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OVERCRIMINALIZATION 2.0:
THE SYMBIOTIC RELATIONSHIP BETWEEN PLEA BARGAINING
AND OVERCRIMINALIZATION

*Lucian E. Dervan**

In discussing imperfections in the adversarial system, Professor Ribstein notes in his article entitled *Agents Prosecuting Agents*, that “prosecutors can avoid the need to test their theories at trial by using significant leverage to virtually force even innocent, or at least questionably guilty, defendants to plead guilty.”¹ If this is true, then there is an enormous problem with plea bargaining, particularly given that over 95% of defendants in the federal criminal justice system succumb to the power of bargained justice.² As such, while Professor Ribstein pays tribute to plea bargaining, this piece provides a more detailed analysis of modern-day plea bargaining and its role in spurring the rise of overcriminalization. In fact, this article argues that a symbiotic relationship exists between plea bargaining and overcriminalization because these legal phenomena do not merely occupy the same space in our justice system, but also rely on each other for their very existence.

To illustrate the co-dependent nature of plea bargaining and overcriminalization, consider what it would mean if there were no plea bargaining. Novel legal theories and overly-broad statutes would no longer be tools merely for posturing during charge and sentence bargaining, but would have to be defended and affirmed both morally and legally at trial. Further, the significant costs of prosecuting individuals with creative, tenuous, and technical charges would not be an abstract possibility used in determining how great of an incentive to offer a defendant in return for pleading guilty. Instead, these costs would be a real consideration in determining whether justice is being served by bringing a prosecution at all.

Similarly, consider the significant ramifications that would follow should there no longer be overcriminalization. The law would be refined and clear regarding conduct for which criminal liability may attach. Individual benefits, political pressure, and notoriety would not incentivize the

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¹ See Larry E. Ribstein, *Agents Prosecuting Agents*, 7 J.L. ECON. & POL'Y 617 (2011).

² U.S. SENTENCING COMM'N, 2009 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2010), available at <http://ftp.ussc.gov/ANNRPT/2009/FigC.pdf>.

invention of novel legal theories upon which to base liability where none otherwise exists, despite the already expansive size of the United States criminal code. Further, novel legal theories and overly-broad statutes would not be used to create staggering sentencing differentials that coerce defendants, even innocent ones, to falsely confess in return for leniency.

As these hypothetical considerations demonstrate, plea bargaining and overcriminalization perpetuate each other, as plea bargaining shields overcriminalization from scrutiny and overcriminalization creates the incentives that make plea bargaining so pervasive. For example, take the novel trend toward deputizing corporate America as agents of the government, as illustrated in the case of Computer Associates.³

In 2002, the Department of Justice and the Securities and Exchange Commission began a joint investigation regarding the accounting practices of Computer Associates, an Islandia, New York-based manufacturer of computer software.⁴ Almost immediately, the government requested that Computer Associates perform an internal investigation.⁵ As has been noted by numerous commentators, such internal investigations provide invaluable assistance to the government, in part because corporate counsel can more easily acquire confidential materials and gain unfettered access to employees.⁶ Complying with the government's request, Computer Associates hired an outside law firm.⁷ What happened next was both typical and atypical:

Shortly after being retained in February 2002, the Company's Law Firm met with the defendant Sanjay Kumar [former CEO and chairman of the board] and other Computer Associates executives [including Stephen Richards, former head of sales,] in order to inquire into their knowledge of the practices that were the subject of the government investigations. During these meetings, Kumar and others did not disclose, falsely denied and otherwise concealed the existence of the 35-day month [accounting] practice. Moreover, Kumar and others concocted and presented to the company's law firm an assortment of false justifications, the pur-

³ See *United States v. Kumar*, 617 F.3d 612, 616-19 (2d Cir. 2010); see also *United States v. Kumar*, 2006 WL 6589865 (E.D.N.Y. Feb. 21, 2006); *Indictment, United States v. Kumar* 30-32 (E.D.N.Y. Sept. 22, 2004), available at <http://www.justice.gov/archive/dag/cftf/chargingdocs/compassocs.pdf>.

