

Class v. United States: Bargained Justice and a System of Efficiencies

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Introduction

In 2018, the United States Supreme Court ruled in *Class v. United States* that a defendant does not inherently waive his or her right to appeal constitutional claims simply by entering an unconditional plea of guilty. Rather, the Court determined such waivers must be express.¹ While the issue decided in *Class* was relatively straightforward, the case stands more importantly as another pillar in the growing body of modern plea-bargaining jurisprudence. In particular, *Class* is of note because the facts of the case and the discussions surrounding the appeal raise fundamental questions regarding the operation of the plea-bargaining machine, the psychology of defendant decisionmaking, and the voluntariness of plea bargaining given our growing understanding of the phenomenon of factually innocent defendants falsely pleading guilty.

This article begins with an examination of *Class*, including the incentives that led the defendant to plead guilty despite his belief that the statute of conviction infringed his constitutional rights. The article then examines the shadowy rise of plea bargaining during the 19th and 20th centuries and the recent focus on plea bargaining by the Supreme Court since its 2010 decision in *Padilla v. Kentucky*.²

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¹ See *Class v. United States*, 138 S. Ct. 798, 800 (2018). Factual description and case background is also taken from Petition for Writ of Certiorari at 5, *Class v. United States*, 138 S. Ct. 798 (2018) (No. 16-424) and Brief for the United States at 3, *Class v. United States*, 138 S. Ct. 798 (2018) (No. 16-424).

² 559 U.S. 356.

This analysis of recent plea-bargaining case law will illustrate that fundamental issues are beginning to rise to the surface regarding defendant decisionmaking and voluntariness in the plea context, including the reliability of admissions of guilt in return for plea bargains and the phenomenon of false pleas. The article, therefore, next examines recent psychological research on these topics, including research demonstrating that factually innocent individuals will falsely confess in return for the benefits of a bargain and research finding that pretrial detention is a driver of false pleas. Finally, the piece considers the ramifications of growing evidence that plea bargaining has a voluntariness and reliability problem. Along with considering ways to address these concerns, the article proposes that these revelations will inevitably lead us to face a broader question. What does it mean if we have adopted a criminal justice system that embraces efficiency at the expense of accuracy?

The Class Saga

In 2013, Rodney Class was indicted by a federal grand jury in Washington, D.C., for violating 40 U.S.C. § 5104(e)(1), which makes it illegal to “carry . . . on the Grounds or in any of the Capitol Buildings a firearm.” The charge stemmed from events that began in May of that year when Class parked his jeep in an employee parking lot on the grounds of Capitol Hill. After exiting his vehicle, Class proceeded to various congressional office buildings. While Class was inside, a U.S. Capitol police officer observed that Class’s vehicle did not have a parking permit. Upon closer inspection, the officer saw a large blade and a gun holster.

Several hours later, Class returned to his vehicle and encountered the police. Although he refused to consent to a search of the jeep, he did admit that there were weapons inside. Police informed Class that it was illegal to possess weapons on the grounds of the Capitol. According to Class, he had been unaware that he had parked in such an area or that weapons were prohibited there. Moreover, there were no signs indicating that the parking lot was within the grounds of the Capitol or that weapons were prohibited in that location. Class was arrested, and police obtained a search warrant for the vehicle. During their search, officers discovered weapons and ammunition, including a 9mm Ruger pistol, .44 caliber Taurus pistol, and .44 caliber Henry rifle, all of which lawfully belonged to Class.

During a later interrogation by the Federal Bureau of Investigation, Class admitted that he traveled with weapons to assist him in “enforcing” federal criminal laws against federal judges as a “constitutional bounty hunter.”

After Class’s indictment, he waived his right to counsel and represented himself during subsequent proceedings. He filed several pro se motions in an attempt to have the case against him dismissed. Those motions raised, among other things, issues related to the Second Amendment and fair notice. The district court examined the claims in light of the Supreme Court decision in *District of Columbia v. Heller*³ and concluded that the applicable statute was valid. Class’s case was then set for trial.

