



# Plea Bargaining in the United States: a Perversion Of Justice

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# PLEA BARGAINING IN THE UNITED STATES: A PERVERSION OF JUSTICE

Emilio C. VIANO\*

Criminal justice today is for the most part a system of pleas, not a system of trials." Justice Anthony Kennedy, *Missouri v. Frye* (2012)

Our entire criminal justice system has shifted far away from trials and juries and adjudication to a massive system of sentence bargaining that is heavily rigged against the accused citizen. William Young, (then) Chief Judge, U.S. District Court, Massachusetts, *U.S. v. Richard Green* (2004)

## Myth and Reality

In a country that prides itself on being a beacon of democracy, the rule of law, the protection of human rights and enlightened justice policies, the exponential growth of plea bargaining is instead a clear signal that the American justice system is not working that well, that, on the contrary, is being skewed and distorted by the confluence of several negative factors.

The majority of Americans takes it for granted that when someone is accused of a crime by the state, the case routinely goes to trial. There, it is believed, the prosecution and the defense spar over the facts of the case in front of a jury of citizens that will eventually deliberate, at times at great length, before reaching a verdict on the innocence or guilt of the accused based on the "evidence" provided by the two parties. More fundamentally, it is held in the United States that the law gives more weight and value to avoid convicting the innocent than to obtain the maximum possible convictions of the guilty. Procedural criminal law is seen as putting into practice these values and ensuring that criminal cases are decided accordingly, especially by extending to the accused the presumption of innocence and by requiring proof beyond a reasonable doubt in order to obtain a conviction.<sup>1</sup>

Unfortunately, this depiction of the American justice system does not reflect what really happens in courtrooms around the country. Actually, very few criminal

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<sup>1</sup> Tim Lynch, *The Devil's Bargain: How Plea Agreements Undermine Justice in the U.S.*, REASON, July 2011 (3) 68-69.

cases go to trial. About 97 percent of the criminal cases are resolved by plea bargains. In a plea bargain, the prosecutor normally offers a reduced prison sentence if the defendant agrees to forego his right to a jury trial and admit guilt in a summary proceeding before a judge.

The data are unmistakable. In fiscal year 2010, the prevalent mode of conviction in U.S. District Courts of all crimes was by plea of guilty (96.8% of all cases).<sup>2</sup> The percentage ranges from a relative low of 68.2% for murder to a high of 100% for cases of burglary, breaking and entering. With the exception of sex abuse (87.5%), arson (86.7%), civil rights (83.6%) and murder (68.2%), for all other crimes the rate of convictions by plea of guilty is well over 90%. In the recent U.S. Supreme Court decision, *Missouri v. Frye*<sup>3</sup>, Justice Kennedy, writing the majority opinion, pointed out the statistics that 97% of federal convictions and 94% of state convictions are the result of guilty pleas. Given the federalist nature of the United States, states and localities have their own substantive and procedural laws and regulations. Consequently, data on convictions by pleas of guilty vary from state to state but they are all substantial.

The U.S. Supreme Court officially recognized plea bargaining as a formal procedure for the resolution of criminal cases in 1970 when it declared plea bargaining constitutional in the *Brady v. United States* case.<sup>4</sup> In another case, *Santobello v. New York*<sup>5</sup>, the Supreme Court decided that the defendant's sentence should be vacated because the plea agreement had been violated. The agreement contained a provision that the prosecutor would not recommend a sentence. However, the prosecutor did not respect the agreement when he actually asked for the maximum sentence. Thus, the U.S. Supreme Court established that, in order for a plea bargain to be legally valid, both the prosecutor and the defendant must honor the terms of the agreement. Consequently, all plea bargains must be approved by a judge to be considered legally binding. Additionally, this decision supports the conclusion that, when plea bargains are broken, there are remedies, even though the Court did not prescribe them.<sup>6</sup> As a consequence, given the frequency and prevalence of plea agreements, there are

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<sup>2</sup> Sourcebook of Criminal Justice Statistics Online 2010; <http://www.albany.edu/sourcebook/pdf/t5342010.pdf>, Table 5.34.2010. Accessed on 21 June 2012.

<sup>3</sup> No. 10-444, 2012 WL 932020 (U.S. Mar. 21, 2012)

<sup>4</sup> *Brady v. United States*, 397 U.S. 742 (1970)

<sup>5</sup> *Santobello v. New York*, 404 U.S. 257 (1971), 261

<sup>6</sup> Peter Westen and David Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 1978 CALIF. L.R. 66, May, 3, 471 (arguing that the most important right the criminally accused has in plea bargaining may be found not in procedural law but in the law of contracts)

those who say that the strongest rights of the accused may actually be found in contract law rather than in procedural trial law<sup>7</sup>

There are several aspect of the American criminal justice system that favor and support plea bargaining. First of all, the fact that the system is adversarial in nature places the judge in a passive, "umpire"-like position. The judge depends almost totally on the two parties, the prosecution and the defense, to construct, articulate and present the factual record. The judge definitely cannot take any steps to independently find, verify or assess information about the case in order to evaluate the strength of the case against the defendant. Consequently, the parties, prosecution and defense, clearly control the result of the case, either by asserting their rights or by bargaining them away. Another major difference between the civil law and the American procedural systems is that in civil law the prosecutor must press charges when there is sufficient evidence to convict.<sup>8</sup> The prosecutor has no discretion, in principle, to prosecute or not a case. On the contrary, in the common law system, there is no compulsory prosecution. The prosecutor has ample decision-making power to decide whether to prosecute or not, depending on various variables from the quality of the evidence to the credibility of the accuser and other witnesses. This substantial discretion gives the prosecutor the legal power and the flexibility to negotiate and plea bargain, especially when the odds of obtaining a conviction are not that good for different reasons or the cases are numerous, fairly routine, involving defendants who have limited financial means to mount a vigorous defense and therefore have little choice but to settle.

#### Historical Perspectives

Historically, plea bargaining is a relatively new phenomenon. It was basically rare in the United States until the 19<sup>th</sup> century and even looked upon with misgiving.<sup>9</sup> Up to that time, trials by jury were short and quick, with little attention to complex rules of procedure and evidence. Often, no attorneys represented the parties at trial. The main reasons for this were the mostly farming and ranching nature of American life with little law enforcement presence, few courthouses in distant county seats or cities, not many law schools to produce lawyers, a limited number of crimes recognized at common law, informal and at times violent dispute resolution mechanisms, and a strong culture limiting governmental regulation and

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<sup>7</sup> *Supra*, note 6; see also Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *YALE L.J.* 1909, 1965-66 (1992).

<sup>8</sup> French Senate, *Les Caractéristiques du Procès Pénal*, <http://www.senat.fr/lc/lc25/lc251.html>. Accessed on 22 July 2012. Summary of criminal procedures in various countries. Also M. Carnot, *DE L'INSTRUCTION CRIMINELLE* (Paris: Thorel & Guilbert, 1836) 35.

<sup>9</sup> Albert W. Altschuler, *Plea Bargaining and Its History*, 13 *LAW & SOC. REV.* 211, 214-215 (1979).

interference in the private lives of the citizens. Access to formal justice and the practice of law in the American colonies were limited to the upper classes of merchants and planters. Actually, before the American Revolution, lawyers were disliked and distrusted. For the Puritans this had a religious justification, the Bible being all the law that one needed.<sup>10</sup> Planters also did not favor lawyers that they considered their competitors for power and influence. During the Revolutionary times, lawyers were even more unpopular. They belonged mostly to the upper classes with strong ties with and loyalties to England. Following the American Revolution, lawyers were busy trying to collect and enforce rich creditors' claims, an activity deemed unpatriotic. Eventually, given the new political order in the United States, the profession became somewhat more egalitarian.<sup>11</sup> However, for a long time no formal education was required for being admitted to the bar. The bar exam itself was a rather informal test. Apprenticeship was the normal route to becoming a lawyer. A professional law school was established in Litchfield, Connecticut in 1784 but issued no diploma. The first law professorships, starting to enhance the study of law to a respectable academic subject, were created at the College of William and Mary in Virginia in 1779 and at Columbia University in New York in 1793. Harvard Law School was not established until 1816 and Yale's until 1824. Requirements and standards for succeeding in law school then were quite low.<sup>12</sup> Until the end of the 19<sup>th</sup> century there were actually more lawyers than college graduates.<sup>13</sup> It was not until 1870 that the legal field began to professionalize and the teaching of law became a more respected academic field, especially with the introduction of the case method at Harvard.

Gradually, especially thanks to the industrial revolution of the 19<sup>th</sup> century, the country became more urban in nature, the population in the cities grew exponentially; industry, commerce and trade added considerable complexity to everyday life and consequently crime rates also grew with increasing caseloads burdening prosecutors and the courts.<sup>14</sup> Moreover, the study of law flourished in the country and with it, the legal profession in numbers and visibility. The increasing procedural and evidentiary complexity of the trials and the professionalization of the legal and criminal justice careers meant that the processing of cases became much more formal, exacting and slow.

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<sup>10</sup> Bertram Turner & Thomas Kirsch (eds.), *Permutations of Order: Religion and Law as Contested Sovereignities* (Ashgate, 2009).

<sup>11</sup> Steven Vago, *LAW AND SOCIETY* (Prentice Hall, 2012) 348-350.

<sup>12</sup> Lawrence Friedman, *A HISTORY OF AMERICAN LAW* (Simon & Schuster, 2005), 242.

<sup>13</sup> Robert Stevens, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s* (Union NJ: Lawbook Exchange, 2001) 73.

<sup>14</sup> George Fischer, *Plea Bargaining's Triumph*, 109 *YALE L.J.* 857, 865 (2000).

Consequently, processing cases needed and absorbed ever increasing time and resources and burdened state systems.<sup>15</sup>

Thus, it was between the mid-19<sup>th</sup> to the early 20<sup>th</sup> century that plea bargaining became de facto the preferred procedure for handling an ever increasing number of criminal cases. There were no formal reforms of procedural law or court decision. It was a practice introduced by prosecutors to deal with the population growth, especially in large cities like New York, Chicago, Boston and others; with the increasing crime rates and consequent caseload, themselves stemming from more police officers, more laws, and improving investigating techniques; and with the growing complexity of trial procedures. Since then, the rate of utilization of plea bargaining steadily grew, due to several reasons, like the national crime wave from the late 1960s until the early 1980s; a stronger recognition of the protections provided by due process, which gave defendants more room for bargaining; and simply the increasing familiarity and ease with the procedure in the nation's courtrooms.<sup>16</sup>

#### Plea Bargaining and the Determinate Sentencing Guidelines

The growth of plea bargaining has acquired even more momentum in recent years. One of the most important factors is the introduction of determinate sentencing guidelines at the Federal and also State levels. The Guidelines are issued by the United States Sentencing Commission established by the Sentencing Reform Act of 1984, part of the Comprehensive Crime Control Act of 1984.<sup>17</sup> The objective of the Guidelines was to diminish the disparities in sentencing that were revealed as being widespread by research at the time and to curb the power of administrative bodies, like a Parole Commission, to actually reduce the time to be served by the convict by freeing him or her before the expiration of the sentence through an administrative proceeding ("parole hearing"). "Shopping for a (lenient) judge" was a well-known defense lawyer's tactic to help a defendant escape a harsh punishment. Moreover, there was also considerable discretion, mostly controlled by the correctional system and the Parole Board, in how much time the convict would actually serve before being released on parole. Thus, the Commission was impaneled to rationalize the process of sentencing by establishing determinate sentences. This means that at the time of sentencing the maximum time to be served (and at times also the minimum) is determined and cannot be changed once the convict begins serving his prison time. Consequently, parole was abolished. A mandatory sentencing system had also been introduced in several States before the Federal system

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<sup>15</sup> See Friedman, *supra* note 12 at 237-38.

<sup>16</sup> Jenia Turner, *PLEA BARGAINING ACROSS BORDERS* (New York: Wolters Kluwer/Aspen, 2009) 9.

<sup>17</sup> Pub.L. 98-473, S. 1762, 98 Stat. 1976, enacted October 12, 1984.

was enacted. About half the States in the Union eventually adopted this approach.