⁴ *Kumar*, 617 F.3d at 617; see also Robert G. Morvillo & Robert J. Anello, *Beyond 'Upjohn': Necessary Warnings in Internal Investigations*, 224 N.Y.L.J. 3 (Oct. 4, 2005).

⁵ *Kumar*, 617 F.3d at 617.

⁶ See, e.g., Morvillo & Anello, *supra* note 4 ("Corporate internal investigations have become a potent tool for prosecutors in gathering evidence against corporate employees suspected of wrongdoing."). Though outside the scope of this article, another phenomenon leading to the growth of overcriminalization in white collar criminal cases is the lack of aggressive defense strategies. Where the government can secure convictions and concessions with mere threats, they have the ability to launch more investigations with wider reaches using the same resources. See, e.g., Alex Berenson, *Case Expands Type of Lies Prosecutors Will Pursue*, N.Y. TIMES, May 17, 2004, at C1 (quoting a Washington, D.C.-based defense attorney as saying, "An internal investigation has to be an absolute search for the truth and an absolute capitulation to the government.").

⁷ Morvillo & Anello, *supra* note 4.

pose of which was to support their false denials of the 35-day month practice. Kumar and others knew, and in fact intended, that the company's law firm would present these false justifications to the United States Attorney's Office, the SEC and the FBI so as to obstruct and impeded (sic) the government investigations.

For example, during a meeting with attorneys from the company's law firm, the defendant Sanjay Kumar and Ira Zar discussed the fact that former Computer Associates salespeople had accused Computer Associates of engaging in the 35-day month practice. Kumar falsely denied that Computer Associates had engaged in such a practice and suggested to the attorneys from the company's law firm that because quarterly commissions paid to Computer Associates salespeople regularly included commissions on license agreements not finalized until after end of quarter, the salespeople might assume, incorrectly, that revenue associated with those agreements was recognized by Computer Associates within the quarter. Kumar knew that this explanation was false and intended that the company's law firm would present this false explanation to the United States Attorney's Office, the SEC and the FBI as part of an effort to persuade those entities that the accusations of the former salespeople were unfounded and that the 35-day month practice never existed.⁸

The interviewing of employees by private counsel as part of an internal investigation is common practice and few would be surprised to learn that employees occasionally lie during these meetings. Further, information gathered during internal investigations is often passed along to the government in an effort to cooperate.⁹ What was uncommon in the Computer Associates situation, however, was the government's response to the employees' actions. Along with the traditional host of criminal charges related to the accounting practices under investigation, the government indicted Kumar and others with obstruction of justice for lying to Computer Associates' private outside counsel.¹⁰ According to the government, the defendants "did knowingly, intentionally and corruptly obstruct, influence and impede official proceedings, to wit: the Government Investigations," in violation of 18 U.S.C. § 1512(c)(2).¹¹

This novel and creative use of the obstruction of justice laws, which had recently been amended after the collapse of Enron and the passage of Sarbanes-Oxley, was ill-received by many members of the legal establishment.¹² Echoing the unease expressed by the bar, Kumar and his codefen-

⁸ Indictment, *supra* note 3.

⁹ Timothy P. Harkness & Darren LaVerne, *Private Lies May Lead to Prosecution: DOJ Views False Statements to Private Attorney Investigators as a Form of Obstruction of Justice*, 28 NAT'L L.J. S1 (July 24, 2006) ("[I]nternal investigations—and the practice of sharing information gathered during those investigations with federal regulators and prosecutors—have become standard practice . . .").

¹⁰ Indictment, *supra* note 3.

¹¹ *Id.* at 38.