When the date of Class’s trial arrived, he failed to appear after having provided the court with a letter stating that he would no longer participate in the case. As would be expected, the court issued a bench warrant, and Class was later arrested. Facing the possibility of additional charges for failing to appear under 18 U.S.C. § 3146(a)(1), which carries a possible sentence of up to five years in prison, Class took the road so frequently traveled by defendants today and pleaded guilty in return for the benefits of a plea bargain. In return for giving up his constitutional right to a jury trial, the government agreed that it would not charge Class with his failure to appear. Further, the government agreed that it would recommend a sentence at the low end of the applicable federal sentencing range of 0 to 6 months imprisonment along with a fine of \$500 to \$5,000 for the weapons charge.

Class was certainly not alone in pleading guilty in federal court that year. In 2014, the year in which he pleaded guilty, 97.1 percent of convictions in the federal system were obtained through guilty pleas.⁴ Further, it is likely that around 75 percent of those pleading guilty did so in return for a promise of leniency or in response to a threat

³ 554 U.S. 570 (2008).

⁴ See U.S. Sentencing Commission, 2014 Sourcebook of Federal Sentencing Statistics, Figure C, <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/FigureC.pdf>. In the last reported year from the Federal Sentencing Commission, 2017, 97.2 percent of criminal convictions in the federal system resulted from a plea of guilty. See U.S. Sentencing Commission, 2017 Sourcebook of Federal Sentencing Statistics, Figure C, <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/FigureC.pdf>.

of further punishment.⁵ For Class, the offer of leniency in return for waiving his right to a jury trial was significant. The statutory maximum term of imprisonment for the weapons charge was five years in prison.⁶ For failure to appear, it was an additional five years in prison, which, according to the statute, “shall be consecutive to the sentence of imprisonment for any other offense.”⁷ It is hard to imagine that anyone—whether guilty or innocent, whether believing the statute to be valid or not—would reject an offer to go home immediately when the alternative was to risk up to 10 years in prison. As promised, Class received a remarkably light sentence when compared with the statutory maximum. He was sentenced to time served, which was 24 days, and 12 months of supervised release.⁸

The issue that eventually brought this case to the Supreme Court involved questions about what rights were waived as a result of Class accepting the government’s proposed plea agreement. According to Justice Stephen Breyer’s majority opinion, Class’s written plea agreement contained the following express waivers:

- (1) [A]ll defenses based upon the statute of limitations;
- (2) several specified trial rights;
- (3) the right to appeal a sentence at or below the judicially determined, maximum sentencing guideline range;
- (4) most collateral attacks on the conviction and sentence; and
- (5) various rights to request or receive information concerning the investigation and prosecution of his criminal case.⁹

At the same time, the plea agreement contained express areas in which Class could challenge issues on appeal, including claims based upon “(1) newly discovered evidence; (2) ineffective assistance of counsel; and (3) certain statutes providing for sentence

⁵ According to the assistant solicitor general who argued for the government in *Class*, approximately 25 percent of pleas in the federal system are so-called “open pleas” that do not involve any conditions or promises from the government in exchange for the defendant’s agreement to plead guilty. Accordingly, the remaining 75 percent of plea agreements are in fact plea bargains featuring some promise of favorable treatment by the government. See Transcript of Oral Arg. at 61–62, *Class v. United States*, 138 S. Ct. 798 (2018) (No. 16-424).

⁶ See 40 U.S.C. § 5109(a) (2018).

⁷ 18 U.S.C.A. § 3146(b)(2) (West 2018).

⁸ See *Class*, 138 S. Ct. at 802.

⁹ *Id.* at 802.

reductions.”¹⁰ Despite Class’s having raised the issue of the constitutionality of the weapons statute during earlier proceedings, the plea agreement said nothing about whether his right to appeal based on this argument was waived.

During the court’s Rule 11 plea hearing, a proceeding during which defendants enter their plea of guilty and are advised, among other things, of the various rights they are waiving as a result, there was also no specific mention of whether Class had waived this right. At one point, the court discussed the issue of appeal, but the discussion did not specifically address the Second Amendment challenges the defendant had previously brought or constitutional challenges more generally.

THE COURT: All right. Now, by pleading guilty, you would be generally giving up your rights to appeal. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Now, there are exceptions to that. You can appeal a conviction after a guilty plea if you believe that your guilty plea was somehow unlawful or involuntary or if there is some other fundamental defect in these guilty-plea proceedings. You may also have a right to appeal your sentence if you think the sentence is illegal. Do you understand those things?

