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## **Pretrial Incentives, Post-Conviction Review, and Sorting Criminal Prosecutions by Guilt or Innocence**

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SAMUEL R. GROSS

Pretrial Incentives, Post-Conviction  
Review, and Sorting Criminal Prosecutions  
by Guilt or Innocence

ABOUT THE AUTHOR: Thomas and Mabel Long Professor of Law at the University of Michigan Law School. I would like to thank Cameron Smith, University of Michigan Law School class of 2011, for excellent research assistance and the organizers of the November 2010 New York Law School symposium *Exonerating the Innocent: Pre-Trial Innocence Procedures* for the opportunity to present and discuss an early version of this article.

## SORTING CRIMINAL PROSECUTIONS BY GUILT OR INNOCENCE

### I. INTRODUCTION

The fundamental problem with false convictions is that they are unobserved, and in general, unobservable. We don't spot them when they happen—if we did, they *wouldn't* happen—and in most cases we can't identify them after the fact. We have no general reliable test for innocence or guilt; if we did, we'd use it at trial. As result, we often say that we don't know for sure whether a convicted criminal defendant is innocent or guilty, or even that we *can't* know for sure. But this isn't exactly true—or rather, its truth depends on who we mean by “we.”

There are questions that are truly beyond present human knowledge: How old is the universe? Is there a cure for the common cold? Who'll win next year's World Series? But, “did the defendant kill the victim?” is rarely one of them. The defendant almost always knows, and he can tell us, if he's willing.<sup>1</sup> But the defendant can't be trusted. Guilty or innocent, he is heavily motivated to deny that he did it. This basic structural problem frames a large portion of our criminal justice procedure and practice: Can we get accused criminals to tell us the truth? Are the methods we use to get information from them effective? Are they moral? Are they legal?

Of course, we also have to recognize the truth when we hear it. There are two issues here: (1) Can we spot those denials of guilt that come from suspects who really are innocent? (2) Can we get suspects who are guilty, but only those who are guilty, to admit it? In practice, many American criminal investigations focus heavily on the second task, getting suspects—who are assumed to be guilty—to admit guilt.

In modern America, few criminal defendants assert innocence or admit guilt at trial. Few ever get to trial. A substantial proportion of criminal charges are dismissed by prosecutors: sometimes because the defendants appear to be innocent, more often because there is insufficient admissible evidence of guilt, and frequently for procedural or policy reasons unrelated to guilt or innocence. If charges are not dismissed, the defendant almost always pleads guilty, usually pursuant to a negotiated agreement with the prosecutor. For the huge bulk of criminal cases that do not go to trial—at least 98% of the total—the task of sorting the innocent from the guilty is performed by police and prosecutors, and the accuracy of the process depends on the answers to two questions: How frequently do prosecutors dismiss the charges against innocent defendants? And how often do innocent defendants accept plea bargains rather than face harsher penalties at trial?

For the few defendants who do go to trial, there is another question: How reliably do juries and judges acquit innocent defendants? Needless to say, we don't know. We do know, however, that they make some mistakes: of 340 innocent American felony defendants who were exonerated from 1989 through 2003, nearly 95% were convicted at trial, mostly by juries.<sup>2</sup>

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1. Because falsely convicted criminal defendants who are later exonerated (like American criminal defendants in general) are overwhelmingly male, I generally refer to them using male pronouns. See Samuel R. Gross, Kristen Jacoby, Daniel J. Matheson, Nicholas Montgomery & Sujata Patil, *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 524 (2005) (finding that over 96% of 340 U.S. exonerations from 1989 through 2003 involved male defendants).

2. See *id.* at 536.

This article is addressed to the process of pretrial sorting, where the bulk of the action takes place. The pretrial choice that American criminal defendants face today is stark: plead guilty and accept the conviction and punishment the prosecutor offers, or go to trial and risk much worse. In most cases the defendant has an overwhelming incentive to plead guilty; that's why so few cases go to trial. Unfortunately that incentive is similar for defendants who are guilty and for those who are not.

In this article I consider what would happen if we offered defendants a different sort of pretrial option: not to plead guilty but to waive major procedural rights at trial, in return for important procedural advantages on post-conviction review. In theory, this pretrial choice should be sufficiently more attractive to innocent defendants than to guilty ones such that it will separate the two groups, at least in part. Along the way, if this option became regular practice, it might also reduce our reliance on plea bargaining, regain some ground for criminal trials, and improve the accuracy of fact finding in criminal cases.

But would it work in practice? I have no idea.

I begin, in the next two sections, by discussing the nature of plea bargaining and some of the problems it presents, and then go on to develop the alternative that I offer.

## II. PLEA BARGAINING AND TORTURE

This impulse to get the truth from the accused is at the root of the use of torture in interrogation. As John Langbein describes in a remarkable article, *Torture and Plea Bargaining*, torture was introduced in thirteenth-century Continental Europe in order to make the process of adjudication more reliable.<sup>3</sup> Because medieval jurists distrusted human judgment, they were unwilling to permit conviction for a serious crime (for which the punishment was death or mutilation) on the basis of circumstantial evidence or uncertain eyewitness testimony. Unless two unimpeachable witnesses testified that they actually saw the accused commit the crime, he could only be convicted by his own confession. In other words, for any crime that was not committed in flagrant view of reliable witnesses, the accused had to confess or go free. Since most people would greatly prefer to go free, torture was introduced to persuade them to confess.

This was not a crazy notion. A guilty person *can* make the process of determining his own guilt simple and accurate by voluntarily telling the authorities what he knows. It's a common event, and when it happens we are justified in concluding, along with medieval jurists, that "confession is the queen of proof."<sup>4</sup> But confessions under torture are not voluntary, and if the accused is not guilty, the ordeal is likely to produce false confessions. The European law of torture recognized this danger and purported to deal with it by various devices. A confession under torture had to be

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3. John Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 3-8 (1978) (the section of Langbein's article on judicial torture is based on JOHN LANGBEIN, *TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN RÉGIME* 1-16 (1977)).

4. *Id.* at 14.

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repeated “voluntarily” in court (but a suspect who declined to do so might be tortured again); an accused could only be tortured if there was other substantial evidence of guilt; interrogation under torture was supposed to be limited to non-suggestive questions; in theory, confessions obtained by torture were only valid if the accused supplied telling details of the crime; previously unknown facts disclosed by the accused were supposed to be investigated. According to Langbein these protections were both inadequate and unenforced.<sup>5</sup>

Torture, of course, is not officially sanctioned by any modern system of criminal procedure.<sup>6</sup> Judicial torture was abolished in Europe in the eighteenth century. In the United States, the Fifth Amendment, also an eighteenth-century provision, prohibits “compelling” a criminal defendant to provide testimonial evidence to the government by any coercive means, including fines and imprisonment as well as physical abuse. Indeed, the accused may not even be questioned against his will, or without the aid of counsel if he requests it, either in court or in police custody.<sup>7</sup> All the same, the ancient focus on the unique value of the defendant’s knowledge of the crime is still very much with us.

Opposition to the *Miranda* rule, for example, is saturated with claims that obtaining confessions from criminal suspects is essential to effective law enforcement.<sup>8</sup> On the other side, a defendant’s decision not to testify at trial—as is his constitutional right—is known to weigh heavily against him.<sup>9</sup> Prosecutors are prohibited from arguing that such silence is tantamount to an admission of guilt,<sup>10</sup> but jurors are perfectly capable of reaching that conclusion on their own. They *want* to hear from the person who knows most about what happened, and are likely to assume the worst

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5. *Id.* at 8–9.