The consequences of these policies were far reaching. While it is beyond the scope of this article to do a detailed analysis, one of the major effects of the mandatory sentencing system was a major transfer of power from the judge to the prosecutor.<sup>18</sup> The prosecutor now did not have to go “judge shopping” any more to find a judge ready to impose a severe sentence in exemplary cases. He or she already knew what the penalty limits were, both “the floor and the ceiling” in some cases, and the judge had no choice but to impose them. Thus, the prosecutor became the more powerful figure in the courtroom.<sup>19</sup> He and the defense attorney could anticipate the penalty through arithmetical calculations (“calculator” justice as it came to be derided by opponents). Moreover, the prosecutor could increase the penalty by adding charges against the defendant that could translate into a long prison sentence and even the death penalty where applicable. This would certainly create serious concern for the accused and the defense attorney.<sup>20</sup> Thus, the prosecutor gained the upper hand in dealing with the defendant and the defense attorney since the determinate sentence system gave the prosecutor’s office the control of the minimum eventual sentence that the judge was obliged to impose, but could not modify.<sup>21</sup>

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<sup>18</sup> Elizabeth A. Parsons, *Shifting the Balance of Power: Prosecutorial Discretion Under the Federal Sentencing Guidelines*, FALL, 1994, 29 VAL. U.L. REV. 417; William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, Fall, 1993, 54 OHIO ST.L.J. 1325.

<sup>19</sup> Ronald F. Wright & Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing and Prosecution Power*, September, 2006, 84 N.C.L. REV. 1935.

<sup>20</sup> Evangeline A. Zimmerman, *The Federal Sentencing Guidelines: A Misplaced Trust in Mechanical Justice*, Spring, 2010, 43 U. MICH. J.L. REFORM 841.

<sup>21</sup> The literature on this subject is quite extensive. Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, January, 2001, 86 IOWA L. REV. 393; Robert L. Misner, *Criminal Law Recasting Prosecutorial Discretion*, Spring, 1996, 86 J. CRIM. L. & CRIMINOLOGY 717; Norman C. Bay, *Symposium: Sentencing Guideline Law and Practice in a Post-Booker World: Reactions to Booker: Prosecutorial Discretion in the Post-Booker World*, 2006, 37 MCGEORGE L. REV. 549; Philip Oliss, *Mandatory Sentencing Discretion, the Safety Valve, and the Sentencing Guidelines*, Summer, 1995, 63 U. CIN. L. REV. 1851; Kay A. Knapp, *Allocation of Discretion and Accountability within Sentencing Structures*, May, 2005, 105 COLUM. L. REV. 1315; Frank O. Bowman, *Symposium: Panel four: The Institutional Concerns Inherent in Sentencing Regimes: The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, May, 2005, 105 COLUM. L. REV. 1315; Ronald F. Wright, Rodney L. Engen, *Bargaining in the Shadow of the Law—the Relationship between Plea Bargaining and Criminal Code Structure: Charge Movement and Theories of Prosecutors* Fall, 2007, 91 MARQ. L. REV.

Another dynamic supporting the determinate sentencing approach was the victim/witness rights movement that supported a harder "law and order" approach to criminal justice, a limitation of some of what they considered the more egregious procedural maneuvers by defense attorneys, and especially "truth in sentencing," meaning that the convict should actually serve a good portion of a sentence before being released through an administrative hearing. In particular the life sentence was criticized as being misleading for the jury and the public in general because in actuality a convict with good behavior might serve only 12 years or so before being released. Notwithstanding the victim/witness movement's clout and pressure, even with the victim the power of the prosecutor remains strong and much unconstrained. For example, only in a handful of States it is required that the prosecutor consults or at least notifies the victim or the survivors about the plea agreement with the defendant.<sup>22</sup> This means that the victim/witness may be summoned to court supposedly for the trial to take place and instead see the proceedings wrap up quickly after some mumbled questions and answers between the judge and the accused, without any previous notification to them that an agreement has been reached between the prosecution and the defense, without their knowledge or input. This is a very sore point in the relationship between the victim/witness rights movement and the prosecution.<sup>23</sup>

In the *U.S. v. Booker*<sup>24</sup> case, the determinate sentencing Guidelines were eventually declared unconstitutional by the U.S. Supreme Court because they violate the Sixth Amendment right to trial by jury. The Court decided that the "determinate" aspect of the Guidelines had to be eliminated to pass constitutional muster. Presently, the Guidelines are deemed to be advisory only, both at the Federal and State levels. However, judges are still expected to take the Guidelines into consideration and to calculate the sentence according to them. They are not required per se to sentence the convict according to the Guidelines

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9 ; Alafair S. Burke, *Bargaining in the Shadow of the Law-the Relationship between Plea Bargaining and Criminal Code Structure: Insights from the Field of Psychology: Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, Fall, 2007, 91 MARQ. L. REV.183.

<sup>22</sup> See generally U.S. Department of Justice, *Victim Input into Plea Agreements* (2002) at [www.ojp.usdoj.gov/archives/pressreleases/2002/OVC03015.html](http://www.ojp.usdoj.gov/archives/pressreleases/2002/OVC03015.html) - 12k - 2010-08-20. Accessed on July 31, 2012.

<sup>23</sup> Douglas E. Beloof, *Bargaining in the Shadow of the Law-the Relationship between Plea Bargaining and Criminal Code Structure: Victims, Apology, and Restorative Justice in Criminal Procedure: Dignity, Equality, and Public Interest for Defendants and Crime Victims in Plea Bargains: A Response to Professor Michael O'Hear*, 2007, 91 MARQ. L. REV. 349.

<sup>24</sup> 543 U.S. 220; 125 S. Ct. 738; 160 L. Ed. 2d 621; 2005 U.S. LEXIS 628. Decided on January 12, 2005.

(*Blakely v. Washington*<sup>25</sup>). However, their decision can be appealed by both parties and could be reversed by a Court of Appeals. With these decisions, the U.S. Supreme Court introduced uncertainties that have impacted the Federal courts, especially when it comes to increasing the penalty through “enhanced sentencing.” This means that the prosecution seeks and the judge may impose a harsher penalty than the Guidelines “advise” for conduct the convict was acquitted for by the jury (“acquitted conduct sentencing”). Research has found that “above-Guidelines-range sentences are imposed at a rate double that of the rate before Booker.”<sup>26</sup>

### Exponential Growth of Criminalized Behaviors

Another major reason for the normalization of the use of plea bargaining to process criminal cases, especially in order to expedite the proceedings, is the rapid and exponential growth of behaviors labeled as criminal by Federal and State governments. Especially after the events of September 11, 2001, federal and state laws addressing issues related to guns, drugs, immigration, terrorism and many others have been numerous and invasive. This has been particularly noticeable at the Federal level.<sup>27</sup> Not too long ago, the expression “It should be a federal crime” was used to stress the seriousness of a reprehensible behavior because there were very few “federal” crimes so that to qualify for that type of attention a criminal behavior had to be especially heinous. Under the United States federal system, addressing criminal behavior was considered almost the exclusive province of the States with limited intervention by the Federal government.<sup>28</sup> In reality, instead, the “number of criminal offenses in the United States Code increased from 3,000 in the early 1980s to 4,000 by 2000 to over 4,450 by 2008.”<sup>29</sup> From 2000 to 2007 Congress added 56.5 new crimes every year.<sup>30</sup>

Additionally, statutes imposing mandatory minimum penalties have grown in number; cover more types of conduct; exact longer periods of incarceration; and are applied much more frequently than 20 years ago.<sup>31</sup>

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<sup>25</sup> 542 U.S. 296; 124 S. Ct. 2531; 159 L. Ed. 2d 403; 2004 U.S. LEXIS 4573.

<sup>26</sup> Mark T. Doerr, *Not Guilty? Go to Jail. The Unconstitutionality of Acquitted Conduct Sentencing*, 41 COLUM. HUMAN RIGHTS L. REV. (Fall 2009) 235.

<sup>27</sup> Jackie Lu, *How Terror Changed Justice: A Call to Reform Safeguards that Protect Against Prosecutorial Misconduct*, 2006, 14 J.L. & POL'Y 377.

<sup>28</sup> Susan A. Ehrich, *The Increasing Federalization of Crime*, 32 ARIZ. ST. L.J. 825 (2000);

<sup>29</sup> *Overcriminalization: An Explosion of Federal Criminal Law*. Heritage Foundation Fact Sheet No. 86 (April 27, 2011).

<sup>30</sup> John S. Baker, *Revisiting the Explosive Growth of Federal Crimes*. Heritage Foundation Fact Sheet No. 86 (April 27, 2011).

<sup>31</sup> U.S. Sentencing Commission, *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, October 2011, 63.

It must be noted that the larger number of crimes added to the list<sup>32</sup> is actually through federal regulations written by administrative agencies under powers delegated by Congress. It is estimated that regulatory criminal offenses number in the "tens of thousands."<sup>33</sup> Moreover, there have been substantial changes in the size and composition of the federal criminal docket, which for our purposes here includes only the most serious infractions: felonies and Class A misdemeanors.<sup>34</sup> The total number of federal cases has basically tripled from 29,011 in 1990 to 83,946 in 2010. Likewise, the number of federal offenders convicted of an offense that by statute carries a mandatory minimum penalty has more than tripled, from 6,685 in 1990 to 19,896 in 2010.<sup>35</sup>

In summary, at the federal level, the factors that have led to a manifold increase of cases in the federal criminal justice system are the federalization of criminal law, the increased size and the changing composition of the federal criminal docket, high percentages of convicts sentenced to prison, and longer average prison terms. Added to the changes in the mandatory minimum penalties, all of these factors explain the large number of cases that is overwhelming the courts and making plea bargains a very attractive solution for the system.<sup>36</sup> Another consequence is clearly the staggering increase of the prison population in the United States at the Federal and State levels.<sup>37</sup> In 2010, there were 2,266,832 incarcerated persons in the United States. There were 198,339 in Federal prisons (35,781 in 1985), 1,311,136 in State prisons (451,812 in 1985), and 748,136 persons in local jails (256,615 in 1985). The incarceration rate in 2010 was 721 per 100,000 U.S. residents at yearend (313 in 1985).<sup>38</sup>

#### Advantages and Disadvantages

Plea bargaining is supported and justified by both the government and the defendant. For the prosecution, plea bargaining is amply justified by the substantial savings in cost and time to fully prosecute cases. Because it is less expensive and time consuming than a full scale trial, especially a jury trial, prosecutors can prosecute more people, be more productive in processing cases,

<sup>32</sup> Erik Luna, *Overcriminalization: The Politics of Crime: The Overcriminalization Phenomenon* February, 2005, 54 AM. U.L. REV. 703.

<sup>33</sup> *Supra*, note 31. at 4.

<sup>34</sup> See 18 U.S.C. para.3559(a). Class B or C misdemeanors or other infractions are not included. See para. 1B1.9.

<sup>35</sup> U.S. Sentencing Commission, *REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM*, October 2011, 66.

<sup>36</sup> Michael A. Simon, *Prosecutorial Discretion and Prosecutorial Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U.L.R. 893, 906 n. 8 (2000).

<sup>37</sup> See *supra*, note 31 at 63.

<sup>38</sup> *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2010*, Table 6, 13; <http://www.albany.edu/sourcebook/pdf/t6132010.pdf>. Accessed on August 1, 2012.

and more effective in obtaining convictions through a guilty plea. Based on this efficient, "assembly line" type of justice system, the government can add more crimes to the criminal code so that the citizens' life is even more controlled and regulated. Since pleading guilty eliminates the jury that would be impaneled for a full scale trial, judges, but especially prosecutors, gain much greater power over the conduct of the case, more control over the outcome of criminal cases, and are therefore more able to make defendants "offers that they cannot refuse."