THE DEFENDANT: Yeah. Pretty much.¹¹

Although the government would later argue that most appellate rights were waived once the plea was entered and accepted by the district court, Class appears not to have understood or agreed with that assessment as he appealed his conviction to the U.S. Court of Appeals for the D.C. Circuit just a few days later.

The appeal centered on the issues raised by Class unsuccessfully in the lower court, namely, whether the statute of indictment violated the Second Amendment and whether the lack of notice afforded that weapons were prohibited in the lot in which he parked violated the Due Process Clause. Rather than address the substantive challenges to the statute, however, the appeals court determined that those issues could not be raised because Class had waived his right to appeal on those

¹⁰ *Id.*

¹¹ Joint Appendix at 63, *Class v. United States*, 138 S. Ct. 798 (2018) (No. 16-424).

grounds by pleading guilty. “It is well-established law,” the appellate court wrote, “that [u]nconditional guilty pleas that are knowing and intelligent . . . waive the pleading defendant[s] claims of error on appeal, even constitutional claims.”¹² Despite the fact that the plea agreement in the case contained no express waiver of the right to appeal on constitutional grounds, the appellate court nonetheless concluded that Class should have invoked Rule 11’s provisions for conditional pleas if he wished to preserve the opportunity to challenge the constitutionality of the statute of conviction after pleading guilty.¹³ In essence, the court determined that an inherent result of Class’s decision to plead guilty was the waiver of his ability to raise on appeal his constitutional challenges to the prosecution. Class appealed that holding to the Supreme Court.

In a 6-3 decision handed down on February 21, 2018, the Supreme Court concluded that a guilty plea by itself does not bar a federal criminal defendant from challenging the constitutionality of the statute of conviction on direct appeal, and therefore “Class did not relinquish his right to appeal the District Court’s constitutional determinations simply by pleading guilty.”¹⁴

Justice Stephen Breyer wrote for the majority that the issue in *Class* had been previously raised in the 1968 case of *Haynes v. United States*, in which the Court concluded that a defendant’s “plea of guilty . . . did not waive his previous [constitutional] claim.”¹⁵ The rationale for the holding, as explained by the Court particularly by reference to *Blackledge v. Perry*¹⁶ and *Menna v. New York*,¹⁷ was that a guilty plea reflected a “confession of all the facts,” but it did not preclude a challenge based on the notion that the “facts alleged and admitted do not constitute a crime.”¹⁸ Applying these principles to *Class*, the Court

¹² *Class v. United States*, No. 15-3015, 2016 WL 10950032, at *22 (D.C. Cir. July 5, 2016) (citing *United States v. Delgado-Garcia*, 374 F.3d 1337, 1341 (D.C. Cir. 2004)) (brackets and ellipsis in original).

¹³ See Fed. R. Crim. P. 11(a)(2).

¹⁴ *Class*, 138 S. Ct. at 803. The majority opinion was written by Justice Breyer and joined by Chief Justice John Roberts and Justices Ruth Bader Ginsburg, Sonia Sotomayor, Elena Kagan, and Neil Gorsuch. Justice Samuel Alito wrote a dissenting opinion that was joined by Justices Anthony Kennedy and Clarence Thomas.

¹⁵ *Haynes v. United States*, 390 U.S. 85, 87 n.2 (1968).

¹⁶ 417 U.S. 21 (1974).

¹⁷ 423 U.S. 61 (1975).

¹⁸ *Class*, 138 S. Ct. at 804 (citing *Commonwealth v. Hinds*, 101 Mass. 209, 210 (1869)).

wrote, “In sum, the claims at issue here do not fall within any of the categories of claims that Class’ plea agreement forbids him to raise on direct appeal. They challenge the Government’s power to criminalize Class’ (admitted) conduct.”¹⁹ In so ruling, the Court rejected the contentions that (1) Class had inherently waived his constitutional claims simply by pleading guilty; (2) Federal Rule of Criminal Procedure 11(a)(2) required him to affirmatively preserve his right to appeal through a conditional plea; and (3) Class expressly waived his right to appeal during the plea colloquy in the district court.