6. In the past several years there have been legal and political debates on the permissible use of torture by the U.S. government. Whatever else can be said about this extraordinary development, nobody (so far) advocates using torture, however defined, as an aspect of *criminal procedure*. Rather, some favor or would tolerate its use outside of that sphere as a security measure to prevent terrorist attacks. *See, e.g.,* Tung Yin, *Broken Promises or Unrealistic Expectations: Comparing the Bush and Obama Administrations on Counterterrorism*, 20 *TRANSNAT’L L. & CONTEMP. PROBS.* 465, 486–87 (2011).

7. *See* *Miranda v. Arizona*, 384 U.S. 436 (1966).

8. *See, e.g.,* Paul G. Cassell, *Miranda’s Social Costs: An Empirical Reassessment*, 90 *NW. U. L. REV.* 387, 390 (1996); Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda’s Harmful Effects on Law Enforcement*, 50 *STAN. L. REV.* 1055 (1998).

9. *See, e.g.,* 8 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2272, at 426 (McNaughton rev. 1961) (“What inference does a plea of privilege [against self-incrimination] support? The layman’s natural first suggestion would probably be that the resort to privilege in each instance is a clear confession of a crime.”); HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 140–65 (1966); Note, *To Take The Stand or Not to Take the Stand: The Dilemma of the Defendant with a Criminal Record*, 4 *COLUM. J.L. & SOC. PROBS.* 215, 221–22 (1968); John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 *J. EMPIRICAL LEGAL STUD.* 477 (2008).

10. *See* *Griffin v. California*, 380 U.S. 609 (1965) (holding that comments made by the trial court and counsel regarding defendant’s failure to testify violated the self-incrimination clause of the Fifth Amendment).

if they don't. We all know this (or think we do), and lawyers and judges deal with it constantly.<sup>11</sup>

Under modern American procedure, a defendant who admits guilt can do it in two ways: he can confess to the crime, usually to police officers in jail or at a police station, or he can plead guilty to the charges against him in court before a judge. The second route is by far the more common. Many defendants do confess—for example, among a sample of 137 prisoners who were executed for murder between 1973 and 2003, 52% had confessed<sup>12</sup>—but many more plead guilty: about 95% of all defendants who are convicted of felonies.<sup>13</sup> For the most part, they do not do so out of altruism. Rather, they strike bargains with the prosecuting attorneys: guilty pleas in return for large, sometimes huge reductions in the sentences the defendants would receive if convicted at trial.

The main contribution of Professor Langbein's article is the parallel he draws between plea bargaining and torture. In material conduct they have little in common: on one side, the methodical infliction of unbearable pain and maiming injuries on a helpless human being; on the other, a verbal or written agreement, negotiated by lawyers, to enter a formal plea before a judge in open court. But the functions of these two procedures are similar within the systems in which they operate. In each case, the legal system set a high bar to conviction of a crime in order to protect the accused from injustice. In medieval Europe this was accomplished by the two-reliable-eyewitnesses rule; in modern America by due process rules imposed by the Constitution, as interpreted by the courts: the privilege against self-incrimination, the right to counsel, the right to trial by jury, the requirement of proof of guilt beyond a reasonable doubt, and so forth. The upshot, in both instances, was the same—convicting criminals at contested trials became too costly, too time consuming, too difficult, or too unlikely to be a workable practice for most cases. As a result, both systems developed methods to bypass the protective procedures they designed, and both did so by giving criminal defendants extreme incentives to admit their guilt and eliminate the need for proof: confess, or have your thumbs crushed; plead guilty and get two years, or go to trial and risk imprisonment for life. And, of course, in both systems most defendants are persuaded to give in without a struggle. The idea is to

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11. For example, prior criminal convictions—which are generally an inadmissible species of character evidence to prove that the person who committed these crimes is likely to have done other similar things—may sometimes be used to impeach a witness's testimony at trial. *See, e.g.*, FED. R. EVID. 609. This may be the single most litigated evidentiary issue in American criminal trials. While the rule applies to all witnesses, the debates surrounding it have focused almost entirely on its effect on testimony by criminal defendants: How many will forgo testifying and pay the penalty in jury deliberations rather than let the jurors know about past crimes? How many will simply plead guilty if their only other choices are not to testify or to testify and, in the process, inform the jury of their criminal records?
  12. Samuel R. Gross & Barbara O'Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. EMPIRICAL LEGAL STUD. 927, 953 (2008).
  13. *See, e.g.*, THE HINDELANG CRIMINAL JUSTICE RESEARCH CENTER, STATE UNIVERSITY OF NEW YORK AT ALBANY, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 450, tbl. 5.46 (Ann L. Pastore & Kathleen Maguire eds., 31st ed. 2003), available at <http://www.albany.edu/sourcebook/pdf/t5462002.pdf> (95% of state felony convictions in the United States in 2002 were by guilty plea).

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get defendants to confess (or plead guilty) because of the *threat* of torture (or many years in prison). The actual use of torture, or of extreme sentences after trial, should be rare.

### III. PLEA BARGAINING AND FALSE CONVICTIONS

Professor Langbein—along with many others—opposes plea bargaining in part on the ground that it results in the conviction of innocent defendants. On this issue the analogy to judicial torture breaks down, as Langbein acknowledges, if grudgingly.<sup>14</sup> Both plea bargaining and torture may coerce admissions of guilt, but by different means. Innocent medieval defendants would confess to avoid the use of torture as part of the *process* of determining guilt; if they didn't confess, torture was unavoidable. Innocent defendants in modern American courts plead guilty to avoid the *consequences* of a determination of guilt at trial—if they are convicted. But they may not be. If judgments at trial were always accurate, or at least if innocent defendants were never convicted at trial, no defendant would ever accept a plea bargain instead of going to trial.<sup>15</sup>

Are trial judgments always accurate? Plainly not. In the past three decades we have witnessed hundreds of exonerations of defendants who were convicted of serious felonies, mostly after trial, and there's no end in sight. A majority of these exonerated defendants were sentenced to death or life imprisonment, and most of the rest to very long terms in prison.<sup>16</sup>

How great a risk does an innocent defendant face at trial? There are no data that speak to that issue directly, but a few studies shed some limited light on it. First, Michael Finkelstein analyzed the relationship between guilty pleas and nonconviction rates and concluded that a third to a half of those who pled guilty in federal courts in the 1970s would have been acquitted at trial.<sup>17</sup> That finding might not apply now, when the trial rate among federal criminal cases is much lower,<sup>18</sup> and in any event does not tell us how many of these defendants (or for that matter, how many of those who would have been convicted at trial) were factually innocent. Second, Bruce

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14. Langbein, *supra* note 3, at 13–14 n.34.

15. I am ignoring innocent defendants who plead guilty to avoid the process costs of a criminal prosecution, in particular those who have been held long enough in pretrial detention that they will get to go home if they accept the prosecutor's offer to plead guilty in return for a sentence of imprisonment that they have already served. This is a major omission, especially for comparatively light crimes—misdemeanors and some nonviolent felonies—for which pretrial detention may rival or exceed the likely sentence on conviction. As usual in this area, we have no idea how many innocent defendants plead guilty to avoid pretrial detention. See Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. L. & SOC. SCI. 173, 180 (2008).