From the defendant's point of view, there is the advantage, at times illusory, that one can negotiate with the prosecution and obtain a much more lenient sentence than through a full scale trial by cooperating with the prosecutor and by waiving one's right to a jury trial. This more lenient outcome is not guaranteed. It depends on a number of variables from the strength or weakness of the evidence that the prosecutor can muster to how valuable is the information that the accused can give the police and prosecutor to arrest and successfully prosecute someone else who might represent a major success for law enforcement and the prosecution. In a certain sense, there is a distortion of justice here. The more involved an accused was in the criminal activity or the higher he or she was on the hierarchy of the criminal organization, the more valuable he or she is to the prosecutor and the police. Thus, the higher the likelihood those negotiations with the prosecutor will successfully lead to a substantially reduced penalty. Others members of the same criminal syndicate, who only carried out orders and have no particularly important information to provide, are often sent to prison for longer periods of time simply because they are of no value to the system.<sup>39</sup> This is another aspect of the system that enhances the power of the prosecutor in criminal proceedings. Just as the prosecutor can increase the likelihood of a stiff sentence against a recalcitrant defendant by piling up charges against him or her, so can the prosecutor downgrade the charges to obtain a reduced sentence to reward the collaborator who can provide valuable information. It is called "substantial assistance."<sup>40</sup>

The disadvantage for the defendant is that plea bargaining is a form of extortion for guilty pleas. Citizens, who have never been in contact with the justice system, especially as defendants, firmly believe that they would never even consider pleading guilty. However, the reality of prosecution may be quite different from what people imagine it to be, especially if the government has a "witness" who is ready to lie in support of the prosecution or possibly strong circumstantial evidence. At that point, the defense attorney, particularly if court appointed or a

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<sup>39</sup> Yvette A. Beeman, *Accomplice Testimony Under Contingent Plea*, 72 CORNELL L.REV. May, 1987, 72, 800.

<sup>40</sup> Adriano Hrvatin, *Unconstitutional Exploitation of Delegated Authority: How to Deter Prosecutors from Using "Substantial Assistance" to Defeat the Intent of Federal Sentencing Laws*, Spring, 2002, 32 GOLDEN GATE U.L. REV.117.

public defender, will urge the suspect to agree to a lesser sentence instead of risking a much longer one. Thus, one's resolution to stand on one's constitutional rights to a jury trial may weaken dramatically. As William Young, then chief judge of the U.S. District Court in Massachusetts observed in a lengthy and strong 2004 opinion:<sup>41</sup>

To achieve its ends, the government routinely imposes a stiff penalty upon defendants who exercise their constitutional right to trial by jury... The government's attempts to burden a citizen's right to a jury of his peers exceed all constitutional bounds.

This is the essential key to an understanding of federal sentencing policy today -- the (U.S. Justice) Department is so addicted to plea bargaining to leverage its law enforcement resources to an overwhelming conviction rate that the focus of our entire criminal justice system has shifted far away from trials and juries and adjudication to a massive system of sentence bargaining that is heavily rigged against the accused citizen.

#### Supporters and Detractors

Plea bargaining has its supporters and detractors. It is criticized by both the conservative, "law and order" camp and by the liberal, "human rights" camp for different reasons. The conservative camp often lumps plea bargaining with the insanity defense as an unfair way for criminals to easily escape responsibility and a well deserved substantial punishment. Thus, plea bargaining in their eyes becomes a travesty of justice in that it deprives the victim, the survivors, and the community of their chance to obtain true justice while it favors the accused that is the criminal. Moreover, this way, according to these critics, plea bargaining deprives the community of the protection from criminals that it deserves in that criminals are quickly returned to the streets to commit new and more crimes thanks to light sentences negotiated through plea bargaining.

Additionally, critics say, criminals are emboldened to continue a life of crime because they rely on plea bargaining as an easy way to avoid punishment and confinement and to "beat the rap" so to speak. Most importantly, conservatives argue that plea bargaining by definition and the way in which it appears to operate, subverts the justice system because it opens the door for the criminal to receive a much reduced sentence than should otherwise be meted out.<sup>42</sup> Thus, plea bargaining in the eyes of conservatives is a pernicious practice that undermines justice, denies fairness, mocks truth in sentencing, leaves the community unprotected, deprives citizens of their right to be safe and to have

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<sup>41</sup> U.S. versus Richard Green, 346 F. Supp. 2d 259; 2004 U.S. Dist. LEXIS 11292, June 18, 2004, at 6-7.

<sup>42</sup> Bryan S. Gowdy, Leniency Bribes: Justifying the Federal Practice of Offering Leniency for Testimony, Winter, 2000, 60 LA. L. REV. 447.

miscreants taken off the streets at least for a time, defeats the retributive goal of the criminal justice system, and in the end, along with the insanity defense, is at the root of the spread and growth of crime by providing an easy way out for the accused and thus an incentive to engage and continue in a life of crime.

Basically, the conservatives' strong negative assessment of plea bargaining is based on the perceived imbalance favoring the rights of the accused to the detriment of the rights of society to be protected from crime. For the conservatives, the practice of plea bargaining is at the root of increasing or persistent crime rates along with some landmark U.S. Supreme Court decisions, especially the *Miranda*<sup>43</sup>, the *Escobedo*<sup>44</sup> and the *Gideon*<sup>45</sup> ones.

On the other hand, plea bargaining is criticized as well by more liberal, radical thinkers for a variety of reasons. One of them is that plea bargaining is basically a system to more easily and efficiently railroad the poor to conviction for crimes that at times they are innocent of. The criminal justice system is seen as a machinery stacked against the poor because of its complex and arcane procedural maneuvers that require skilled, experienced and expensive legal assistance to confront and manage the accusation and save the defendant from a guilty verdict. The lower middle class and the poor cannot afford seasoned legal counsel. Thus, they have no choice but to accept the prosecution's offer that may or may not include a reduced sentence and resolve their legal problem with the hope of serving no jail time or a shorter jail term.

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<sup>43</sup> *Miranda v. State of Arizona*; *Westover v. United States*; *Vignera v. State of New York*; *State of California v. Stewart*, 384 U.S. 436 86 S. Ct. 1602; 16 L. Ed. 2d 694; 1966 U.S. LEXIS 2817; 10 A.L.R.3d 974. The U.S. Supreme Court reversed the Arizona Supreme Court and remanded the case holding that the Fifth Amendment privilege against self-incrimination requires that police officials advise a suspect interrogated in custody of his rights to remain silent and to obtain an attorney. The reading of the "Miranda rights" has become an integral part of the arrest practices of police in the U.S. The Miranda protection has been eroded in subsequent U.S. Supreme Court decisions.

<sup>44</sup> *Escobedo v. Illinois*, 378 U.S. 478 84 S. Ct. 1758; 12 L. Ed. 2d 977; 1964 U.S. LEXIS 827; 4 Ohio Misc. 197; 32 Ohio Op. 2d 31. The U.S. Supreme Court reversed the Illinois Supreme Court and remanded, holding that when the police investigation begins to focus on a particular suspect who has asked for but has been refused counsel, his statements to police are then excluded.

<sup>45</sup> *Clarence E. Gideon v. Louie L. Wainwright, Corrections Director* Citations 372 U.S. 335 83 S. Ct. 792; 9 L. Ed. 2d 799; 5951 U.S. LEXIS 1942; 23 Ohio Op. 2d 258; 93 A.L.R.2d 733. The U.S. Supreme Court reversed the Supreme Court of Florida holding that the right to counsel provided by the Sixth Amendment is a fundamental right that binds the states by means of the due process clause of the Fourteenth Amendment, and requires that indigent criminal defendants be provided counsel at trial.

Other powerful social variables contribute to this injustice, especially racism,<sup>46</sup> national origin,<sup>47</sup> immigrant status,<sup>48</sup> previous arrests or convictions and, at times, gender. Thus, by supporting plea bargaining as the main way of resolving criminal cases in the United States, these critics argue, the system basically denies its most vulnerable citizens the possibility of obtaining that fair trial which supposedly is the standard in the American constitutional system. The critics argue that the poor and other vulnerable groups deserve to be treated with dignity and fairness as the Constitution require.

#### Evaluating the Odds: The Innocent Pleading Guilty

One obstacle that many defendants encounter when dealing with a criminal accusation is how to evaluate accurately and rationally the weight and credibility of the evidence against them during the plea negotiations. This is an inherently unjust flaw of plea bargaining because the outcome of the negotiations is less driven by the evidence proffered and consequently less based on actual guilt or innocence than a verdict resulting from a trial.<sup>49</sup> This means then that at least some innocent defendants, who normally would go to trial, decide to plead guilty in order to obtain a less punitive sentence. This, of course, applies to guilty defendants as well. We do not know how many innocent defendants are wrongly convicted at trial.<sup>50</sup> Since the advent of DNA as a key element of the evidence presented at a trial, there has been growing evidence of past wrongful convictions.<sup>51</sup> According to the Innocence Project<sup>52</sup> there have been around 300 exonerations after conviction in the United States starting in 1989, with the majority taking place after the year 2000. Among the wrongly convicted people were 17 sentenced to death. Fifteen more were charged with crimes carrying the possibility of the death penalty but were not so sentenced. The mean time served by people wrongfully convicted was 13 years with a cumulative total of 3,876

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<sup>46</sup> Floyd D. Weatherspoon, *The Devastating Impact of the Justice System on the Status of African-American Males: An Overview Perspective*, 1994, 23 CAP. U..L.R. 23.

<sup>47</sup> Shiv Narayan Persaud, *Is Color Blind Justice Also Culturally Blind?*, 2012, 14 BERKELEY J. AFR.-AM. L. & POL'Y 23.

<sup>48</sup> Jennifer M. Chacon, *Managing Migration Through Crime*, December 12, 2009, 109 COLUM. L. REV. Sidebar 135.

<sup>49</sup> Gregory M. Gilchrist, *Plea Bargains, Convictions and Legitimacy*, 48 AM. CRIM. L. REV. 143 (2011).

<sup>50</sup> See Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. OF L. & SOC. SCI. 173, 175 (2008) ; see also Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, at 1935-49 (1992).

<sup>51</sup> See for example Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987).

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[http://www.innocenceproject.org/Content/Facts\\_on\\_PostConviction\\_DNA\\_Exonerations.php](http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php). Accessed on 21 July 2012.

years served by all the finally exonerated convicts.<sup>53</sup> The mean age of their conviction was the prime of their lives, 27 years. The majority, 183, were African-Americans followed by 85 Whites. In 144 of the exonerated cases, the true suspect was also identified. According to the Innocence Project, since 1989, there have been tens of thousands of cases where those who were singled out and pursued as primary suspects for a crime were eventually found to be wrongly accused, thanks to DNA testing.<sup>54</sup>

When it comes to plea bargaining, it is realistic to accept that innocent defendants do actually plead guilty. This means that, beside the wrongful convictions, plea bargaining substantially increases the number of wrongly accused individuals eventually found to be guilty because every one of those who pleads guilty is convicted while only a percentage of those who go to trial are convicted.<sup>55</sup> Basically, with rare exceptions, when a defendant agrees to plead guilty, that plea will be accepted and he will be convicted. The only exceptions are based on the voluntariness of the agreement, whether the plea is freely offered or not, and when the plea is definitely unsupported by the evidence. However, verifying these elements is often done in a cursory and ritualistic manner by the judge. Generally, these cases are uncommon.

True, plea bargaining also increases the number of guilty defendants convicted because, if they were allowed to go to trial, some may be wrongly acquitted. In other words, one can say that with plea bargaining, the rate of conviction, including innocent defendants, is one-hundred percent, much higher than at trial. Consequently, it seems reasonable to conclude that the rate of wrongful convictions will be higher in a system that routinely permits plea bargaining than in a system that does not. Thus, the use of plea bargaining is fundamentally flawed and unjust because, unlike a trial, is only peripherally based or related to the evidence.<sup>56</sup> With all its shortcomings and judicial errors, a full scale trial, whose outcome normally depends on the evidence presented, has a much

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<sup>53</sup> Fernanda Santos, *Vindicated by DNA, but a Lost Man on the Outside*, N.Y. TIMES, Nov. 25, 2007, at A1 (stating that 53 of prisoners exonerated through DNA evidence since 1989 had been convicted of murder and about 35% had been confined to prison for more than 15 years).

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[http://www.innocenceproject.org/Content/Facts\\_on\\_PostConviction\\_DNA\\_Exonerations.php](http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php). Accessed on 21 July 2012.

<sup>55</sup> Josh Bowers, *Punishing the Innocent*, May 2008, U.P.A.L.R. 156,5, 1117 (arguing that plea bargaining is not the cause of wrongful punishment; inaccurate guilty pleas are merely symptomatic of errors at the point of arrest, charging and trial; worry over an innocence problem stems from misperceptions).

