*, [Reader's Digest](#).

80 Ricky Riley, *This Man's Heartbreaking Story Shows How Lawyers Coerce Too Many Innocent People To Plead Guilty*, [Atlanta Black Star](#) (Feb. 4, 2017).

81 Ricky Riley, *This Man's Heartbreaking Story Shows How Lawyers Coerce Too Many Innocent People To Plead Guilty*, [Atlanta Black Star](#) (Feb. 4, 2017).