16. Gross et al., *supra* note 1, at 535.

17. MICHAEL O. FINKELSTEIN, *QUANTITATIVE METHODS IN LAW* 265–83 (1978).

18. See, e.g., *Federal Justice Statistics, 2008 Statistical Tables: Table 4.2*, BUREAU OF JUST. STAT. (Nov. 3, 2010), <http://bjs.ojp.usdoj.gov/content/pub/html/fjst/2008/tables/fjs08st402.pdf> (showing that of the 91,728 criminal cases disposed of in federal court between October 2007 and September 2008—the latest year for which data is available—3184 were disposed of by trial, or about 3.5%).

Spencer uses data on disagreements on the correct verdict between the presiding judge and judge and jury to estimate the accuracy of jury verdicts in criminal cases in four metropolitan jurisdictions.<sup>19</sup> He concludes that at least 25% of defendants who “should” have been acquitted were in fact convicted, which translates into an error rate of about 10% of all criminal convictions at trial. But Professor Spencer is unable to distinguish between defendants who should have been acquitted because they were factually innocent and those who were guilty but should have been acquitted because of insufficient evidence or other legal considerations.<sup>20</sup>

In other words, judging from these studies (and a wealth of anecdotal evidence), an innocent defendant who goes to trial facing the most extreme penalties available—death, life imprisonment, or decades of incarceration—stands an unknown but substantial risk of a false conviction.

What then is the impact of plea bargaining on innocent defendants? That depends on the context. At the *individual* level (assuming no changes in the system of adjudication) plea bargaining is a benefit for the defendant, innocent as well as guilty. Various writers have proposed methods to discourage or prevent an innocent defendant from plea bargaining,<sup>21</sup> but unless the risk of false conviction at trial is also greatly reduced doing so would be no favor.<sup>22</sup> If you were accused of a robbery you did not commit, would you rather have the option to limit the damage you might suffer by pleading guilty to assault, or would you prefer to have no choice but to go to trial for armed robbery and risk your entire life?

This is not an abstract question. In Tulia, Texas, for example, thirty-five innocent defendants were convicted of selling cocaine in 1999 and 2000 on the uncorroborated word of a single perjurious undercover narcotics agent. They were exonerated en masse in 2003.<sup>23</sup> Eight of these defendants went to trial and were convicted; they

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19. Bruce D. Spencer, *Estimating the Accuracy of Jury Verdicts*, 4 J. EMPIRICAL LEGAL STUD. 305 (2007).

20. In addition, studies of capital exonerations indicate that at least 2.3% to 3.5% of all defendants who are tried for capital crimes and are sentenced to death in the United States are factually innocent. D. Michael Risinger, *Convicting the Innocent: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761 (2007); Gross & O'Brien, *supra* note 12. These findings do not speak directly to the risk of conviction for innocent capital defendants, but since most capital defendants who go to trial are not innocent, and many who are innocent are convicted but not sentenced to death, they do indicate that the risk of false conviction for a capital defendant who is innocent must be considerably higher than that 2.3% to 3.5% range.

21. *See, e.g.*, H. RICHARD UVILLER, *VIRTUAL JUSTICE: THE FLAWED PROSECUTION OF CRIME IN AMERICA* 191–92 (1996); Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 CARDOZO L. REV. 2295 (2006) (proposing screening model to limit plea bargaining to guilty only); Oren Bar-Gill & Oren Gazal Ayal, *Plea Bargains Only for the Guilty*, 49 J.L. & ECON. 353 (2006) (proposing restricting the permissible sentence reduction in a plea bargain).

22. For a thorough treatment of this issue, see Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117 (2008).

23. *See* Polly Ross Hughes, *Perry Pardons 35 in Tulia Sting*, HOUS. CHRON., Aug. 23, 2003, at A1; Adam Liptak, *\$5 Million Settlement Ends Case of Tainted Texas Sting*, N.Y. TIMES, Mar. 11, 2004, at A14; Laura Parker, *Texas Scandal Throws Doubt on Anti-Drug Task Forces*, USA TODAY, Mar. 31, 2004, at 3A. To be precise, thirty-nine innocent defendants were charged in Tulia and ultimately cleared, mostly by pardons. Four defendants were ineligible for pardons either because the charges against them had been



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were sentenced to prison for terms that ranged up to life, and averaged nearly forty-seven years. The remaining twenty-seven defendants pled guilty. One was not sentenced; eleven received combinations of probationary terms and fines; and fifteen were sentenced to prison terms ranging from three months to eighteen years, and averaging about seven years.<sup>24</sup> Would you advise an innocent defendant in the position of those in Tulia to turn down a guilty plea to eighteen months in jail, go to trial, and very possibly die in prison?<sup>25</sup>

But what's the effect of plea bargaining on our *system* for determining guilt or innocence? That's the real debate. I will touch on it only briefly.<sup>26</sup> On one side, opponents of plea bargaining point out that in 95% of criminal convictions—those that are based on guilty pleas—the facts are effectively determined in a cursory, informal, and virtually secret process, with little critical examination of whatever evidence was gathered by the police. That sort of process breeds sloppy investigations. At the same time, the threat of extremely harsh penalties after trial may increase the number of false convictions by persuading some innocent defendants to plead guilty even though they would probably have been acquitted. Surely the accuracy of the system would improve if we removed that sort of threat and conducted contested public trials before neutral tribunals in at least a substantial proportion of criminal prosecutions. It may be that we can't afford full-blown jury trials for more than a small minority of criminal cases, but we could devise some simpler and quicker method of adversarial or non-adversarial fact finding that produces judgments based on evidence at a reasonable cost.

On the other side, advocates of plea bargaining focus on the relative accuracy of the two types of sorting processes we now use. They are skeptical of the accuracy of

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dismissed or because they were imprisoned on unrelated charges; technically these four were not "exonerated." Gross et al., *supra* note 1, at 534 (relying for details on the numbers of the Tulia defendants and the outcomes of their cases on information provided by Ms. Vanita Gupta, a lawyer, formerly at the NAACP Legal Defense and Educational Fund, who represented the Tulia defendants in the proceeding that led to their exoneration).

24. Gross, *supra* note 15, at 181 (relying on unpublished data from Gross et al., *supra* note 1).
25. For a disturbing account of a defendant who faced this choice, written by her lawyer, see Abbe Smith, *Defending the Innocent*, 32 CONN. L. REV. 485, 494 (2000). *But see* Stephanos Bibas, Response, *Exacerbating Injustice*, 157 U. PA. L. REV. PENNUMBRA 53 (2008), <http://www.pennumbra.com/responses/11-2008/Bibas.pdf>; *see also* Josh Bowers, Response, *The Unusual Man in the Usual Place*, 157 U. PA. L. REV. PENNUMBRA 260, 261–67 (2009), <http://www.pennumbra.com/responses/05-2009/Bowers.pdf>.
26. On the side of the critics, see, for example, Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652 (1981); John Kaplan, *American Merchandising and the Guilty Plea: Replacing the Bazaar with the Department Store*, 5 AM. J. CRIM. L. 215 (1977); Kenneth Kipnis, *Plea Bargaining: A Critic's Rejoinder*, 13 LAW & SOC'Y REV. 555 (1979); Langbein, *supra* note 3; Stephen J. Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733 (1980); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979 (1992). On the other side of the debate, see, for example, Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 308–22 (1983); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992); Robert E. Scott & William J. Stuntz, *A Reply: Imperfect Bargains, Imperfect Trials, and Innocent Defendants*, 101 YALE L.J. 2011 (1992).

trials, even with all the bells and whistles, and critical of plans to make trials more frequent by reducing their cost because that will make trials less accurate, which will increase the risk of false conviction at trial, which, in turn, will increase the number of false guilty pleas as innocent defendants realize that their risk at trial has increased. On the other hand, proponents of plea bargaining have qualified praise for the accuracy of pretrial bargaining as a sorting mechanism, at least by comparison to trial: on the whole, guilty defendants will be more likely to plead guilty than innocent ones because their private knowledge that they are in fact guilty often confirms that they stand little chance at trial, and prosecutors dismiss charges in many cases when they are presented with evidence of innocence.