<sup>56</sup> Gilchrist, *supra* note 49 at 158.

greater probability of achieving a correct outcome than the bargaining procedure.<sup>57</sup>

To quote Alschuler's cogent statement:

although an authoritative empirical answer cannot be given [as to the frequency of wrongful convictions by plea bargaining versus by trial], the sensible non empirical answer seems plain: A procedure that is designed to determine who is guilty and who is innocent seems almost certain to accomplish this task more effectively than a procedure that is deliberately designed to evade the issue.<sup>58</sup>

Thus, basically, the major difference between plea bargaining and a full scale trial is this lack of connection and reference to the evidence which is a key and essential factor in establishing guilt or innocence. This is especially so in a system like the United States, which is ideally based on the presumption of innocence and presenting to the jury proof beyond a reasonable doubt. These elements are missing in plea bargaining.

Consequently, critics say, plea bargaining ultimately undermines public confidence in the justice system. This is another major reason why it should be used very sparingly, if at all, and definitely not routinely as it is in the United States presently.<sup>59</sup>

#### Reasonable Doubt versus Preponderance of the Evidence

The U.S. Supreme Court reaffirmed the importance of a conviction based on the reasonable doubt standards in the *In re Winship* case.<sup>60</sup> In its opinion, besides the importance of history and tradition, the Court underlined two other reasons for requiring the "beyond a reasonable doubt" standard in criminal prosecutions, even when affecting a juvenile like in this case. First, the Court took notice of the almost uniform acceptance of the standard in common law jurisdictions.<sup>61</sup> Although the Court did not go so far as to endorse jurisprudence by survey, it said that "such adherence does reflect a profound judgment about the way in which law should be enforced and justice administered."<sup>62</sup> The Court's other basis for endorsing the "beyond a reasonable doubt"<sup>63</sup> standard was a risk calculus previously articulated in *Speiser v. Randall*.<sup>64</sup> The Supreme Court first

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<sup>57</sup> Gilchrist, *supra* note 49 at 159.

<sup>58</sup> Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652, 714 (1981).

<sup>59</sup> Gilchrist, *supra* note 49 at 160.

<sup>60</sup> 397 U.S. 358 (1970).

<sup>61</sup> *Ibid.* at 362.

<sup>62</sup> 397 U.S. 374.

<sup>63</sup> *Ibid.* at 361-62.

<sup>64</sup> 357 U.S. 513 (1958).

acknowledged that there is always a margin of error in litigation, especially in fact-finding, which both parties must take into account. Where the interest in play of one party is of great value—as liberty is to a criminal defendant—the criminal justice system reduces this margin of error for the defendant by requiring the other party to produce sufficient proof in the first instance, so as to persuade the fact finder at the conclusion of the trial of the defendant's guilt beyond a reasonable doubt.<sup>65</sup> The Court forcefully affirms:

Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction, except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime for which he is charged.<sup>66</sup>

The Court later states:

[U]se of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. 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. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact-finder of his guilt with utmost certainty.<sup>67</sup>

Thus, the critics point out, by eliminating the fundamental protection against wrongful conviction, the system favors less trustworthy results through plea bargaining and ultimately causes an erosion of the confidence of the public in what a criminal conviction might represent. Basically, when there is no trial, then the standard of proof that is needed for convicting is reduced to probable cause only, a strong departure from the “beyond a reasonable doubt” standard.

Undermining the Public's Confidence in the Justice System

As Schulhofer<sup>68</sup> has written,

[T]he decision of an innocent defendant to plead guilty in return for a low sentence inflicts costs on society, even if the defendant prefers this result, because it undermines the accuracy of the guilt-determining process and public confidence in the meaning of criminal conviction.

There is ample literature stressing the crucial importance of the confidence of the public in the criminal justice system and of the perception by the citizenry that the

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<sup>65</sup> *Ibid.* at 525-26.

<sup>66</sup> 397 U.S. 358 (1970) at 364.

<sup>67</sup> *In re Winship*, 397 U.S. 358, 364 (1970).

<sup>68</sup> Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 *YALE L.J.* 1979, 1996 (1992).

system and its operations are legitimate.<sup>69</sup> Without such confidence, respect and legitimacy the justice system cannot perform successfully; the rule of law is undermined; and many citizens will not cooperate and support the criminal justice system. The system can ensure compliance with the law only if it is considered fair, impartial and legitimate. Procedural fairness is extremely important to the public in its dealings with the justice apparatus.

As Tomas Tyler writes,<sup>70</sup>

[P]eople are more interested in how fairly their case is handled than they are in whether they win . . . . [N]umerous studies conducted over the last several decades have consistently found this to be true.<sup>71</sup>

Tyler<sup>72</sup> has identified four factors that impact how the public assesses procedural justice:

First, people want to have an opportunity to state their case to legal authorities. They want to have a forum in which they can tell their story; they want to have a "voice" in the decision-making process. Second, people react to signs that the authorities with whom they are dealing are neutral. Neutrality involves making decisions based upon consistently applied legal principles and the facts of the case rather than personal opinions and biases. Transparency and openness foster the belief that decision-making procedures are neutral. Third, people are sensitive to whether they are treated with dignity and politeness and to whether their rights as citizens and as people are respected. Finally, people focus on cues that communicate information about the intentions and character of the legal authorities with whom they are dealing.

There is considerable evidence that how citizens perceive the legitimacy of a source of authority is more important when it comes to compliance with the law, police, and the judiciary than the penalties they may incur because of disobeying. In other words, controlling crime is best done through example than by punishment and deterrence.<sup>73</sup>

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<sup>69</sup> Gilchrist, *supra* note 49 at 161.

<sup>70</sup> Tom R. Tyler, Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority, 56 DEPAUL L. REV. 661, 663 (2007).

<sup>71</sup> See for example, David B. Rottman, TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS: A SURVEY OF THE PUBLIC AND ATTORNEYS (Sept. 2005), available at [http://www.courtinfo.ca.gov/reference/documents/4\\_37pubtrust1.pdf](http://www.courtinfo.ca.gov/reference/documents/4_37pubtrust1.pdf). Accessed on 22 July 2012.

<sup>72</sup> Tom R. Tyler, WHY PEOPLE OBEY THE LAW (Princeton Univ. Press 2006) at 163-65.

<sup>73</sup> Tracey L. Meares, Norms, Legitimacy and Law Enforcement, 79 OR. L. REV. 391, 399 (2000) See also Lisa Kern Griffin, Criminal Lying, Prosecutorial Power and Social Meaning, 97 CALIF. L. REV. 1515, 1550 (2009) (stressing the "strong social scientific support for the

### Negative Impact on the Performance of Police & Prosecutors

While plea bargaining is ubiquitous in the American justice system, criticism of its use is also frequent and widespread.<sup>74</sup> Beside the grounds for criticism already expounded on previously, there are several other grounds for questioning the plea bargaining system and its use. Gazal-Ayal<sup>75</sup>, for example, argues that the fact that plea agreements are easily and quickly obtained greatly reduces any motivation or incentive that the prosecutor should have to evaluate and screen cases carefully and thoroughly. This means that more innocent defendants will be railroaded into pleading guilty simply because it is a convenient and quick way for the prosecution to dispose of cases and clear the docket.<sup>76</sup> The same can be said with the police investigation of the case and collection of evidence. If the police anticipate a plea bargaining, based for example of the socio-economic level, the race or ethnic background, previous arrests or convictions etc. of the accused, they may not pursue a serious or thorough investigation of the case which may increase the chance that the real culprit will escape detection and prosecution while an innocent suspect will be erroneously convicted by pleading guilty. Additionally, if plea bargains normally lead to lenient sentences, it may demoralize police and discourage them from performing at their best.<sup>77</sup>

### Coercion and False Confessions in Plea Bargaining

Another serious criticism is the coercive aspect of plea bargaining. While at the formal court hearing held to obtain the judge's approval of the agreement between the prosecution and the defense, the judge will ask the defendant if s/he is entering into the agreement and plead guilty freely and willfully and the response is almost invariably a "yes", in reality most innocent people who plead

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general proposition that divergence between commonsense views of justice and the conduct of enforcers diminishes compliance").

<sup>74</sup> See for example, Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining*, Part I, 76 COLUM. L. REV. 1059 (1976); Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1 (1979) ; Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931 (1983) ; Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361 (2003); Russell Covey, *Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining*, 91 MARQ. L. REV. 213 (2007); Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 CARDOZO L. REV. 2295 (2006); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984).

<sup>75</sup> Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 CARDOZO L. REV. 2295 (2006)

<sup>76</sup> Robert M. Bohm, "MCJUSTICE": on the McDonaldization of Criminal Justice, *JUSTICE QUARTERLY*, 23 (1) ( March 2006) 127 – 146.

<sup>77</sup> A. F. Arcuri, *Police Perceptions of Plea Bargaining: A Preliminary Inquiry*, *JOURNAL POLICE SCIENCE & ADMIN*, 1 (1) (March 1973) 93-101.

guilty do it not only to possibly obtain a reduced charge and/or penalty but also to avoid the full wrath of the prosecution and of the court and a much longer sentence, to teach him/her a lesson, should the accused choose to go to a full jury trial. The bargain offered by the prosecution is predicated not on a close and impartial review of the case, the evidence and other circumstances surrounding the crime but mostly on saving the cost, the time and the effort to prepare the case and argue it to successfully defeat the defense. It is also a risk-avoidance maneuver on the part of the prosecution, not wanting to jeopardize his reputation for obtaining convictions and pleas and putting miscreants behind bars in great numbers, should the defense prevail. There may also be strong external pressures to quickly and successfully resolve a case through conviction of someone, even if s/he may not be the real culprit<sup>78</sup> so as to appease the victim, the survivors and the community and receive high marks for the police and prosecution's speedy work in solving the case. This is especially true where prosecutors are elected and normally count on a high conviction and imprisonment record to demonstrate to the electorate that they should be returned to office. Underlying the offer is the obvious threats that, if the plea is not accepted and agreed upon, the accused will see the charges multiply so that the punishment will be as harsh as possible. Should the defense fail at trial, the defendants is then also liable to receive the maximum penalty allowed and often imposed under the law for those offenses because of determinate sentencing rules that do not allow the judge to exercise any meaningful discretion. Sentences for crimes in the United States are quite severe, generally much longer and harsher than in Europe and other countries. Faced with the threat of enhanced and increased charges leading to a long mandatory prison term, possibly a life sentence, on the one hand, and the offer of a reduced sentence if there is a plea of, on the other, innocent defendants often opt to make a false confession, plead guilty and receive the promised reduced sentence, even if they did not commit the crime.<sup>79</sup> For example, false confessions played a substantial part in 25 percent of the first 250 convictions eventually found to be wrong through subsequent DNA

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<sup>78</sup> According to the Innocence Project, when convicts are exonerated thanks to DNA testing, in 25% of the cases the innocent defendants incriminated themselves, confessed or pled guilty. This indicates that confessions are not always based on real guilt. They are at times elicited through external pressures. <http://www.innocenceproject.org/understand/False-Confessions.php>. Accessed on July 27, 2012.

<sup>79</sup> See Talia Fischer & Issachar Rosen-Zvi, *The Confessional Penalty*, 30 *CARDOZO L. REV.* 871, 875 (2008) ("A 2005 study estimated that thousands of individuals in the United States have been wrongfully convicted over the past three decades, many on the basis of false confessions."). See also Edward J. Sackman, *False Confessions: Rethinking a Contemporary Problem*, 16 *KAN. J.L. & PUB. POL'Y* 208 (2007).

analysis.<sup>80</sup> Other review of wrong convictions has produced parallel findings. For instance, Gross and his collaborators reviewed 340 exonerations and determined that there were false confessions in twenty percent of the wrongful murder convictions and seven percent of the wrongful rape convictions.<sup>81</sup> This takes place especially in the case of innocent defendants unable to come up with the funds to retain a private attorney. They basically have no choice. If they decide to fight the charges, they might lose, especially if they have to depend on a pro bono or court appointed attorney who may also want a rapid conclusion of the case, given the low pay these lawyers receive per case and the very limited resources they have to pursue disculpatory leads. There is empirical evidence that defense attorneys who should carefully review the evidence and investigate the case to evaluate the weaknesses of the prosecution and the strengths of the defense arguments, they actually do a less thorough job if a plea bargain is anticipated than they would if they were preparing for trial.<sup>82</sup> The defendant may be told by both the prosecution and the defense that, if he does not cooperate and accept the plea, he may face a long prison sentence. Faced with the real possibility of receiving a life sentence and being "offered" a shorter one (which may still be substantial), often innocent people, especially if a capable attorney is out of the question financially speaking, will opt to plead guilty and accept the prosecutor's offer. This means that these innocent persons will actually admit in court to a crime they did not commit and at times had no knowledge of.<sup>83</sup> In other words the system coerces them into making a false confession of guilt with major consequences for the rest of their lives.<sup>84</sup> A confession, like eyewitness testimony, has enormous value for the prosecution in its quest for a conviction. The importance of a confession in the criminal justice system stems from a number of factors. Confessions are easily available to police that may coerce them if needed. The cost of obtaining a confession is quite low while it is very valuable because it is taken by judges and juries at face value. Once a false confession is entered into the record, it taints, most often irremediably, the perception and

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<sup>80</sup> Innocence Project, 250 Exonerated: Too Many Wrongfully Convicted 22 (2010) at 22-23, available at [http://www.innocenceproject.org/docs/InnocenceProject\\_250.pdf](http://www.innocenceproject.org/docs/InnocenceProject_250.pdf). Accessed on July 29, 2012.