¹² As examples, consider the following excerpts from news articles regarding the case:

Defense lawyers and civil libertarians are expressing alarm at the government's aggressive use of obstruction of justice laws in its investigation of accounting improprieties at Computer Associates

. . . .

. . . The Computer Associate executives were never accused of lying directly to federal investigators or a grand jury. Their guilty pleas were based on the theory that in lying to Wachtell

dants challenged the validity of the government's creative charging decision and filed a motion to dismiss.¹³ The district court responded by denying the defendants' motion without specifically addressing their concerns about the government's interference with the attorney–client privilege.¹⁴ The stage was thus set for this important issue to make its way to the U.S. Court of Appeals for the Second Circuit (and, perhaps, eventually the U.S. Supreme Court) for guidance on the limits of prosecutorial power to manipulate the relationships among a corporation, its employees, and its private counsel.

Unfortunately, despite the grave concerns expressed from various corners of the legal establishment about the obstruction of justice charges in the Computer Associates case, the appellate courts never had the opportunity to scrutinize the validity of this novel and heavily criticized expansion of criminal law. The government's new legal theory went untested in the Computer Associates case due to the symbiotic relationship between plea bargaining and overcriminalization. Three of the five defendants in the Computer Associates case pleaded guilty immediately, while Kumar and Stephens gave in to the pressures of plea bargaining two months after filing their unsuccessful motion to dismiss before the district court.¹⁵ As might be expected in today's enforcement environment, not even the corporation challenged the government in the matter. Computer Associates entered into a deferred prosecution agreement that brought the government's investigation to an end.¹⁶ Once again, overcriminalization created a situation where the defendants could be charged with obstruction of justice and presented

[the law firm representing Computer Associates] they had misled federal officials, because Wachtell passed their lies to the government.

Berenson, *supra* note 6.

While the legal theory of obstruction in these cases may be unremarkable, the government's decision to found these obstruction charges on statements to lawyers is notable as a further example of government actions that are changing the role of counsel for the corporation.

Audrey Strauss, *Company Counsel as Agents of Obstruction*, CORP. COUNS. (July 1, 2004).

The possibility that lying to an attorney, hired by a defendant's employer and acting in a purely private capacity, could lead to criminal charges contributed to growing concern within the criminal defense bar that the government was effectively transforming company lawyers into an arm of the state.

Harkness & LaVerne, *supra* note 9.

¹³ See *United States v. Kumar*, 2006 WL 6589865, at *1 (E.D.N.Y. Feb. 21, 2006).

¹⁴ See *id.* at *5. The court noted, "An objective reading of the remarks of the Senators and Representatives compels the conclusion that what they plainly sought to eliminate was corporate criminality in all of its guises which, in the final analysis, had the effect of obstructing, influencing or, impeding justice being pursued in an 'official proceeding' . . ." *Id.* at *4.

¹⁵ *United States v. Kumar*, 617 F.3d 612, 618 (2d Cir. 2010).

¹⁶ *Kumar*, 617 F.3d at 617.

with significant incentives to plead guilty, while plea bargaining ensured these novel legal theories would go untested.

Given the symbiotic existence of plea bargaining and overcriminalization, perhaps the answer to overcriminalization does not lie solely in changing imperfect prosecutorial incentives or changing the nature of corporate liability—it may also lie in changing the game itself.¹⁷ Perhaps the time has come to reexamine the role of plea bargaining in our criminal justice system.

While the right to plead guilty dates back to English common law, the evolution of plea bargaining into a force that consumes over 95% of defendants in the American criminal justice system mainly took place in the nineteenth and twentieth centuries.¹⁸ In particular, appellate courts after the Civil War witnessed an influx of appeals involving “bargains” between defendants and prosecutors.¹⁹ While courts uniformly rejected these early attempts at bargained justice, deals escaping judicial review continued to be struck by defendants and prosecutors.²⁰

By the turn of the twentieth century, plea bargaining was on the rise as overcriminalization flourished and courts became weighed down with ever-growing dockets.²¹ According to one observer, over half of the defendants in at least one major urban criminal justice system in 1912 were charged with crimes that had not existed a quarter century before.²² The challenges presented by the growing number of prosecutions in the early twentieth

¹⁷ See Larry E. Ribstein, *Agents Prosecuting Agents*, 7 J.L. ECON. & POL'Y 617 (2011) (proposing to address overcriminalization in the context of corporate liability by changing imperfect incentives and the nature of corporate liability itself).