Even without bargaining, the basic process of entering a plea may do a fairly good job of sorting the guilty from the innocent. Many guilty defendants, but virtually no innocent ones, would plead guilty without any explicit quid pro quo, out of remorse or because they were caught red-handed and have nothing to gain by denying guilt and have some hope of lenience if they admit it. That type of sorting, however, doesn't help in judging those cases for which judgment matters. At the end of the day, it's just as difficult as ever to distinguish the innocent defendants who plead not guilty from the guilty ones who do the same.

Plea *bargaining* might improve the separation to some extent, or it might not. Plea bargaining does induce a very high proportion of guilty defendants to plead guilty, no doubt far higher than would plead guilty without receiving concrete benefits in return. That's what plea bargaining is *for*. Plea bargaining also induces some innocent defendants to plead guilty. Whether it improves the ratio of guilty to innocent defendants at trial is anybody's guess. We can't observe the effect directly since we don't know the proportions of innocent defendants before and after plea bargaining. And we can't infer it without knowing things about which we simply have no information: Do innocent and guilty defendants differ in other relevant ways—for example, risk aversion?<sup>27</sup> How often do the parties to a criminal case misjudge the likely outcome at trial? How are these mistakes distributed? Are prosecutors systematically better or worse at making these predictions than defendants and their attorneys? Are defendants—or some of them—excessively optimistic? Excessively pessimistic? Are innocent defendants more likely to make mistakes than guilty ones? If so, in which direction? And so forth.

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27. See, e.g., Gene M. Grossman & Michael L. Katz, *Plea Bargaining and Social Welfare*, 73 AM. ECON. REV. 749, 757 (1983); Scott & Stuntz, *Plea Bargaining as Contract*, *supra* note 26, at 1943. For example, assume that innocent defendants are more risk averse than guilty ones, on the theory that criminals are uncommonly risk tolerant, and guilty defendants are criminals but innocent defendants are not. They offer no evidence for the proposition or the underlying assumptions. Even if their major premise is correct in some sense—if criminals *are* risk tolerant—innocent defendants are also often “criminals” who are guilty of other crimes. More important, assuming that risk tolerance is a stable trait (not established), it may be domain specific. Imagine the daredevil motorcyclist, or a professional poker player, who keeps his savings in treasury bonds, if not gold. Such a person might seek out risks he believes he can control (motorcycle stunts or poker games), but studiously avoid those he cannot (stock fluctuations, bacterial infections, the behavior of witnesses, and judges and juries). All of this, of course, is speculation.

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We can learn a bit, but not much, from data on actual false convictions. Since we have no general test for guilt or innocence other than the process of adjudication itself, what we know about false convictions is based entirely on exonerations: those rare cases in which an innocent defendant was convicted (by trial or guilty plea) and then later cleared of criminal liability on the basis of new evidence of innocence. These cases fall into two distinct groups: individual exonerations and mass exonerations.

Individual exonerations are the main work of innocence projects around the country. They involve huge investments of time and money, and the ones we know about consist almost exclusively of extremely serious criminal convictions. For 340 individual exonerations from 1989 through 2003,<sup>28</sup> the median sentence was life imprisonment, and 93% were sentenced to ten years in prison or more.<sup>29</sup> On average, the exonerated defendants spent ten years in custody before being cleared.<sup>30</sup> Rape and murder account for 96% of these individual exonerations,<sup>31</sup> but only 2% of felony convictions in the United States. Only twenty of the 340 exonerated defendants—6%—pled guilty, and in most respects these guilty-plea cases looked more like other individual exonerations than like felony plea bargains in general. All but one pled guilty to murder or rape; all had faced life imprisonment or the death penalty; the average sentence they received after pleading guilty was more than forty-six years in prison; only three were sentenced to less than ten years. By contrast, even in rape prosecutions, 81% of all defendants sentenced in state courts in 2000 pled guilty; only 2.5% were sentenced to life imprisonment; 10% received probation, and the median sentence for the rest was seven years.<sup>32</sup>

Three mass exonerations in the United States have received extensive attention in the last twelve years: the 2003 cases from Tulia, Texas, which we've already mentioned;<sup>33</sup> the Rampart scandal that was uncovered in Los Angeles in 1999 and 2000; and the Dallas "Sheetrock" scandal, which came to light in 2002.<sup>34</sup> In all of these scandals the police planted illegal drugs or guns on innocent defendants, or simply booked them as evidence and reported that they had been seized from the defendants. In all three sets of cases the great majority of the innocent defendants pled guilty and received comparatively modest sentences. In Tulia, for example, more than three-quarters of the exonerated defendants pled guilty; of these 40% received probation and the rest received prison terms averaging seven years.<sup>35</sup>

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28. Gross et al., *supra* note 1, at 523–24.

29. *Id.* at 535.

30. *Id.* at 524.

31. *Id.* at 529.

32. Gross, *supra* note 15, at 181.

33. See *supra* text accompanying notes 23–24.

34. Gross et al., *supra* note 1, at 533–35.

35. Gross, *supra* note 15, at 181.

To summarize, the individual exonerations we know about consist almost entirely of a subset of the most serious false convictions for rape and murder. Inevitably, they underrepresent guilty pleas because most available resources (of courts as well as innocence projects and other defense attorneys) are devoted to potentially innocent defendants who have been sentenced to death or very long prison terms, and such sentences are much less likely after a plea bargain than after a trial.<sup>36</sup> That means that the true proportion of guilty pleas among false convictions for rape and murder must be more than 6%. But by how much? And what about other crimes? We don't know. We do know that some innocent defendants who were sentenced to death or life imprisonment and later exonerated turned down attractive plea bargains. Some report that they could not stomach the idea of pleading guilty to a crime they did not commit; others say that until it actually happened they could not believe that they would ever really be convicted.<sup>37</sup>

Mass exonerations are more democratic. Once the scandal is exposed, all of the defendants who were framed are cleared, even those who pled guilty and got \$500 fines. The experience of Tulia illustrates that under some circumstances a majority of innocent defendants will take plea bargains, but that lesson may have limited reach. In Tulia, for example, the innocent defendants were all drawn from a small community and had all been framed by the same dishonest cop. After the first few convictions at trial, the remaining innocent defendants could see what was coming their way with unusual clarity.