<sup>81</sup> Samuel R. Gross et al., Exonerations in the United States 1989 Through 2003, 95 J. CRIM. L. & CRIMINOLOGY 523, 531 (2005) at 524, 544.

<sup>82</sup> M. Lieberman, Investigation of Facts in Preparation for Plea Bargaining, ARIZONA STATE LAW JOURNAL 1981 (2) 557-583.

<sup>83</sup> Kevin C. McMunigal, Disclosure and Accuracy in the Guilty Plea Process, July, 1989, 40 HASTINGS L.J. 957.

<sup>84</sup> Welsh White, False Confessions and the Constitutions: Safeguards Against Untrustworthy Confessions, 32 HARV. C.R.-C.L. L. REV. 105, 108 (1997).

handling of a case as it proceeds through the justice system.<sup>85</sup> Both judges and juries have no training or methodology to distinguish between genuine and false, coerced, confessions. They tend to convict based on a confession significantly overestimating their reliability and credibility (just as they do with eyewitness testimony<sup>86</sup>, regardless of substantial research evidence to the contrary<sup>87</sup>). This applies to “no contest” pleas as well which do not necessarily contain an admission of guilt. In a radio interview, defense attorney Richard J. Banta<sup>88</sup> offered the example of a high school football star pleaded “no contest” to an accusation of rape. He actually served five years in prison until his conviction was reversed and he was freed from confinement. He did plead that way because he was informed that, if he went to trial, the prosecution would seek life in prison.

### Fear and Intimidation

What are some of the factors that most frequently lead suspects to make a false confession that leads to a wrongful conviction? One can be fear or intimidation. Most people have no knowledge or contact with law enforcement and the criminal justice system. Thus their reaction to an arrest and an accusation of criminal wrongdoing may generate confusion, apprehension, fear and intimidation, especially when interrogated by police. Suspects who may already have had previous arrests and maybe convictions in the past may feel that they are in a hopeless situation since it will be easy for the police and the prosecution to convince a jury of their guilt, given their criminal record. There are cases where the suspect may be threatened with harm to him or his family by the actual perpetrators or their family or friends if he does not take the blame and go to prison for a while. Especially where there are major socio-economic differences, it will be easy for the upper class party and their family and supporters to prevail over a lower class person who has no social standing or “respect” in society and no means to defend and protect himself and his family.

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<sup>85</sup> George Castelle & Elizabeth Loftus, *Misinformation and Wrongful Convictions*, in *Wrongly Convicted: Perspectives on Failed Justice* 30 (Saundra O. Westervelt & John Humphrey eds., 2001). See also Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 921 (2004).

<sup>86</sup> John W. Clark and Roger Enriquez, *Now Performing in a Courtroom near you: The Elderly Eyewitness! to Believe or not to Believe that is the Question*, Fall, 2007, 3 *Crim. L. Brief* 17.

<sup>87</sup> Steven E. Clark, *Blackstone and the Balance of Eyewitness Identification Evidence*, 2010 / 2011, 74 *ALB. L. REV.* 1105.

<sup>88</sup> Southern California Public Radio, *Researchers say plea bargains actually send innocent defendants to jail*, Rina Palta, June 13, 2012. See also <http://www.denvercriminaldefenseattorneyblog.com/2012/06/many-false-convictions-stem-from-plea-bargains.shtml>

### Forced Confessions by the Police

Another reason to plead guilty is a forced false confession extracted from an arrestee the police believe or have decided has committed the crime.<sup>89</sup> While we like to think that torture and mistreatment of people in custody by the authorities is a thing of the past, there is ample evidence that coercion, abusive practices and even mistreatment and pressure akin to torture are quite frequent, especially in more notorious cases when the police may be under pressure to solve the case quickly. Reportedly, suspects have at times been detained for long periods of time; have been interrogated relentlessly for hours, often deprived of water, food, and sleep and subjected to physical and psychological threats or abuse.<sup>90</sup> Police are routinely filmed using excessive force and violating the constitutional rights of citizens to peacefully assemble or during confrontations and arrests. The "Occupy Wall Street" movement was subjected to excessive force, unjustified arrests and pervasive surveillance.<sup>91</sup> The "G-20" meeting in Chicago in 2012 was also marred by excessive, disproportionate and violent police suppression of the right of assembly and expression. The use by police of excessive force during encounters with citizens with mental problems, homeless, drunk, suffering from debilitating diseases (e.g. an epileptic fit) which may lead to confrontations and eventual arrest is well documented, at times filmed. It is not surprising if that abusive behavior takes place or continues behind closed doors, away from the possibly witnessing and recording by bystanders. In the aftermath of "9/11", police have become much more aggressive, invasive and violent in their interactions with the public, justifying it with the "fight against terrorism and the steady erosion by the law and judicial decisions of constitutional protections for the citizen. Besides the threat or reality of physical violence - the so-called "third degree" - questioning by

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<sup>89</sup> Edward J. Sackman, *False Confessions: Rethinking A Contemporary Problem*, 16 KAN. J.L. & PUB. POLY 208 (2006).

<sup>90</sup> Dov Fox, *The Right to Silence as Protecting Mental Control*, 2009, 42 AKRON L. REV. 763; Saul M. Kassin, *Symposium: Wrongful Convictions: understanding and addressing criminal injustice: false confessions*, 2010, 73 ALB. L. REV. 1227; John T. Parry, *Torture Warrants and the Rule of Law* 2008, 71 ALB. L.REV. 885; Gunter Frankenberg, *Torture and Taboo: An Essay Comparing Paradigms of Organized Cruelty*, Spring, 2008, 56 AM. J. COMP. L. 403; Sean Kevin Thompson, *A Brave New World of Interrogation Jurisprudence?*, 2007, 33 AM. J. L. and MED. 341; Maya Dominguez, *"Custody" in Custody: Redefining Miranda Rights in Prison*, 2011, 19 AM. U.J. GENDDER SOC. POL'Y & L. 1305; Donald P. Judges and Stephen J. Cribari, *Speaking of Silence: A Reply to Making Defendants Speak*, Fall, 2009, 93 MINN. L. REV. Headnotes 11.

<sup>91</sup> See the report on the New York Police use of excessive force against the Occupy Wall Street movement by the Global Justice Clinic at New York University School of Law and the Walter Leitner International Human Rights Clinic at Fordham Law School. <http://www.reuters.com/article/2012/07/25/us-newyork-occupy-report-idUSBRE86O1PA20120725>. Accessed on July 26, 2012.

the police today can be distressing mental experience.<sup>92</sup> The development and advances of the behavioral sciences have certainly provided law enforcement with effective tools and tested formulas to put tremendous psychological pressure on the suspect in custody.<sup>93</sup> Police begin their interrogation with presuming the arrestee to be guilty. Their objective is to obtain an incriminating statement from the suspect.<sup>94</sup> Thus, the police tactics are designed to generate stress feelings of isolation, anxiety, and desperation. This is done according to a nine-step formula called "the Reid technique" after one of its authors.<sup>95</sup> It uses both positive and negative inducement, the so-called "carrot and the stick" or the "good cop-bad cop" approach. Interrogators are advised to stress the guilt of the suspect, constantly interrupt him, and disparage his attempts to rebut the evidence, even if it has been invented by the police.<sup>96</sup> Basically, the goal is to generate in the arrestee a feeling of being trapped in a hopeless predicament so that blurring out a confession increasingly looks like a rational and attractive way out.<sup>97</sup> At this point, the interrogators may switch to offering sympathy, understanding and minimizing the seriousness of the crime so that the suspect may feel more comfortable in deciding to confess in order to get out of the high pressure situation.<sup>98</sup> The objective here is to induce the arrestee to make an analysis of the cost of continuing to maintain innocence versus the benefit of confessing.<sup>99</sup>

Additionally, police may use other coercive tactics to put more pressure on the suspect and increase his or her sense of being trapped.<sup>100</sup> For example, they

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<sup>92</sup> Robert J. Norris, Catherine L. Bonventre, Allison D. Redlich and James R. Acker, "Than That One Innocent Suffer": Evaluating State Safeguards Against Wrongful Convictions, 74 ALB L. REV 1301.

<sup>93</sup> See Richard A. Leo, POLICE INTERROGATION AND AMERICAN JUSTICE, Harvard U. P. (2008) 45; Richard A. Leo, Inside the Interrogation Room, 86 J. CRIM. L. & CRIMINOLOGY, (2) 266-303 (Winter 1996).

<sup>94</sup> Saul M. Kassir et al., Police-Induced Confessions: Risk Factors and Recommendations: Looking Ahead, 34 LAW & HUM BEHAV. 49 (2010) at 6.

<sup>95</sup> John E Reid and Fred E. Inbau, CRIMINAL INTERROGATION AND CONFESSION (Williams and Wilkins, 1962).

<sup>96</sup> Id. At 218-19 (2001 edition).

<sup>97</sup> Deborah Davis & William O'Donohue, The Road to Perdition: Extreme Influence Tactics in the Interrogation Room, in Handbook of Forensic Psychology: Resource for Mental Health and Legal Professionals 918-19 (William T. O'Donohue & Eric R. Levensky eds., 2004); Saul M. Kassir & Gisli H. Gudjonsson, The Psychology of Confession: A Review of the Literature and Issues, 5 PSYCHOL. SCI. PUB. INT. 33, 45-46 (2004).

<sup>98</sup> Don Raban, INTERVIEWING AND INTERROGATION (Carolina Academic Press, 1994; especially chapter 5, The Process of Deception).

<sup>99</sup> See Kassir & Gudjonsson, *supra* at 97.

<sup>100</sup> Several case studies have addressed the many techniques and approaches that lead to false self-incrimination. For an overview of these studies, see Marvin Zalman & Brad W.

may exaggerate the amount and importance of the evidence they have collected. They can and may often lie about the proof they have, including the confession of other suspects implicating the person being interrogated,<sup>101</sup> false or fabricated fingerprints, eyewitness statements and identifications, forensic evidence, and failed polygraph tests.<sup>102</sup> These moves are legal in the United States.<sup>103</sup> As a result of this strategies, research shows that individuals become more pliable and susceptible to being manipulated<sup>104</sup> and to becoming unable or finding very difficult to perceive reality accurately and objectively and to maintain their beliefs and opinions.<sup>105</sup> Other tactics also often used are to minimize what the detainee is accused of, to justify or volunteer explanations or excuses for what happened (e.g. provocation, it was an accident, there was a justification) so that the innocent arrestee may think that there will be leniency and it is safe to confess to the crime in order to get out of the high pressure situation.<sup>106</sup>

#### Confessions and the Preponderance of the Evidence Standard

It follows therefore that false confessions implicating an innocent person in a crime s/he did not commit are not rare occurrences.<sup>107</sup> Moreover, as Brandon L. Garrett<sup>108</sup> states, "not only can innocent people falsely confess, but they can be induced to deliver false confessions with surprisingly rich, detailed, and accurate information" that may even contain "inside information" that could be known only by the perpetrator of the crime. It must be noted that in recent years the U.S. Supreme Court has significantly reduced the available remedies for these types of

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Smith, *The Attitudes of Police Executives Toward Miranda and Interrogation Policies*, 97 J. CRIM. L. & CRIMINOLOGY 873, 895-96 (2007).