¹⁸ See Lucian E. Dervan, *Plea Bargaining's Survival: Financial Crimes Plea Bargaining, A Continued Triumph in a Post-Enron World*, 60 OKLA. L. REV. 451, 478 (2007) (discussing the rise of plea bargaining in the nineteenth and twentieth centuries); Mark H. Haller, *Plea Bargaining: The Nineteenth Century Context*, 13 LAW & SOC'Y REV. 273, 273 (1978) (“[Alschuler and Friedman] agree that plea bargaining was probably nonexistent before 1800, began to appear during the early or mid-nineteenth century, and became institutionalized as a standard feature of American urban criminal courts in the last third of the nineteenth century.”); see also John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOC'Y REV. 261 (1978); Lynn M. Mather, *Comments on the History of Plea Bargaining*, 13 LAW & SOC'Y REV. 281 (1978); John Baldwin & Michael McConville, *Plea Bargaining and Plea Negotiation in England*, 13 LAW & SOC'Y REV. 287 (1978).

¹⁹ See Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 19 (1979) (“It was only after the Civil War that cases of plea bargaining began to appear in American appellate court reports.”).

²⁰ See *id.* at 19-22. In particular, plea bargaining appears to have grown in prominence because judges and prosecutors began accepting bribes from defendants in return for “plea agreements” that guaranteed reduced sentences. According to Professor Albert Alschuler, “The gap between these judicial denunciations of plea bargaining [in the late nineteenth century] and the practice of many urban courts at the turn of the century and thereafter was apparently extreme. In these courts, striking political corruption apparently contributed to a flourishing practice of plea bargaining.” *Id.* at 24.

²¹ *Id.* at 5, 19, 27.

²² *Id.* at 32.

century accelerated with the passage of the Eighteenth Amendment and the beginning of the Prohibition Era.²³ To cope with the strain on the courts, the symbiotic relationship between overcriminalization and plea bargaining was born:

[F]ederal prosecutions under the Prohibition Act terminated in 1930 had become nearly eight times as many as the total of all pending federal prosecutions in 1914. In a number of urban districts the enforcement agencies maintain that the only practicable way of meeting this situation with the existing machinery of federal courts . . . is for the United States Attorneys to make bargains with defendants or their counsel whereby defendants plead guilty to minor offenses and escape with light penalties.²⁴

In return for agreeing not to challenge the government's legal assertions and for assisting in lessening the strain created by overcriminalization, defendants were permitted to plead guilty to reduced charges and in return for lighter sentences.²⁵ The strategy of using plea bargaining to move cases through the system was effective, as the number of defendants relieving the government of its burden at trial swelled. Between the early 1900s and 1916, the number of federal cases concluding with a guilty plea rose sharply from 50% to 72%.²⁶ By 1925, the number had reached 90%.²⁷

By 1967, the relationship between plea bargaining and overcriminalization had so solidified that even the American Bar Association (ABA) proclaimed the benefits of bargained justice for a system that remained unable to grapple with the continued growth of dockets and the criminal code.²⁸ The ABA stated:

[A] high proportion of pleas of guilty and *nolo contendere* does benefit the system. Such pleas tend to limit the trial process to deciding real disputes and, consequently, to reduce the need for funds and personnel. If the number of judges, courtrooms, court personnel and counsel for prosecution and defense were to be increased substantially, the funds necessary for such increases might be diverted from elsewhere in the criminal justice process. Moreo-

²³ Alschuler, *supra* note 19, at 5, 27; see also GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 8 (2003).