All things considered, I think innocent defendants are less likely to accept plea bargains than guilty ones, other things equal. Their private knowledge that they are innocent may legitimately affect their assessment of the likely outcome at trial; they may be unduly optimistic out of a misplaced faith that the truth will out; and they may maintain their innocence against all odds as a matter of principle. But this is speculation. What we know is that some innocent defendants do plead guilty, in return for plea bargains, and that others do not and go to trial instead. Almost any general statement beyond that is guesswork.

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36. *Id.* at 180–81; Gross et al., *supra* note 1, at 535–37.

37. Smith, *supra* note 25, at 485–91, presents a poignant illustration of a defendant who had both of these reactions, and paid dearly for them. These effects illustrate the difficulty of any attempt to model pretrial sorting by guilt or innocence. For example, as Jennifer Reinganum points out, some innocent defendants might suffer more from a given punishment than they would if they were guilty because it is undeserved. Jennifer F. Reinganum, *Plea Bargaining and Prosecutorial Discretion*, 78 AM. ECON. REV. 713, 724 (1988). Reinganum assumes that the additional disutility (if any) is achieved by multiplying the punishment received by some factor greater than one, in which case it would not greatly affect the comparison between a plea bargain and a greater punishment after trial, or possibly would increase the attractiveness of the plea bargain by “scaling up” the proportional difference in the disutility of punishment after trial. But what if this “injustice” penalty is at least in part a constant, fixed quantity that is added to other consequences of the conviction? If so, it could dwarf other considerations and prevent guilty pleas by some innocent defendants. More important, the sense of loss and humiliation caused by an *unjust punishment* may be only one part of the unique costs suffered by innocent defendants who are convicted. The suffering caused by a *false admission* of guilt may be as great, or greater. If so—and that is how some exonerated defendants talk about it after the fact—the only possible effect would be to depress guilty pleas by the innocent.

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We also know that many *guilty* defendants reject plea offers and go to trial. That has to be true since most defendants who go to trial turned down plea bargains, and the great majority of them are convicted. Unless a majority of criminal convictions at trial are erroneous—which nobody believes—most defendants who turn down plea bargains must be guilty. The net effect is that after plea bargaining, as before, most defendants who go to trial are guilty—but some are innocent, and we can't tell which and don't know how many.

The reason that judicial torture didn't separate the innocent from the guilty is that both had the same incentives: to avoid conviction, punishment, and the excruciating pain of interrogation. Innocent defendants may have been more strongly motivated to resist torture and avoid confession, but at best that meant that a larger minority managed to withstand agonizing physical coercion.

In the case of plea bargaining, the incentives of innocent and guilty defendants are also identical, but the process is different. Refusing to admit guilt does not lead directly to punishment, but to continued prosecution. The ultimate consequences depend on the prosecutor's choice to go to trial or to dismiss; and if the case does go to trial, on the jury's verdict. In that context, refusal to plead guilty is a signal that could make the system more accurate, but that very fact creates a feedback loop that alters incentives and reduces the value of the signal. Innocent defendants may be more likely than guilty ones to reject plea bargaining, for one reason or another—but only so long as that sort of rejection is not seen as a clear signal of innocence. If innocent defendants can say or do anything that prosecutors and judges will rely on as a clear indicator of innocence—talk to the police, represent themselves, go to mass, refuse to plea bargain—guilty defendants will say or do it too.<sup>38</sup>

Of course, the pretrial process as a whole separates many innocent defendants from the guilty ones. Most prosecutors will dismiss charges if they believe a defendant is innocent, and the defendant can contribute to this process by presenting evidence that might convince them.<sup>39</sup> But any statement that is entirely within the defendant's

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38. See Grossman & Katz, *supra* note 27, where the authors construct a model that leads them to conclude, given severe and unrealistic assumptions, that plea bargaining might generate “perfect separation” between guilty defendants (who plead guilty) and innocent ones (who don't). They describe this outcome as welfare enhancing, but fail to consider the implications of this unrealistic finding. On the one hand, if prosecutors don't realize what's going on they will press ahead and take all or most innocent defendants to trial, where most of them will be falsely convicted and receive harsher punishments than they would have if they pled guilty. On the other hand, if prosecutors do realize that all defendants who turn down plea bargains are innocent they will (presumably) dismiss the charges against them; but once that pattern becomes established guilty defendants will also plead not guilty and reject all plea offers. In other words, even if this sort of separation could be accomplished in the first instance, it could not be used to free the innocent and convict the guilty without destroying the process that created the separation in the first place.

39. See, e.g., Lynch, *supra* note 26, at 2126–27; see also Samuel R. Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. LEGAL STUD. 395, 437–40 (1987) (describing occasions when innocent defendants might find it advantageous to present evidence and prove their innocence to prosecutors rather than await a trial).

control is a signal a guilty defendant can mimic—and will mimic, if it creates a sufficiently strong appearance of innocence.<sup>40</sup>

To summarize, a pretrial procedure that changes the defendants' options might reduce false convictions if it satisfies two criteria: (1) *Does it offer a choice that generates different incentives and different behavior for innocent and guilty defendants?* This condition is necessary—we have to improve the separation of those who are innocent from those who are not—but it is not sufficient. Improved separation between guilty and innocent defendants at this preliminary stage will only reduce the number of false convictions if it's accompanied by improved detection of innocence in the proceedings that follow. And contested proceedings must follow because no choice that's within the defendants' control can ever become a reliable proxy for innocence. So an effective reform must also meet a second test: (2) *Does it reduce the probability of conviction of innocent defendants at trial?*

In the next section, I describe a proposal that just might satisfy these two criteria.

#### IV. A NEW BARGAIN: WAIVING PROCEDURAL RIGHTS IN POLICE INVESTIGATIONS AND TRIALS IN RETURN FOR MORE OPEN POST-CONVICTION REVIEW

##### A. *The Context*

It's only a slight exaggeration to say that fact finding in American courts is a one-act play entitled *Trial*.<sup>41</sup> A losing party may appeal, of course, but appeal only provides a review *of the record of the trial*, and that review is for procedural error rather than factual accuracy.<sup>42</sup> Appellate judges do occasionally express concern about the possibility of factual error at trial (or, more often, say that they are unconcerned because they see no such danger), but they have no mechanism to obtain evidence that was not presented at trial and no authority to revisit factual findings. Not surprisingly, few of the exonerations we know about occur in the course of review on appeal.<sup>43</sup>

After appeal, the process is even more forbidding. There are procedures for reopening convictions in the face of new evidence, but they are disfavored. The defendant has no right to reconsideration; he has to convince the courts that there is a high probability of error. He has to do that without the power to require witnesses

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40. See Scott & Stuntz, *Plea Bargaining as Contract*, *supra* note 26, at 1951.

41. *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977) (“Society’s resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens.”); cf. MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* 51–53, 62 (1986) (discussing the “day-in-court” model of law).

42. See generally Anna-Rose Mathieson & Samuel R. Gross, *Review for Error*, 2 *LAW PROBABILITY AND RISK* 259 (2004).

43. See Gross et al., *supra* note 1, at 524 (noting that the average time spent in prison by a wrongfully convicted individual before being released is about ten years—well beyond the usual time span of direct review).