<sup>101</sup> Melanie Wilson, *An Exclusionary Rule for Police Lies*, Winter, 2010, 47 AM. CRIM. L. REV. 1

<sup>102</sup> See Kassin & Gudjonsson, *supra*, note 97 at 17.

<sup>103</sup> *Frazier v. Cupp*, 394 U.S. 731, 739 (1969).

<sup>104</sup> Elizabeth F. Loftus, *Planting Misinformation in the Human Mind: A 30-Year Investigation of the Malleability of Memory*, 12 LEARNING & MEMORY 361 (2005). See also Reid and Inbau, *supra*, note 95, 5-6, 17.

<sup>105</sup> Craig A. Anderson et al., *Perseverance of Social Theories: The Role of Explanation in the Persistence of Discredited Information*, 39 J. PERSONALITY & SOC. PSYCHOL. 1037, 1045 (1980).

<sup>106</sup> See Kassin & Gudjonsson, *supra*, note 97 at 12; Norris et al. *supra*, note 92 at 1332

<sup>107</sup> See *supra*, notes 49 & 97. See also Alan Hirsch, *Threats, Promises, and False Confessions: Lessons of Slavery*, 49 HOW. L.J. 31, 33 (2005); Jacqueline McMurtrie, *The Role of the Social Sciences in Preventing Wrongful Convictions*, 42 AM.CRIM. L. REV. 1271, 1280 (2005).

<sup>108</sup> Brendon L. Garrett, *The Substance of False Confessions*. STANFORD LAW REV. 64 (4) 2010; Virginia Public Law and Legal Theory Research Paper No. 2010-11.

constitutional violations.<sup>109</sup> Also, even if a defense attorney may attempt at a suppression hearing to exclude a false confession on grounds of coercion, police, denying any pressure or mistreatment, have the advantage of their status and position vis-à-vis the accused who may already have been arrested or convicted in the past and carries little status and credibility. Additionally, if needed, police are known to perjure themselves on the stand. Moreover, judges have consistently shown readiness to accept the police's testimony at face value, even when improbable. Even more damaging, in the wake of the *Lego v. Twomey's* U.S. Supreme Court decision,<sup>110</sup> the evidentiary standard in these cases is the lowest one<sup>111</sup>: only the preponderance of the evidence is needed.<sup>112</sup> Not surprisingly, many accused feel and are coerced into making a false confession that will then box them into accepting the prosecutor's offer and plead guilty.<sup>113</sup>

#### Impairments and False Confessions to Guilt

False confession can also stem from various impairments and the consequent lack of psychological awareness, strength, and energy.<sup>114</sup> Basically, the system takes advantage of the person's psychological or emotional weaknesses. Especially vulnerable to suggestions on the part of law enforcement that will lead them to confess to crimes that they did not commit are juveniles, the mentally ill, and people with drug or alcohol dependencies. Research shows that younger people are at a higher risk of involuntary and false confessions<sup>115</sup> and are over-represented when it comes to false confession.<sup>116</sup> One of the most notorious cases of a false confession by teenagers in the United States is that of the

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<sup>109</sup> Justin F. Marceau, *The Fourth Amendment at a Three-Way Stop*, 62 ALABAMA LAW REVIEW 687 (2011).

<sup>110</sup> 404 U.S. 477 (1972); see also *Colorado v. Connelly*, 479 U.S. 157, 168 (1986) (restating that "[w]henver the State bears the burden of proof in a motion to suppress a statement that the defendant claims was obtained in violation of our Miranda doctrine, the State need prove waiver only by a preponderance of the evidence.").

<sup>111</sup> Michael D. Pepson and John N. Sharifi, *Lego v. Twomey: The Improbable Relationship between an Obscure Supreme Court Decision and Wrongful Convictions*, Summer, 2010, 47 AM. CRIM. L. REV. 1185.

<sup>112</sup> *Ibid.*

<sup>113</sup> Samuel R. Gross & Barbara O'Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases* 25-26 UNIV MICH. L.SCH. PUB. LAW RESEARCH PAPER NO. 05-14.

<sup>114</sup> Gisli H. Gudjonsson et al., *Custodial Interrogation: What Are the Background Factors Associated with Claimed False Confessions?*, 18 J. FORENSIC PSYCHIATRY & PSYCHOL. 266, 273 (2007).

<sup>115</sup> Jessica Owen-Kostelnik, et al., *Testimony and Interrogation of Minors: Assumptions About Maturity and Morality*, 61 AM. PSYCHOLOGIST 286, 293-97 (2006).

<sup>116</sup> Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 968-69 (2004).

Central Park Jogger case. It involved the assault, rape, and beating almost to death of a woman jogger, Trisha Meili, in New York City's Central Park on April 19, 1989. Five juvenile black males were arrested. Four of the five confessed to the crime and implicated the others. Despite glaring inconsistencies, they were all convicted for the crime. The convictions were vacated in 2002, when another man, in prison for another crime, confessed that he had committed the crime alone and DNA evidence confirmed it.<sup>117</sup>

The same vulnerabilities to pressure, suggestion, and false confessions also affect the mentally ill and those with developmental challenges.<sup>118</sup>

Very young people, mentally and developmentally impaired persons perceive police as authority figures and have a tendency to be compliant and to reply to their questions as they think is expected of them. They want to please and be accepted, even if they are not telling the truth. Thus, they are very vulnerable to manipulation and suggestions not only by the police but also by other adults or even people their age. They also want to show or give the appearance of being competent. Because of their condition, they are blamed more often for accidents and mishaps and therefore more readily accept blame. Some of them because of their disability may act in ways that arouse the suspicion of the police.<sup>119</sup> Consequently, their confessions should not easily be relied on.<sup>120</sup> The youngest among them, for instance, may think that, if they tell the police what they want to hear, they will then be free to go home and be with their family or friends. Others may believe that they will for sure be handed down a less severe sentence if they say what law enforcement is looking for. Police often skirt their duty to inform these vulnerable persons of their rights to remain silent or they do it but ambiguously, conveying at the same time the message that they will be displeased and even angry if the detainee does not waive them and confess. At times, suspects do not have the capability to understand and appreciate the Miranda warnings<sup>121</sup> or other statement of what they are entitled to. Thus, they will

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<sup>117</sup>[http://www.innocenceproject.org/Content/Six\\_Years\\_Later\\_The\\_Central\\_Park\\_Jogger\\_Case.php](http://www.innocenceproject.org/Content/Six_Years_Later_The_Central_Park_Jogger_Case.php)

<sup>118</sup> Gisli H. Gudjonsson, *The Psychology of Interrogations and Confessions: A Handbook* 325 (2003); Kassin, *supra*, note 48 at 20-21.

<sup>119</sup> Gisli H. Gudjonsson et al., *Interrogative Suggestibility in Adults Diagnosed with Attention-Deficit Hyperactivity Disorder (ADHD). A Potential Vulnerability During Police Questioning*, 43 *PERSONALITY & INDIVIDUAL DIFFERENCES* 737, 744 (2007).

<sup>120</sup> Robert Perske, *Understanding Persons with Intellectual Disabilities in the Criminal Justice System: Indicators of Progress?*, 42 *MENTAL RETARDATION* 484, 486 (2004).

<sup>121</sup> There are several studies showing that individuals belonging to these groups have limited understanding and appreciation of the Miranda warnings when they are compared to the general population. Among these studies are: Caroline Everington & Solomon M. Fulero, *Competence to Confess: Measuring Understanding and Suggestibility of*

confess to a crime because of the psychological manipulation, the intimidating assertion of authority, and their lack of knowledge of their rights.<sup>122</sup>

#### Ignorance of the Law and False Confessions

Another reason why people make false confessions and plead guilty is their ignorance of the relevant law and of their constitutional rights. Many persons have very limited knowledge of the law and of the Constitution. Therefore, they tend to truly believe the police when they admonish them that invoking their rights will cause them to receive a much more severe penalty. On the other hand, they may also believe that, if they confess, a more lenient sentence will be meted out. Some may even believe that, if they admit to the police that they were somewhat connected to the crime, the police will let them go. In the end, they may provide a false confession simply because of their ignorance.

In conclusion, McMurtrie aptly states: "The literature regarding modern interrogation methods establishes that although the police no longer rely upon physical torture to obtain confessions, they are instead trained to employ a number of methods of psychological persuasion that are intended to compel a suspect to confess."<sup>123</sup>

#### The Role of Criminal Informants and "Snitches"

Finally, criminal informants, or "snitches"<sup>124</sup> or "rats", exercise a major role in the process leading to wrongful confessions and convictions. A study by

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Defendants with Mental Retardation, 37 MENTAL RETARDATION 212, 218 (1999); Solomon M. Fulero & Caroline Everington, Mental Retardation, Competency to Waive Miranda Rights, and False Confessions, in INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 163, 165-66 (G. Daniel Lassiter, ed., 2004); Michael J. O'Connell et al., Miranda Comprehension in Adults with Mental Retardation and the Effects of Feedback Style on Suggestibility, 29 LAW & HUM. BEHAV. 359, 367 (2005).

<sup>122</sup> For a review of studies on psychological coercion on suspects to induce their confessions, see Marvin Zalman & Brad W. Smith, The Attitudes of Police Executives Toward Miranda and Interrogation Policies, 97 J. CRIM. L. & CRIMINOLOGY 873, 895-96 (2007). For more analysis of false confessions coerced by police, see Richard J. Ofshe & Richard A. Leo, The Decision to Confess Falsely: Rational Choice and Irrational Action, 74 DENV. U. L. REV. 979 (1997) ; Richard J. Ofshe & Richard A. Leo, The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions, 16 STUD. in L. POL. & SOC'Y 189 (1997) ; Saul M. Kassir, The Psychology of Confession Evidence, 52 AM. PSYCHOLOGIST 221, 230 (1997).

<sup>123</sup> Jacqueline McMurtrie, The Role of the Social Sciences in Preventing Wrongful Convictions, 42 AM. CRIM. L. REV. 1271, 1280 (2005) at 1281.

<sup>124</sup> "Snitches" are criminals who exchange information for lenient treatment for their own crimes or other benefits. Thus, they are compensated for their false testimony. At times they are given rewards at different stages of the criminal process, including if there is a

Northwestern University Law School's Center on Wrongful Convictions<sup>125</sup>, traced 45.9 percent of wrongful capital convictions to the testimony of a false informant. According to the study, "snitches (are) the leading cause of wrongful convictions in U.S. capital cases." Previously, in 2000, a trailblazing book, *Actual Innocence*<sup>126</sup>, estimated that snitch testimony plays a substantial role in 21 percent of erroneous capital convictions. Another report states that 20 percent of all wrongful convictions in California are based in great part on false "snitch" testimony.<sup>127</sup> In a study of exonerations, Professor Samuel Gross concluded that almost 50 percent of erroneous murder convictions entailed perjury by either "a jailhouse snitch or another witness who stood to gain from the false testimony."<sup>128</sup> And in their seminal study Bedau and Radelet found that one third of the 350 wrongful convictions that they studied were based on "perjury by the prosecution witness."<sup>129</sup> This is twice as many wrong convictions that are attributable to incorrect eyewitness testimony.

Thus, lying "snitches" and paid informants frame innocent parties either because they derive financial benefits<sup>130</sup> from it or because they can then negotiate a more lenient sentence or an early release from prison for themselves.<sup>131</sup> Of course, they must be able to persuade the government that what they say about someone else is true.<sup>132</sup> That may not always be that difficult to do. The police and/or the prosecutor may be very open to readily believe them and what they bring to them. The reason may be that the government has little information on which to prosecute a suspect. What the informant provides is all that the police or the prosecution has and does not lend itself easily to being double-checked and challenged. Moreover, both the police and the prosecution invest heavily to

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conviction at the end. Law-abiding citizens who give information to the police without receiving any benefits for themselves are not included.

<sup>125</sup> Rob Warden, *The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row*, Center on Wrongful Convictions, Northwestern University School of Law, 2004, available at <http://www.law.northwestern.edu/wrongfulconvictions>. Accessed on July 27, 2012.

<sup>126</sup> Jim Dwyer, Peter Neufeld & Barry Scheck, *ACTUAL INNOCENCE* 156 (Doubleday 2000).