²⁴ Alschuler, *supra* note 19, at 27 (citing Nat'l Comm'n On Law Observance & Enforcement, Report On The Enforcement Of The Prohibition Laws Of The United States 56 (1931)).

²⁵ *Id.* at 29; see also Donald A. Dripps, *Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies*, 109 PENN ST. L. REV. 1155, 1156-61 (2005) (discussing the relationship between broadening legal rules and plea bargaining); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 519-20 (2001) (discussing the influence of broader laws on the rate of plea bargaining); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 129 (2005) ("Changes in federal sentencing practices during the 1980s and 1990s increased the certainty and size of the penalty for going to trial, and mightily influenced the guilty plea and acquittal rates during those times.").

²⁶ Alschuler, *supra* note 19, at 27.

²⁷ *Id.*

²⁸ AM. BAR ASS'N PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY 2 (Approved Draft, 1968).

ver, the limited use of the trial process for those cases in which the defendant has grounds for contesting the matter of guilt aids in preserving the meaningfulness of the presumption of innocence.²⁹

Interestingly, although plea bargaining had gained widespread approval by the 1960s, the U.S. Supreme Court had yet to rule on the constitutionality of bargained justice. Finally, in 1970, the Court took up *Brady v. United States*,³⁰ a case decided in the shadows of a criminal justice system that had grown reliant on a force that led 90% of defendants to waive their right to trial and confess their guilt in court.³¹

In *Brady*, the defendant was charged under a federal kidnapping statute that allowed for the death penalty if a defendant was convicted by a jury.³² This meant that defendants who pleaded guilty could avoid the capital sanction by avoiding a jury verdict altogether.³³ According to *Brady*, this statutory incentive led him to plead guilty involuntarily for fear that he might otherwise be put to death.³⁴ The *Brady* Court, however, concluded that it is permissible for a criminal defendant to plead guilty in exchange for the probability of a lesser punishment,³⁵ a ruling likely necessitated by the reality that the criminal justice system would collapse if plea bargaining was invalidated.

While the *Brady* decision signaled the Court's acceptance of plea bargaining, it contained an important caveat regarding how far the Court would permit prosecutors to venture in attempting to induce guilty pleas. In *Brady*'s concluding paragraphs, the Court stated that plea bargaining was a tool for use only in cases where the evidence was overwhelming and the defendant, unlikely to succeed at trial, might benefit from the opportunity to bargain for a reduced sentence,³⁶ a stance strikingly similar to the ABA's at the time.³⁷ According to the Court, plea bargaining was not to be used to overwhelm defendants and force them to plead guilty where guilt was uncertain:

²⁹ *Id.*

³⁰ See *Brady v. United States*, 397 U.S. 742 (1970).

³¹ Diana Borteck, *Pleas for DNA Testing: Why Lawmakers Should Amend State Post-Conviction DNA Testing Statutes to Apply to Prisoners Who Pled Guilty*, 25 CARDOZO L. REV. 1429, 1439 n.43 (2004) (citing Corinna Barrett Lain, *Accuracy Where It Matters: Brady v. Maryland in the Plea Bargaining Context*, 80 WASH. U.L. Q. 1, 1 (2002)) (noting that since the 1960s the plea bargaining rate has been around ninety percent); see also AM. BAR ASS'N, *supra* note 28, at 1-2 ("The plea of guilty is probably the most frequent method of conviction in all jurisdictions; in some localities as many as 95 per cent of the criminal cases are disposed of this way."). Today, pleas of guilty account for over 95% of all federal cases. See U.S. SENTENCING COMM'N, *supra* note 2.

³² *Brady*, 397 U.S. at 743.

³³ See *id.*

³⁴ *Id.* at 743-44.

³⁵ *Id.* at 747, 751.

³⁶ *Id.* at 752.