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to talk to him or to produce evidence, without access to an attorney (unless he happens to be rich or can obtain volunteer help), and in a legal culture in which reconsidering trial verdicts is heavily disfavored.<sup>44</sup> It happens, of course. These are the exonerations we hear about in the news. But they are very uncommon—perhaps fifty a year, at present, in a country with over a million felony convictions annually, overwhelmingly in murder and rape cases, on average about ten years after conviction.<sup>45</sup>

Our process of post-conviction review is a major reason why rape and murder convictions at trial dominate the set of cases that end in exoneration. It is extremely difficult to get American courts or executive officers to seriously consider new evidence that a convicted defendant is innocent, let alone to actually exonerate him. All actors in the process, from governors to innocence projects to the media to the courts themselves, concentrate their time and attention on those cases with the most extreme outcomes: death sentences, life imprisonment, and other extreme sentences. Innocent defendants who plea bargain, even in rape and murder prosecutions, are far less likely to be exonerated. Their sentences are on average much lighter than those imposed at trial: that's what they bargain for. And they have a harder procedural row to hoe. One of the rights they waive by pleading guilty is the right to a direct appeal; and many statutes and procedural rules that deal with alternative modes of review—from state habeas corpus to post-conviction DNA testing—limit or foreclose access by defendants who pled guilty.<sup>46</sup> And innocent defendants who plead guilty are handicapped by a common assumption on all sides, held by potential allies and state officers alike, that those who plead guilty are guilty.

As I mentioned at the beginning, the pretrial choice that American criminal defendants now face is stark: plead guilty and accept the conviction and punishment the prosecutor offers, or go to trial and risk far worse. Almost all defendants have overwhelming incentives to plead guilty, but those incentives are similar for defendants who are guilty and for those who are not. For both, the main effect of plea bargaining is to make conviction cheaper and more certain but less onerous; a significant side effect is that the limited prospects of post-conviction review become even more minimal.

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44. The case of *People v. Cole*, 765 N.Y.S.2d 477 (Sup. Ct. Kings County 2003), is an unusually frank example: “this court finds that the defendant has shown that he is probably innocent (more likely than not approximating 55%)” but, because that showing is not sufficient to satisfy the legal standard, “[t]he motion to vacate the conviction is denied.” *Id.* at 487–88; *see also* *Friedman v. Rehal*, 618 F.3d 142, 159–61 (2d Cir. 2010) (“The record here suggests ‘a reasonable likelihood’ that Jesse Friedman was wrongfully convicted. . . . [The] court [is] faced with a record that raises serious issues as to the guilt of the defendant and the means by which his *supra* conviction was procured, yet [is] unable to grant relief . . .”).

45. *See* Gross et al., *supra* note 1, at 524, 527–29.

46. *See, e.g.*, ARIZ. REV. STAT. § 13-4240(C)(1)(a) (LexisNexis 2011) (referring to the petitioner’s “verdict”); 725 ILL. COMP. STAT. ANN. 5/116-3(b)(1) (LexisNexis 2011) (requiring the defendant to demonstrate that “identity was the issue in the trial which resulted in his or her conviction”); MICH. COMP. LAWS SERV. § 770.16(4)(b)(iii) (LexisNexis 2011) (requiring the defendant to present evidence that, *inter alia*, “identity of the defendant as the perpetrator of the crime was at issue during his or her trial”).

*B. The Trade*

Consider a new pretrial option that we could offer to defendants alongside the common choice of plea bargain or jury trial. We'll call it an Investigative Trial. Under this procedure, a criminal defendant would waive major procedural rights at trial, but *not* plead guilty, in return for procedural advantages on post-conviction review. If properly structured, this alternative might be more attractive to innocent defendants, who are most likely to benefit from full disclosure and open consideration of evidence both before and after conviction, and less attractive to guilty defendants, who have more to gain from procedural rigor before trial and at trial and little to gain from open presentation of evidence from all sources. If so, this new choice might separate innocent defendants from guilty defendants more effectively than our current pretrial procedure. That would reduce the number of innocent defendants who plead guilty; help focus official attention on cases of possible innocence, both before conviction and after; and provide better and cheaper evidence in those cases of possible innocence.

What might this new tradeoff look like? There are, of course, two sides to any trade: (1) *What would the defendant gain?* Here's a rough cut. A defendant who chooses an investigative trial and is then convicted would have two new rights: (i) the right to reopen the question of his guilt if he presents substantial new evidence that casts doubt on his conviction and (ii) the right to a retrial if, at that review proceeding, a *de novo* assessment of all the evidence leads to the conclusion that there is a substantial doubt that he is guilty.

(2) *What would the defendant give up in return?* Again, these are preliminary thoughts. Two obvious rights to waive are (i) the Fifth Amendment privilege against self-incrimination and (ii) the right to exclude evidence that was obtained in violation of the Fourth Amendment prohibition of warrantless and unreasonable searches. Both of these rights limit the accuracy of fact finding in favor of other interests. Next in line is (iii) the right to a jury trial. There is no strong reason to believe that judges are in general better (or worse) as fact finders than juries, or specifically that judges are more likely (or less likely) than juries to detect false accusations. But jury trials are famously time consuming, expensive, and inflexible. That's a major reason why we have come to depend on plea bargaining. We can more easily afford a procedure that is likely to increase the frequency of trials if the trial process it uses is correspondingly less costly than our current practice, and on that score bench trials have a big advantage.

If it works, this option would look quite different to guilty and to innocent defendants. Innocent defendants have comparatively little to lose by giving up the privilege against self-incrimination: if they tell the truth and are believed, they will be released. Many innocent defendants are anxious to tell the authorities whatever they know. Needless to say, innocent defendants are sometimes harmed by talking to the police. About 15% of the false felony convictions we know about are based on false confessions,<sup>47</sup> and many other false confessions do not ultimately produce

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47. Gross et al., *supra* note 1, at 544.



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convictions.<sup>48</sup> I do not propose that defendants who choose this procedure subject themselves to the type of police-dominated interrogations that may produce involuntary and sometimes untrue confessions. Rather, I mean that a defendant who chooses an investigative trial will be required to answer pretrial questions from state officials in the presence of his attorney, possibly under oath, and will be required to testify at trial. This may be a benign process for the innocent, but almost all guilty defendants would have a lot to lose by submitting to formal pretrial questioning, especially under oath, and in most cases even more to lose by testifying at trial.

Similarly, as far as we know, innocent defendants are rarely convicted on the basis of illegally seized evidence (although it's easy to imagine how that could happen). But many guilty defendants can only hope that essential evidence against them will be suppressed under the Fourth Amendment.

On the other side of the equation, innocent defendants have a lot to gain from open-minded reconsideration of their case in light of new evidence, if they are convicted. Since they are in fact innocent, any new evidence is likely to point in that direction. That is the lasting hope of so many of the wrongly convicted, that someday the truth will out. This procedure would make that prospect more likely. It would reduce the risk of trial for innocent defendants and make plea bargains comparatively less attractive. But open consideration of new evidence after conviction is not likely to help the guilty, especially since the guilty defendant must waive the privilege against self-incrimination.

### *C. Open Questions*

This sketchy proposal leaves out many issues that would have to be addressed if anyone actually wanted to implement it. I'll mention several, but there are no doubt others as well.

(1) *Sentencing*. One of the central elements of the system of plea bargaining is the "trial penalty": for the same conviction, punishment is more severe after trial, typically much more severe, than after a guilty plea. Which presents a question: What should the sentence be after an investigative trial?