<sup>127</sup> Nina Martin, *Innocence Lost*, *SAN FRANCISCO MAGAZINE* 87-88 (Nov. 2004)

<sup>128</sup> Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 *J. CRIM.L. & CRIMINOLOGY* 523, 543-44 (2005).

<sup>129</sup> Hugo Bedau & Michael Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 *STAN. L. REV.* 21, 173 (1987).

<sup>130</sup> Ian Weinstein, *Regulating the Market for Snitches*, Winter, 1999, 47 *BUFFALO L.R.* 563

<sup>131</sup> Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 *U. CIN. L. REV.* 645, 652 (2004).

<sup>132</sup> Lisa Kern Griffin, *Criminal Lying, Prosecutorial Power, and Social Meaning*, 2009, 97 *CALIF.L.REV.* 1515.

establish and maintain a network of informants that functions as the primary investigative and witnesses tool that they have.<sup>133</sup> Without informants or prison "snitches," cases would not be solved by police or made by the prosecution, quickly and relatively easily or at all. Because of this vested interest in solving a case in whichever way possible, police and prosecution lack the "arm's length" and the objectivity needed to properly evaluate the information provided.<sup>134</sup> This dynamic generates a "strange bedfellows" situation where both parties have a vested interest in making it work.<sup>135</sup> Both parties benefit from the information provided, regardless of its objective truth, and neither party has any reason or motivation to examine it carefully or challenge it.<sup>136</sup> Thus, the normal legal shields against false evidence, like for example standards of prosecutorial ethics and discovery, are not operating to protect the system from false evidence provided by informants and "snitches."<sup>137</sup> Both parties stand to benefit by accepting, using and not questioning the information provided.<sup>138</sup> The police solve the case without too much investigative effort; the prosecutor can make his/her case with readily available testimony that may be believed by the jury, especially when the evidence is scant or unreliable; the informant will be able to negotiate a lighter sentence for himself or escape arrest to continue quite possibly a life of crime with relative impunity;<sup>139</sup> and the prison "snitch" may obtain better prison conditions or an early release in exchange for the information provided.<sup>140</sup> No doubt in many cases, faced with damning testimony by an informant or a "snitch," the accused, innocent of the crime, may see no alternative but to negotiate a deal with the prosecution and plead guilty in exchange for leniency or a reduced sentence. This especially if s/he belongs to a category vulnerable to being disbelieved or

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<sup>133</sup>Supra, note 131. at 671.

<sup>134</sup> Ellen Yaroshfsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 *FORDHAM L. REV.* 917, 945 (1999).

<sup>135</sup> George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 *PEPP. L. REV.* 1, 4 (2000).

<sup>136</sup> Robert Bloom, *Rattling: The Use and Abuse of Informants in the American Justice System* 64-66 (Praeger 2000).

<sup>137</sup> Scott J. Krischke, *Absent Accountability: How Prosecutorial Impunity Hinders the Fair Administration of Justice in America*, 2010, 19 *J.L. & POL'Y* 395; Jackie Lu, *How Terror Changed Justice: A Call to Reform Safeguards that Protect Against Prosecutorial Misconduct*, 2006, 14 *J.L. & POL'Y* 377.

<sup>138</sup> George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 *PEPP. L. REV.* 1, 54 (2000).

<sup>139</sup> John Glionna and Lee Romney, *Snagging a Rogue Snitch*, *L.A. TIMES*, Dec. 5, 2005, at A1.

<sup>140</sup> Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*.

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associated with deviance and criminality or with previous arrests and convictions.<sup>141</sup> The testimony of the accused will be no match for that of police, who do not hesitate to commit perjury<sup>142</sup>, and most often worse in the eyes of a jury than that of an informant or “snitch” who are vouched for by the police or prosecutor.

#### Plea bargaining and effective assistance of counsel

In the 2011-12 term, the U.S. Supreme Court decided two cases that should have considerable impact on plea bargains. In *Missouri v. Frye*<sup>143</sup> and *Lafler v. Cooper*<sup>144</sup>, the Supreme Court held that the Sixth Amendment’s right to effective assistance of counsel applies at the plea bargaining stage. Since 97 percent of federal criminal convictions and 94 percent of the state ones are obtained through guilty pleas<sup>145</sup>, these cases should significantly affect the practice of law and generate considerable litigation by individuals seeking to have their pleas overturned.<sup>146</sup>

These were not solid majority decisions. Both cases were 5-4 split decisions. Justice Anthony M. Kennedy wrote the majority opinion for both cases joined by Justices Ruth Bader Ginsburg, Stephen G. Breyer, Sonia Sotomayor, and Elena Kagan.

In *Frye*<sup>147</sup>, the defendant was charged with the felony of driving with a revoked license. The prosecutor wrote to Frye’s defense counsel offering two different plea possibilities with a maximum sentence of 90 days in jail. Frye’s lawyer did not tell his client of the plea offers. Frye was convicted and sentenced to three years in prison.

Importantly, the court found that plea bargaining is a “critical stage” of criminal proceedings and thus the right to effective assistance of counsel applies. This

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<sup>141</sup>Aaron Clemens, *Removing the Market for Lying Snitches: Reforms to Prevent Unjust Convictions* 2004, 23 QUINNIPIAC L. REV. 151.

<sup>142</sup>Melanie D. Wilson, *An Exclusionary Rule for Police Lies*, Winter, 2010, 47 Am. Crim. L. Rev. 1.

<sup>143</sup>132 S. Ct. 1399; 182 L. Ed. 2d 379; 2012 U.S. LEXIS 2321; 80 U.S.L.W. 4253; 23 Fla. L. Weekly Fed. S 198, October 31, 2011, Argued, March 21, 2012, Decided.

<sup>144</sup>132 S. Ct. 1376; 182 L. Ed. 2d 398; 2012 U.S. LEXIS 2322; 80 U.S.L.W. 4244; 23 Fla. L. Weekly Fed. S 203, October 31, 2011, Argued, March 21, 2012, Decided.

<sup>145</sup>132 S.Ct 1402.

<sup>146</sup>Erwin Chemerinsky, *Effective Assistance of Counsel Now a Right in Plea Bargaining*, American Bar Association, ABA JOURNAL, Law News Now, June 4, 2012. [http://www.abajournal.com/news/article/chemerinsky\\_effective\\_assistance\\_of\\_counsel\\_now\\_a\\_right\\_in\\_plea\\_bargaining/](http://www.abajournal.com/news/article/chemerinsky_effective_assistance_of_counsel_now_a_right_in_plea_bargaining/) Accessed on August 1, 2012.

<sup>147</sup>132 S. Ct. 1391.

especially since, as Justice Kennedy noted, 97 percent of federal convictions and 94 percent of state convictions are gained by means of guilty pleas.<sup>148</sup>

In analyzing the issues, the court used the test from *Strickland v. Washington*<sup>149</sup>, decided in 1984, to determine if there had been ineffective assistance of counsel. According to *Strickland*, a defendant must show first that the performance of counsel is so deficient as to negate the Sixth Amendment right to counsel, and, second, that he suffered “prejudice” because of the inadequate representation. As to the first, the court held that “as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.”<sup>150</sup>

As to the second requirement, the court stated: “In order to complete a showing of *Strickland*<sup>151</sup> prejudice, defendants who have shown a reasonable probability they would have accepted the earlier plea offer, must also show that, if the prosecution had the discretion to cancel it or if the trial court had the discretion to refuse to accept it, there is a reasonable probability neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented.”<sup>152</sup> The court did not decide this issue. It remanded the case to the lower courts to decide whether this requirement for prejudice was met.

In *Cooper*<sup>153</sup>, the accused shot and wounded the victim and was charged with several crimes, including assault with intent to murder. The prosecutor offered a plea deal with a recommended sentence of 51 to 85 months in prison. At the beginning, the defendant showed willingness to accept the plea, but then rejected it. The main reason was the contrary advice of his attorney who persuaded him that the prosecutor could not prove intent to murder because he had shot the victim below her waist. Instead, the defendant was convicted of all counts at trial and sentenced to a substantially higher prison term of 185 to 360 months. Noticeable, the court rejected the government’s argument, accepted by Justice Antonin Scalia’s dissenting opinion<sup>154</sup>, that there cannot be a claim of ineffective assistance of counsel if the defendant is convicted after a fair trial. The fact that the trial is fair, the prosecution argued, purges any previous error by the defense. But the court disagreed that the Sixth Amendment’s right to counsel exists solely to ensure a procedurally fair trial. In fact, the court pointed out that the defendant “received a more severe sentence at trial, one 3-1/2 times more severe than he

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<sup>148</sup> 132 S.Ct 1402.

<sup>149</sup> 466 U. S. 668 (1984).

<sup>150</sup> 132 S. Ct. 1412.

<sup>151</sup> 466 U. S. 668 (1984).

<sup>152</sup> 132 S. Ct. 1410.

<sup>153</sup> 132 S. Ct. 1376.

<sup>154</sup> 132 S. Ct. 1391.

likely would have received by pleading guilty. Far from curing the error, the trial caused the injury from the error. Even if the trial itself is free from constitutional flaw, the defendant who goes to trial instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence."<sup>155</sup>

Once more, the court applied the two-step analysis from *Strickland*<sup>156</sup> and found that there was ineffective assistance of counsel. The court pointed out that all of the parties had agreed that the performance of counsel had been deficient and said "[a]s to prejudice, respondent has shown that but for counsel's deficient performance there is a reasonable probability he and the trial court would have accepted the guilty plea."<sup>157</sup>

### Impact of *Frye* and *Cooper* on Plea Bargaining

These are noteworthy cases for many reasons.<sup>158</sup> First, they follow the Supreme Court's 2010 decision in *Padilla v. Kentucky*<sup>159</sup>, which held that the failure of a lawyer accurately to inform a criminal defendant of the immigration consequences of a guilty plea constituted ineffective assistance of counsel. Recently, the court granted certiorari for the 2012-13 term to *Chaidez v. United States*<sup>160</sup> as to the crucial question of whether *Padilla*<sup>161</sup> applies retroactively. The three cases, *Padilla*<sup>162</sup>, *Frye*,<sup>163</sup> and *Cooper*<sup>164</sup> point to a Court that holds that the Sixth Amendment right to effective assistance of counsel governs at the plea bargaining stage. Hopefully, this firm stance will not be diluted in subsequent decisions like it happened, for example, with the *In re Winship*<sup>165</sup> decision. Second, these cases probably will impact how plea bargaining takes place at times. Often, these days, plea bargaining is dealt with rather informally like when the prosecutor and the defense lawyer talk to each other. As Justice Kennedy noted in *Frye*, "[s]tates may elect to follow rules that all offers must be in writing, again to ensure against later misunderstandings or fabricated charges. ... [and] formal offers can be made part of the record at any subsequent plea proceeding or before a trial on the merits, all to ensure that a defendant has been fully

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<sup>155</sup> 132 S. Ct. 1386.

<sup>156</sup> 466 U. S. 668 (1984).

<sup>157</sup> 132 S. Ct. 1391.

<sup>158</sup> See Chemerinsky, *supra*, note 146.

<sup>159</sup> 130 S. Ct. 1473; 176 L. Ed. 2d 284; 2010 U.S. LEXIS 2928.

<sup>160</sup> 132 S. Ct. 2101; 182 L. Ed. 2d 867; 2012 U.S. LEXIS 3335.

<sup>161</sup> 130 S. Ct. 1473.

<sup>162</sup> 130 S. Ct. 1473.

<sup>163</sup> 132 S. Ct. 1399.

<sup>164</sup> 132 S. Ct. 1376.

<sup>165</sup> 397 U.S. 358 (1970).

advised before those further proceedings commence.”<sup>166</sup> Thus a considerable amount of formality may be introduced in what often is still a rather informal procedure.