³⁷ AM. BAR ASS'N, *supra* note 28, at 2.

For a Defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious – his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated. For the State there are also advantages – the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are *conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof.*³⁸

According to the Court, if judges, prosecutors, and defense counsel failed to observe these constitutional limitations, the Court would be forced to reconsider its approval of the plea bargaining system altogether:³⁹

This is not to say that guilty plea convictions hold no hazard for the innocent or that the methods of taking guilty pleas presently employed in this country are necessarily valid in all respects. This mode of conviction is no more foolproof than full trials to the court or to the jury. Accordingly, we take great precautions against unsound results, and we should continue to do so, whether conviction is by plea or by trial. We would have serious doubts about this case if the encouragement increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves.⁴⁰

Unfortunately, evidence from the last forty years shows that *Brady's* attempt to limit plea bargaining has not been successful. For example, as Professor Ribstein noted, today even innocent defendants can be persuaded by the staggering incentives to confess one's guilt in return for a bargain.⁴¹

³⁸ *Brady*, 397 U.S. at 752 (emphasis added).

³⁹ *Id.* at 758.

⁴⁰ *Id.* at 757-58. The sentiment that innocent defendants should not be encouraged to plead guilty has been echoed by academics. See Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1382 (2003) ("Even if innocent defendants want to plead guilty, the law should not go out of its way to promote these unjust results."); Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1158 (2005) (supporting Bibas' statements regarding innocent defendants and plea bargaining).

⁴¹ See Michael O. Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 HARV. L. REV. 293, 295 (1975) ("On the basis of the analysis that follows, I conclude that the pressure on defendants to plead guilty in the federal courts has induced a high rate of conviction by 'consent' in cases in which no conviction would have been obtained if there had been a contest."); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1949-51 (1992) (discussing plea bargaining's innocence problem); David L. Shapiro, *Should a Guilty Plea Have Preclusive Effect?*, 70 IOWA L. REV. 27, 39-46 (1984) (discussing innocent defendants and plea bargaining); Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Really Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1343-44 (1997) ("[T]he results of our research suggest that some defendants who perhaps were innocent, and a larger group who probably would have been acquitted had the case gone to trial, were nonetheless induced to plead guilty."); see also Russell D. Covey, *Signaling and Plea Bargaining's Innocence Problem*, 66 WASH. & LEE L. REV. 73, 74 (2009) ("Plea bargaining has an innocence problem."); Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 CARDOZO L. REV. 2295, 2295-96 (2006) (arguing a partial ban on plea bargaining would assist in preventing innocent defendants

Importantly, this failure of the *Brady* limitation is due in part to the fact that overcriminalization, the phenomenon that initially created swelling dockets and the need for plea bargaining, makes creating the incentives to plead guilty easy by propagating a myriad of broad statutes from which staggering sentencing differentials can be created. All the while, plea bargains prevent these incentives, sentencing differentials, and, in fact, overcriminalization itself, from being reviewed.⁴²

Plea bargaining's drift into constitutionally impermissible territory under *Brady*'s express language indicates the existence of both a problem and an opportunity. The problem is that the utilization of large sentencing differentials based, at least in part, on novel legal theories and overly-broad statutes, results in increasingly more defendants pleading guilty. Despite the ever-growing number of Americans captured by the criminal justice system through an increasingly wide application of novel legal theories and overly-broad statutes, these theories and statutes are seldom tested. No one is left to challenge their application—everyone has pleaded guilty instead.

The opportunity is to challenge plea bargaining and reject arguments in favor of limitless incentives that may be offered in exchange for pleading guilty. This endeavor is not without support; *Brady* itself is the guide. By focusing on changing the entire game, it may be possible to restore justice to a system mired in posturing and negotiation about charges and assertions that will never be challenged in court. Such a challenge may also slow or even reverse the subjugation of Americans to the costs, both social and moral, of overcriminalization—plea bargaining's unfortunate mutualistic symbiont.