There's an easy procedural answer: there's no agreed bargain, so the judge decides. But that just postpones the question. We still need to know *how* judges should sentence in that situation in order to make the system work. On the one hand, if the penalty after conviction at an investigative trial is as light as the going punishment for a plea bargain to the same charge, that will reduce the cost of choosing this option and may encourage more guilty defendants to choose it. (It will not eliminate the cost of foregoing plea bargaining to the extent that the bargain is reflected in reduced charges rather than an agreed sentence.) On the other hand, if the penalty after conviction is as severe as the penalty for a similar conviction at an ordinary trial, that may discourage many innocent defendants and drive them to plea bargains.

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48. Steven Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 951 (2004). See generally RICHARD A. LEO, *POLICE INTERROGATION AND AMERICAN JUSTICE* (2008).

My instinct is that the penalties after conviction under this new procedure should be intermediate, somewhere between what defendants now get in plea bargains and what they are now punished with if convicted at trial. This is an obvious compromise. Among other advantages, it reflects the fact this new procedure is likely to cost more than plea bargains but less than jury trials. But the question requires more thought, especially since the distance between the plea bargains and trial sentences may be huge, and a sentence that falls “between” could be anything from a year in prison to twenty years.

(2) *Guilty pleas*. Could a defendant who chooses an investigative trial change his mind and plead guilty? The answer has to be yes. A criminal defendant does not have a constitutional right to plead guilty,<sup>49</sup> but as a practical matter, why prevent it? The real question is not whether the defendant should be allowed to plead guilty but what the consequences of such a plea would be. Would he get a reduced sentence, compared to whatever sentence he would get if convicted at an investigative trial? I think the answer should be no. Otherwise this procedure could turn into a step on the road to plea bargaining, which would undercut its value at separating the guilty from the innocent. Would a defendant who chooses an investigative trial and then pleads guilty get the benefit of the liberal reconsideration procedures that this process provides? Again, I think not. In that context, a guilty plea seems to be a voluntary choice that may be taken at face value as strong evidence of guilt; and in any event, a guilty plea cuts short the process of investigation and adjudication that this procedure is based on. But that answer assumes sentencing practices under which pleading guilty after choosing the investigative option truly is a voluntary choice. I can’t anticipate all the ways that requirement might break down.

(3) *Other possible waivers*. Are there other procedural rights that a defendant might be required to waive as a condition for this new procedure? The Sixth Amendment right to counsel should be off the table; it would be unfair, and no one wants to try to run trials without defense lawyers. What about the prohibition against double jeopardy? Should the government as well as the defendant have the option to reopen a case if new evidence makes its case stronger than it was the first time around? I would say no. The prohibition against double jeopardy is designed primarily to protect defendants against the heavy costs of the *process* of repeated prosecutions.<sup>50</sup> Given the extreme asymmetry between the parties in resources and vulnerability, losing that protection seems to be too high a cost and may pose a danger of abuse. But perhaps an argument could be made that in some limited respects this prohibition could be modified.

(4) *Discovery*. This one is simple. If this trial procedure is used it should be accompanied by open discovery on both sides. The main point is an open and open-

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49. *E.g.*, *Santobello v. New York*, 404 U.S. 257, 262 (1971).

50. *See Green v. United States*, 355 U.S. 184, 187–88 (1957) (“The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . .”).

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minded inquiry into the facts; that's why the defendant is required to waive the privilege against self-incrimination. In that context, it's impossible to justify withholding government information from the defendant. And there's nothing novel about wide-ranging discovery in criminal cases; it's the rule in many American jurisdictions.<sup>51</sup> Of course *open* discovery does not mean *unlimited* discovery; some confidential information has to be protected, and the burden of the process should be minimized. How discovery works in practice under this procedure will depend on how trials are structured, which is the next issue in order.

(5) *The structure of trials.* One practical constraint on jury trials is that they must be run in a continuous and if possible compact time sequence. A modern jury is a single-case group of lay adjudicators who are drafted temporarily into public service. It would be impractical to try to keep a jury intact and reconvene the trial periodically with long breaks over a period of weeks or months or years. But a judge sitting without a jury could conduct an investigative trial as a series of discreet hearings. This temporal flexibility has at least two important procedural consequences.

(i) It undermines a major justification for the elaborate common law exclusionary rules of evidence (which in any event are generally viewed as devices to prevent misuse of evidence by *juries*, and applied loosely, if at all, in bench trials).<sup>52</sup> As Mirjan Damaška points out, one reason that common law rules so often *exclude* potentially unreliable evidence is that the opposition may have no real opportunity to obtain other evidence to *refute* it in the middle of a nonstop trial.<sup>53</sup> When a trial is conducted as a series of hearings, the balance shifts. It makes more sense to hear the controversial evidence and then give the opposing party time to do what it can to explain it or contradict it.

(ii) It reduces the distinction between trial and discovery. The two main justifications for pretrial discovery as a separate system for producing information are that it facilitates pretrial settlement and helps the parties prepare for trial.<sup>54</sup> But an investigative trial is intended as an *alternative* to pretrial settlement by plea bargaining; and advance notice of the opposition's evidence is less critical when a party has the

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51. *E.g.*, FLA. R. CRIM. P. 3.220(b)(A) (a criminal defendant who elects statutory discovery has the right to obtain, among other things, "a list of the names and addresses of all persons known to the prosecutor to have information that may be relevant to any offense charged or any defense thereto, or to any similar fact evidence to be presented at trial [i.e., not limited to prospective prosecution witnesses]," all written/recorded statements "of any kind or manner" by all individuals known to have relevant information, "all police and investigative reports of any kind prepared for or in connection with the case," access to all relevant tangible objects, and the right to depose potential trial witnesses. The defendant also has reciprocal obligations to the prosecution); MICH. CT. R. 6.201 (discovery provisions generally similar to those in Florida but without depositions); *cf.* STANDARDS FOR CRIMINAL JUSTICE §§ 11-2.1-2.2.

52. *See* McCORMICK ON EVIDENCE § 60 (Kenneth S. Broun ed., 6th ed. 2006).

53. MIRJAN R. DAMAŠKA, EVIDENCE LAW ADRIFT 65-68 (1997).

54. *See, e.g.*, Patrick E. Higginbotham, *Purpose and Policy Underlying Civil Discovery*, in 6-26 MOORE'S FEDERAL PRACTICE—CIVIL § 26.02 (Matthew Bender & Co., Inc. 2011) (citations omitted) ("The general purpose of discovery is to remove surprise from trial preparation so that parties may obtain the evidence necessary to evaluate and resolve their dispute.").

time to address and respond to it over the course of an episodic trial. As a result there may be little need for depositions in advance of trial testimony.<sup>55</sup>

Actual practice under this system could take many forms. Here's an obvious example: the first step would be a status conference at which the parties review their claims and plans and the judge sets a preliminary timetable. Next, an initial hearing might include testimony from the central witnesses: the defendant, the investigating officer (if any), and the victim, all of whom could later be recalled to give additional evidence. Following that, additional hearings may be scheduled by the judge to address issues that are raised by the first round of witnesses, and others if necessary to deal with issues raised at the second round, and so forth.

Under this format the process can get underway with little precommitment of resources on the prosecution's side. If a defendant insists he is innocent and chooses an investigative trial, the prosecutor could postpone extensive trial preparation—or for that matter, postpone forming her own initial opinion on the defendant's guilt or innocence—until after she has heard the victim and examined the defendant in court.