Third, these decisions may generate a considerable amount of cases brought by defendants claiming ineffective assistance of counsel at the plea bargaining stage. This even though the court, in granting relief in *Cooper*<sup>167</sup>, clearly stated that it was not introducing a new right but simply recognizing and applying the existing right to effective assistance of counsel and test already established in *Strickland*<sup>168</sup>. Finally, there will be litigation on how to demonstrate “prejudice.” What is needed and at what level one needs to prove that “prejudice” occurred? In both instances, the court presently says that to demonstrate prejudice the defendant, convicted at trial and sentenced to a higher penalty, must show that he or she likely would have agreed to the plea, that the prosecutor would not have withdrawn it, and that the court would have allowed it. However, how to determine this in reality is not clear. Taking into account the very high percentage of cases adjudicated through a guilty plea, these two decisions should have a considerable impact on the theory and practice of plea negotiations and guilty pleas. However, it must also be noted first of all that these two cases continue the line of cases decided by the U.S. Supreme Court that recognize that plea bargaining is now the prevalent mode of case disposition in the American justice system. The Court is not challenging that or calling for a rebalancing of the system or a return to more trials by jury. Secondly, the two cases focus on the defense attorney, not on the prosecutor, the side where most abuse and unfairness take place. Prosecutorial discretion, power, and the abuse of them have not been addressed by the Supreme Court in a manner similar to the defense counsel. Actually, one could argue that these Court’s decisions will skew decision-making on the part of the defense attorney towards accepting the first offer of a plea by the prosecution, even if s/he anticipates that a better deal may be possible in the future. This in order to avoid being later accused and sued for ineffective assistance if the later plea bargain—or sentence after trial—are more severe than the initial offer. One could argue that, instead of carefully developing the case, the defense attorney and the prosecutor will negotiate a deal without full knowledge and understanding of it and of its strengths and weaknesses.

In other words, the real effect of these decisions may be even poorer assistance of counsel concerned about fulfilling the letter of the case law and avoid legal problems for himself.<sup>169</sup> It is ironic that the Supreme Court has decided to reaffirm

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<sup>166</sup> 132 S. Ct. 1409.

<sup>167</sup> 132 S. Ct. 1376.

<sup>168</sup> 466 U. S. 668 (1984).

<sup>169</sup> Gerard E. Lynch, Frye and Lafler: No Big Deal, 122 YALE L.J.. Online 39 (2012), <http://yalelawjournal.org/2012/06/21/lynch.html>. Accessed on July 30, 2012.

Sixth Amendment's protections for the accused at plea bargaining when the real power is with the prosecutor. Of course, these two cases lent themselves to focus on the defense attorney and not on the prosecutor and there is certainly a need to reaffirm that every defendant is entitled in principle to effective assistance of counsel. However, this is a rather ineffective remedy when budgets for public defenders are chronically limited and being slashed everywhere and the power of the prosecution in handling and actually deciding the case continues unchecked because of how the criminal justice system in the United States is now structured and functioning.<sup>170</sup> Forthcoming litigation will further clarify the limits and reach of these decisions.

### Conclusion

Negotiated justice plays a central and dominant role in the American justice system. The American adjudication system is almost 100 percent negotiated justice! Under ideal conditions, plea bargaining has definite advantages for everyone: the prosecution, the defense, and the defendant. However, those ideal conditions for optimum functioning do not seem to exist in the majority of the cases. While "law and order" types reject plea bargaining as invariably offering the accused an easy way out and a costless outcome to his arrest and prosecution, the "human rights" liberals point out serious deprivations and denial of constitutional rights to the defendants that are "railroaded" into accepting deals forced on them through coercion, deceit, psychological pressure and taking advantage of their vulnerable position, especially when they belong to the lower socio-economic levels, to ethnic or racial minorities, for reasons of age, disability, gender, language or immigration status.

The advantages of plea bargaining, especially the economies of time, resources, staff and facilities are obscured by the egregious mistreatment and coercion of vulnerable defendant who often do not receive effective legal assistance from their defense attorneys. Especially worrisome is the high number of false confessions extorted in various ways. The latest report on exonerations<sup>171</sup> presents and analyzes data on the first 873 exonerations reported by the National Registry of Exonerations.<sup>172</sup> It is important to note that 60% of the cases were not connected to DNA testing. The study also addresses more than 1,100 "group exonerations" done to remedy 12 major scandals in the United States where

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<sup>170</sup> Jed. S. Rakoff, Frye and Lafler: Bearers of Mixed Messages, 122 Yale L.J. Online 25 (2012), <http://yalelawjournal.org/2012/06/18/rakoff.html>. Accessed on July 30, 2012.

<sup>171</sup> Samuel Gross and Michael Shaffer, Exonerations in the United States 1989-2012, University of Michigan Working Paper No. 277 (June 25, 2012).

<sup>172</sup> Exonerationsregistry.org, a new project of the University of Michigan Law School and the Center on Wrongful Convictions at Northwestern University School of Law. The Registry assembles and posts information on exonerations of people who were convicted of serious crimes in the United States.

police officers systematically planted or fabricated proof to wrongly frame suspects for non-existing crimes, especially drug crimes. Some of the major findings of this study show that the known exonerations are but a small percentage of all the false convictions for serious crimes.<sup>173</sup> Thus, most exonerations are not known or registered. There are many more than reported.

The reasons for the false convictions are different according to the crimes the suspect was accused of. For homicides (50% of all the exonerations in this study), it was mostly perjury, false identification of the defendant as the perpetrator, official misconduct and 75% of all the false confessions in the study.<sup>174</sup> In adult sexual assault cases, the major cause for error was wrong witness identification and also false or misleading forensic evidence. For robberies, it was mistaken witness identification. In most child sex abuse cases, the convicts had been accused and convicted of fabricated crimes that never happened.<sup>175</sup> These latest data (June 25, 2012) underline once more how widespread the problem of false confessions and convictions is and also that it is not a "one size fits all" problem. Different crimes carry with them different potential reasons for error, misconduct, coercion, and falsity.

The defense most often used to justify the widespread use of plea bargaining is a practical one: tribunals in the United States are so busy and congested with cases that they would be paralyzed if every case was given a full trial. That may be true. However, instead of supporting the system as is, it might be more useful to examine what is behind the high number of criminal cases. One of the major reasons for these many is the exponential expansion of the crime list at the federal and state levels. This is especially true of the so-called "war on drugs." It is these decisions that are transforming millions of Americans into criminals and ruining their lives and those of millions more of their loved ones. Just ending the war on soft drugs, like marijuana and some others, would immediately have a dramatic effect on cutting back the courts' caseloads. The role and the influence of the prison industry (whether privatized or not, prisons are big business) should also be contained and limited. There are indeed powerful financial and political interests that support maintaining and expanding the number of prosecutable crimes in the United States so that prison population levels continue to be high.

Since the very credibility and integrity of the American criminal justice system is impacted, it is imperative to radically reform the system in order to diminish or eliminate false confessions, the risks that they present, and the damage that they cause for the innocent defendant. Serious and meaningful reforms have been

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<sup>173</sup> Exonerations for lesser felonies and misdemeanors are by and large not covered by the data available because they are generally unknown or unreported as such.

<sup>174</sup> *Supra*, note 171.

<sup>175</sup> *Supra*, note 171.

proposed (e.g. videotaping the entire interrogation process<sup>176</sup>, applying consumer protection laws to the process of plea bargaining<sup>177</sup>) and must be introduced to protect the defendants and effectively prevent false confessions and their consequences like wrongful conviction, incarceration and deportation of the innocent. Negotiated justice as it is currently practiced in the United States produces innumerable miscarriages of justice. Hopefully, serious reforms will be introduced especially in the wake of the Padilla<sup>178</sup>, Frye<sup>179</sup> and Cooper<sup>180</sup> decisions of the U.S. Supreme Court.

#### SUMMARY

This article examines in depth plea bargaining as the most frequent form of negotiated justice in the United States criminal justice system. It traces the history and the dynamics of the development of plea bargaining in the U.S. and its gradual transformation into the most commonly used procedure for the disposition of criminal cases in U.S. Federal and State Courts. The article examines in depth the various factors and reasons that have made it possible for plea bargaining to upstage the jury trial and make it a rare occurrence these days. Relevant Supreme Court decisions are cited and analyzed. It also looks at the consequences of this change in altering the balance of power in the courtroom, making the prosecutor the most powerful actor in criminal court and what this means for American justice. The article then carefully looks at the reasons why defendants may enter into plea agreements and even falsely confess to a crime that they did not commit. In particular, it stresses the dynamics of the criminal procedure in today's U.S. courts that make plea bargaining almost inevitable for the majority of defendants, often with serious negative consequences for them. It brings forth arguments in favor of and against plea bargaining as it is used today in U.S. courts. It also touches upon other important consequences of the widespread use of plea bargaining like the exponential growth of the Federal and State prison populations. The article concludes with a call for a re-examination of this process that has deleterious consequences for most defendants, the system and society.

#### RÉSUMÉ

Cet article examine en profondeur la négociation de plaidoyer comme la forme la plus fréquente de la justice négociée dans le système de justice pénale des États-Unis. Il retrace l'histoire et la dynamique du développement de la négociation de plaidoyer aux États-Unis et sa transformation progressive dans la procédure la plus couramment utilisée

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<sup>176</sup> Lars Nelson, *Preserving the Public Trust: Prosecutors' Professional Responsibility to Advocate for the Electronic Recording of Custodial Interrogations*, Fall, 2007, 44 WILLAMETTE L. REV. 1.

<sup>177</sup> Stephanos Bibas, *Regulating the Plea Bargaining Market: From Caveat Emptor to Consumer Protection*, August, 2011, 99 CALIF. L. REV. 1117.

<sup>178</sup> 130 S. Ct. 1473.

<sup>179</sup> 132 S. Ct. 1399.

<sup>180</sup> 132 S. Ct. 1376.

pour le règlement des affaires criminelles aux États-Unis. L'article examine les divers facteurs et les raisons qui ont permis, par la négociation, de reléguer au second plan le procès devant un jury et d'en faire un événement rare ces jours-ci. Les décisions pertinentes de la Cour suprême sont citées et analysées. L'article se penche également sur les conséquences de ce changement sur l'équilibre des pouvoirs dans la salle d'audience, et qui font du procureur l'acteur le plus puissant de la cour criminelle. L'article examine également les raisons pour lesquelles les défendeurs peuvent conclure des accords sur le plaidoyer et même avouer faussement un crime qu'ils n'ont pas commis. En particulier, il souligne la dynamique actuelle de la procédure pénale devant les tribunaux des États-Unis qui rend la négociation de plaidoyer presque inévitable pour la majorité des accusés, souvent avec de graves conséquences pour eux. Il apporte des arguments en faveur et contre la négociation de plaidoyer tel qu'il est utilisé aujourd'hui dans les tribunaux des États-Unis. Il aborde également d'autres conséquences importantes de l'utilisation répandue de la négociation de plaidoyer comme la croissance exponentielle des populations carcérales Fédérales et des États. L'article conclut par un appel à un nouvel examen de ce processus qui a des conséquences délétères pour la plupart des accusés, le système de justice pénale et la société.

#### RESUMEN

En este artículo se examina en profundidad la negociación de los cargos criminales como la forma más frecuente de justicia negociada en el sistema de justicia penal de los Estados Unidos. Se traza la historia y la dinámica del desarrollo de la negociación en los EE.UU. y su transformación gradual en el procedimiento más comúnmente utilizado para la resolución de las causas penales en los tribunales federales y estatales del país. El artículo analiza los diversos factores y las razones que han hecho posible que el plea bargaining haya conseguido eclipsar al juicio con jurado, que en estos días es una ocurrencia rara. En particular, se analizan las decisiones pertinentes de la Corte Suprema de los EE.UU. También se exponen las consecuencias de este cambio en la alteración del equilibrio de poder en la sala del tribunal, porque el fiscal es ahora el actor más poderoso en la corte criminal y lo que esto significa para la justicia estadounidense. Luego, el artículo examina cuidadosamente los motivos por los que los acusados pueden llegar a acuerdos de declaración de culpabilidad e incluso falsamente confesar un crimen que no cometieron. En particular, subraya las dinámicas del procedimiento penal en los tribunales de los Estados Unidos de hoy en día que hacen que el plea bargaining sea casi inevitable para la mayoría de los acusados, a menudo con graves consecuencias negativas para ellos. Se exponen los argumentos a favor y en contra de negociación de los cargos, como se utiliza hoy en tribunales de EE.UU. También el artículo aborda otras importantes consecuencias del uso generalizado de la negociación de los cargos, como el crecimiento exponencial de la población carcelaria federal y estatal. El artículo concluye con un llamamiento a un nuevo examen de este proceso que tiene consecuencias muy nocivas para la mayoría de los acusados, el sistema de justicia penal y la sociedad.