The great difficulty lies in bringing the problem to the forefront so that it can be examined anew. Who among those offered the types of sentencing differentials created through the use of novel legal theories and overly broad statutes will reject the incentives and challenge the system as a whole? Will it be someone like Lea Fastow?

From 1991 to 1997, Lea Fastow, the wife of Enron Chief Financial Officer Andrew Fastow, served as a Director of Enron and its Assistant Treasurer of Corporate Finance.⁴³ Although Ms. Fastow was a stay-at-home mother raising two small children in 2001, federal investigators determined that she had known of her husband's fraudulent financial dealings and had

from being forced to plead guilty by forcing asset allocation by prosecutors towards only strong cases); Leipold, *supra* note 40, at 1154 (“Yet we know that sometimes innocent people plead guilty . . .”).

⁴² See Ellen S. Podgor, *White Collar Innocence: Irrelevant in the High Stakes Risk Game*, 85 CHI.-KENT L. REV. 77, 78 (2010) (“The pronounced gap between those risking trial and those securing pleas is what raises concerns here. Some refer to this as a ‘trial penalty’ while others value the cooperation and support the vastly reduced sentences.”).

⁴³ Michelle S. Jacobs, *Loyalty's Reward—A Felony Conviction: Recent Prosecutions of High-Status Female Offenders*, 33 FORDHAM URB. L.J. 843, 856 (2006).

even assisted him in perpetrating the frauds.⁴⁴ In response, the government, which had already indicted her husband, indicted her under a six-count indictment that included charges of conspiracy to commit wire fraud, conspiracy to defraud the United States, money laundering conspiracy, aiding and abetting, and filing a false tax return.⁴⁵

Based on the indictment's allegations, Ms. Fastow faced a possible ten-year prison sentence, but the government was more interested in persuading her to cooperate.⁴⁶ As a result, the government offered her a deal.⁴⁷ In return for pleading guilty, the government would charge her with a single count of filing a false tax return, which carried a recommended sentence of five months in prison.⁴⁸ The deal also included an agreement that Ms. Fastow and her husband, who also intended to plead guilty in return for leniency, would not have to serve their prison sentences simultaneously, thus ensuring their children would always have one parent at home.⁴⁹ As the lead prosecutor in the case stated, "The Fastows' children can be taken into account in deciding when Andrew Fastow will begin serving his sentence.

⁴⁴ *Id.* at 856-57.

During the time in question, Andrew Fastow and Michael Kopper created several Special Purpose Entities (SPEs) to hold off-balance sheet treatment of assets held by Enron. . . . Ms. Fastow assisted with concealing the fraudulent nature of two of the SPEs. In both cases, Ms. Fastow accepted "gifts" in her name and in the names of her children, knowing that the gifts were kickbacks. In another instance, the Fastows were attempting to hide the fact that Ms. Fastow's father was used as an "independent" third party of RADR [one of the two SPEs]. When the Fastows realized that the father's ownership would trigger a reporting requirement, they had him pull out of the deal. Ms. Fastow convinced her father to file a false tax return in an effort to continue hiding their involvement in the SPE.

Id.; see also Mary Flood, *Lea Fastow in Plea-Bargain Talks; Former Enron CFO's Wife Could Get 5-month Term but Deal Faces Hurdles*, HOUS. CHRON., Nov. 7, 2003, at A1.

⁴⁵ Indictment, United States v. Fastow (S.D.T.X. 2003), available at <http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/enron/usleafstw43003ind.pdf>.

⁴⁶ The ten year sentence is calculated using the 2002 Sentencing Guidelines for fraud. Beginning with a base offense level of six points, Fastow would have received twenty points for a \$17 million loss, and four points for an offense involving more than fifty people. A defendant with no previous criminal history and thirty points has a sentencing range between 97 to 121 months. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2002).

⁴⁷ Flood, *supra* note 44, at A1.