(6) *Post-conviction review.* The trade-off I've described provides that a defendant who is convicted at an investigative trial would have the right to *reopen* the case if he presents *substantial new evidence* of innocence; and that, once reopened, he would have the right to a new trial if that new evidence casts *substantial doubt* on his guilt. These terms are not self-defining. How much new evidence of innocence is substantial? What opportunities and obligations would the parties have at a reopened proceeding? What sort of doubt is substantial enough to require a new trial? I have no answers, except in the most general form: if the barriers to reconsideration and retrial are set too high, this option will not be used. For it to work, prosecutors and judges would have to take it seriously as a method of determining disputed facts, which would require a change in legal culture—the last and most difficult issue, which I address next.

(7) *Legal culture and personnel: the role of the judge.* An American trial is not a factual investigation. The parties rarely hope or expect to learn any important facts at trial; in many cases, they hear nothing new at all. A typical common law trial is an occasion for each side to present evidence that has already been assembled, in an attempt to persuade a passive tribunal. An investigative trial could only work if the participants take it seriously as a new and different method for determining guilt or innocence. If most prosecutors see this option as an obstacle to convicting of the guilty (as well they might), or if most defense lawyers see it as a slow guilty plea without the benefit of a bargain (and some certainly will), it will be a nonstarter. That may be where it ends. Legal practitioners tend to be conservative. They are suspicious of newfangled notions that might upset familiar practices or require more work or a new sort of work.

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55. On the other hand, there is no reason under this or any system to delay access to physical evidence or the exchange of documentary evidence.

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The biggest difficulty will be the role of the judge. Prosecutors and criminal defenders would have to accept the new system and learn to operate within it, but their basic roles would remain the same. Judges would have to take on an entirely new task—leading judicial investigations—and do it well. Unless the judges who conduct investigative trials are seen as effective and open-minded, defendants won't choose this option and prosecutors won't cooperate. It will wither on the vine. On the other hand, if both sides learn to trust the judges, this procedure could take root. But that's a big If.

Our legal culture does not include the role of an investigative judge. American judges are overwhelmingly ex-litigators with no special training for the bench. They believe in attorney-dominated trials because that's the system they learned and practiced as lawyers. The process I have described has some elements in common with European civil law trials, a legal system in which trials are run by judges who are trained in that role and spend their entire careers within a judicial hierarchy.<sup>56</sup> It would not be easy to develop a similar profession in the United States. Fortunately, for this purpose that shouldn't be necessary. A judge conducting an investigative trial would not replace the usual American system of adversarial fact finding, but manage it. The parties would still do the investigation and would still be primarily responsible for presenting the evidence, but the judge would take a more active role in raising and defining issues; she might also participate in the examination of witnesses, and perhaps occasionally call witnesses of her own. This would not be a revolutionary transformation of the role of the judge—but it would be a major change.

### *D. How It Might Run*

There's no way to predict how this system might work in practice if it actually took hold, but I will hazard a few limited predictions.

First, investigative trials would not be a common choice for defendants. The great majority of criminal defendants have no viable factual defense. That's the main structural reason why so many plead guilty; it will not change. Even among those who do have potentially defensible cases, I expect that few would agree to waive the right to a jury trial, and especially not the privilege against self-incrimination, in return for more open reconsideration of their innocence after conviction. Few guilty criminal defendants are in a position to improve their prospects by testifying at trial, especially not if the prosecution has time to investigate their claims before the end of the trial. The bigger danger is the opposite: that defense attorneys will convince *innocent* defendants to avoid investigative trials because they fear the consequences of waiving these rights.

Second, if the process works, most investigative trials will be resolved without verdicts. Investigative trials will only be used if both sides come to see them as serious

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56. See, e.g., John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 848–51 (1985); DAMAŠKA, *supra* note 41, at 52, 116; Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CALIF. L. REV. 539, 564–66 (1990).

attempts to determine the facts of disputed cases. In that context, I expect that most disputes will wash out before or during trial; charges against innocent defendants will be dismissed, and guilty defendants will give up and plead guilty. Of course some guilty defendants will also get off, some innocent ones may plead guilty even after invoking this process, and some innocent defendants will be convicted. It won't be perfect. If it works, however, judicially supervised investigations will lead to better and more accurate imperfect results, before trial and at trial.

Third, the most important impact of this procedure might be its second- and third-level effects, which are impossible to predict. For example, I can imagine that if investigative trials become institutionalized they might drive out other criminal trials: if the participants and the public come to believe that innocent defendants always choose that procedure, a defendant who wants an old-fashioned jury trial might as well plead guilty since no one will believe he's innocent. If that happens, defense attorneys and civil libertarians may oppose this innovation on the ground that it undermines constitutional protections that are designed to limit government power and preserve personal privacy and autonomy rather than produce accurate outcomes. Some may oppose it on those grounds even if ordinary criminal jury trials continue at about the rate we now see.

On the other hand, if investigative trials become the dominant mode, would that necessarily be a bad thing? It may mean that criminal trials become more common, that the main shift is from plea bargains to investigative trials. Resources permitting, that ought to be an advantage both for civil liberties—which are routinely compromised or ignored in the mass of plea bargains—and for factual scrutiny of the government's evidence. There's no way to predict how this process might play out without knowing unknowable facts, including the proportion and characteristics of criminal cases with innocent defendants and the nature of the practice that will develop if it is widely used.

Last, investigative trials may be hard to sell to criminal defendants, at least initially, because a major element of the bargain is distant and conditional. The most specific advantage that a defendant would gain by choosing this option and waiving major constitutional rights is the possibility of easier and more open reconsideration of a conviction—*if* he is convicted and *if* he later obtains new evidence of innocence. That could be a highly valuable opportunity as a general proposition as well as in each individual case. But only time will tell. It will take years after the first investigative trials to know how the post-conviction review process actually works, and years for innocent defendants to see examples of other innocent defendants who have been exonerated under this procedure. The initial selling point will have to be the process of trial-court adjudication. If investigative trials actually are—and are seen to be—open-minded judge-led inquiries into the facts of contested prosecutions, they might catch on and they might reduce the frequency of convictions of innocents.

**V. CONCLUSION**

I propose a novel solution to an old problem: allow criminal defendants who maintain their innocence to waive important constitutional rights at trial (in particular the right to a jury trial and the privilege against self-incrimination) in return for more open reconsideration of any conviction returned against the defendant if new evidence of innocence surfaces months or years after trial. If it works, this procedure might do a better job than the existing pretrial options at separating the innocent from the guilty; it might lead to more accurate fact finding at trial in the cases that follow this path; and it might reduce the frequency of convictions of innocent defendants.

Do not be alarmed. This is a thought experiment. I don't really believe that solutions to intractable legal problems spring full blown from the head of Zeus, or any other head. Big reforms are costly and chancy. It's generally impossible to know in advance how well they will work, or what unintended consequences they may have—and even if clearly superior, the cost of conversion may be prohibitive. The main purpose of thinking through an alternative procedural universe is to try to understand the one we live in, which might lead to something useful. For that purpose, this proposal meets two threshold requirements: it's coherent, and it's not obviously worse than the system we now use. In fact, it has clear advantages, and it just might work.