⁴⁸ See Bruce Zucker, *Settling Federal Criminal Cases in the Post-Enron Era: The Role of the Court and Probation Office in Plea Bargaining Federal White Collar Cases*, 6 FL. COASTAL L. REV. 1, 3-4 (2004).

⁴⁹ See Jacobs, *supra* note 43, at 859.

During the renegotiation of the second plea, it was widely reported that Ms. Fastow was interested in a plea that would allow her children to stay at home with one parent while the other was incarcerated, rather than running the risk that both parents would be incarcerated at the same time. The government apparently acquiesced to this request.

Id.

There is no reason for the government, when it can, to have a husband and wife serve their sentences at the same time.”⁵⁰

For Lea Fastow, the reality of her situation removed any free will she might have had to weigh her options.⁵¹ With two small children at home and the prospect of simultaneous prison sentences for her and her husband, the decision to accept the offer was made for her.⁵² As one family friend stated, “It’s a matter of willing to risk less when it’s for her children than she would risk if it were just for herself.”⁵³ As such, she succumbed to the pressure to confess her guilt and accepted the deal.⁵⁴

Though the judge in the case would force the government to revise its offer because he believed five months was too lenient, Lea Fastow would eventually plead guilty to a misdemeanor tax charge and serve one year in prison.⁵⁵ The agreement to confess her guilt in return for a promise of leniency lessened her sentence by nine years and ensured that her children would not be without a parent.⁵⁶ As promised, Andrew Fastow was not required to report to prison for his offenses until after his wife was released.⁵⁷ As has become all too familiar today, Lea Fastow did not challenge the use of sentencing differentials and bargaining incentives. She did not ask the Supreme Court to examine modern-day plea bargaining against the standards established in *Brady* forty years ago. Just as is true of so many other defendants, she pleaded guilty instead.

And so we wait.

⁵⁰ Mary Flood & Clifford Pugh, *Lea Fastow Expresses “Regret” at Sentencing; Wife of ex-Enron CFO Faces Year in Prison*, HOUS. CHRON., May 7, 2004, at A19.

⁵¹ See *Lynnum v. Illinois*, 372 U.S. 528, 534 (1963) (“[T]he question in each case is whether the defendant’s will was overborne at the time he confessed. If so, the confession cannot be deemed ‘the product of a rational intellect and a free will.’”) (internal citations removed).

⁵² See Greg Farrell & Jayne O’Donnell, *Plea Deals Appear Close for Fastows*, USA TODAY, Jan. 8, 2004, at 1B (“One of the reasons that Lea Fastow wants to limit her jail time to five months is that she and her husband have two young children, and they’re trying to structure their pleas so they’re not both in jail at the same time.”).

⁵³ Flood, *supra* note 44, at A1 (“A family friend said Lea Fastow is willing to consider pleading guilty and forgoing a chance to tell her side to a jury because it would be better for her two small children and could ensure they would not be without a parent at home.”).

⁵⁴ See Mary Flood, *Fastows to Plead Guilty Today; Feds Now Focus on Skilling, Lay*, HOUS. CHRON., Jan. 14, 2004, at A1 (“The plea bargains for the Fastows, who said they wanted to be sure their two children are not left parentless, have been in limbo for more than a week.”).

⁵⁵ Flood & Pugh, *supra* note 50.

⁵⁶ See Mary Flood, *Lea Fastow Begins Prison Sentence; Ex-Enron CFO’s Wife Arrives Early to Start 1-year Term*, HOUS. CHRON., July 13, 2004, at A1; Farrell & O’Donnell, *supra* note 52, at 1B (“U.S. District Judge David Hittner told Lea Fastow Wednesday that he refused to be locked in to the five-month prison sentence that her lawyers had negotiated with prosecutors.”).

⁵⁷ See Flood, *Lea Fastow Begins Prison Sentence*, *supra* note 56.