In a dissenting opinion, Justice Samuel Alito began by concluding, with relative brevity, that waivers are permissible and, with one exception, Rule 11 makes “clear that . . . a defendant who enters an unconditional plea waives all nonjurisdictional claims.”²⁰ Justice Alito then spent most of the remainder of the dissent focusing on that exception in Rule 11, which is contained in the Advisory Committee Notes. The exception noted by Justice Alito, labeled the “*Menna-Blackledge* doctrine,” referring to the two cases discussed in the majority opinion and noted above, holds that “a defendant has the right under the Due Process Clause of the Fourteenth Amendment to contest certain issues on appeal even if the defendant entered an unconditional guilty plea.”²¹ Justice Alito makes clear from his dissent that he believes *Menna* and *Blackledge* represent inconsistent and unjustified departures from prior precedent that established that “[w]hen a defendant pleaded guilty to a crime, he relinquished his right to litigate all non-jurisdictional challenges to his conviction (except for the claim that his plea was not voluntary and intelligent).”²² Justice Alito concludes, therefore, that Rule 11 should govern this case, which would lead to a conclusion that Class had, in fact, waived his rights to appeal.

Class in Context

The decision in *Class* is certainly a narrow one and, in many respects, it is not surprising given the language in *Blackledge* and *Menna*. The Court was simply asked to determine whether Rule 11 creates a default waiver of constitutional claims in unconditional

¹⁹ *Id.* at 805.

²⁰ *Class*, 138 S. Ct. at 808 (Alito, J., dissenting).

²¹ *Id.* at 809 (Alito, J., dissenting).

²² *Id.*

pleas or whether, if the government seeks such a waiver, the prosecution must expressly include pertinent waiver language in the plea agreement. To dismiss *Class* because of its limited focus, however, is to miss the important larger picture that begins to emerge when it is placed alongside other recent Supreme Court decisions from the last decade involving the increasingly problematic question of bargained justice. Plea bargaining arose informally in the shadows of the criminal justice system and was largely ignored for most of its journey to dominance. But the Court has begun paying more attention to the many concerns presented by this expeditious yet extra-constitutional mechanism for resolving criminal cases. And this new focus means that the Court should soon confront one of the most haunting questions in American criminal justice today: How do we respond to plea bargaining's innocence issue and the growing concerns this phenomenon creates regarding the voluntariness and reliability of modern plea-bargaining practice?

To understand the necessity of the Supreme Court's work regarding plea bargaining over the last decade and the significance of where the Court might be moving next, one must step back and gain a historical view of where this journey began. Though many assume that plea bargaining has old common-law roots, the reality is that bargained justice is an American invention with a relatively short history.²³ One need only look to English common law to see how far the law in this area has moved over the last centuries. In the 1783 English case of *Rex v. Warickshall*, for example, the accused was taken into custody for receiving stolen goods.²⁴ Eventually, Warickshall confessed after obtaining a "promise of favor."²⁵ Consistent with earlier precedent, the English court struck down the confession, stating, "[A] confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape . . . that no credit ought to be given to it."²⁶ Language similar to this appeared in American case law as well. For example, in the 1897 case

²³ See Lucian E. Dervan, *Bargained Justice: Plea Bargaining's Innocence Problem and the Brady Safety-Valve*, 2012 Utah L. Rev. 51 (2012); see also George Fisher, *Plea Bargaining's Triumph: A History of Plea Bargaining in America* (2003); Albert W. Alschuler, *Plea Bargaining and Its History*, 79 Colum. L. Rev. 1 (1979).

²⁴ *Re. v. Warickshall*, 168 Eng. Rep. 234 (1783).

²⁵ *Id.* at 234.

²⁶ *Id.* at 235.

of *Bram v. United States*, the Supreme Court said, “[The] true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort.”²⁷

Despite such strong language prohibiting offers of leniency or threats of punishment to induce guilty pleas, appellate courts in America began seeing plea bargains around the time of the American Civil War. Given existing precedent, it is no surprise that these deals were disfavored, as evidenced by examination of some of the language used by the courts at this time. One court wrote, “when there is reason to believe that the plea has been entered through inadvertence . . . and mainly from the hope that the punishment, to which the accused would otherwise be exposed, may thereby be mitigated, the Court should be indulgent in permitting the plea to be withdrawn.”²⁸ Another court said, “[plea bargaining is] hardly, if at all, distinguishable in principle from a direct sale of justice.”²⁹

Nevertheless, such deals continued to grow in the shadows of the American criminal justice system for at least two reasons. First, some judges, prosecutors, and defense counsel realized that plea bargaining offered a vehicle to hide their own corruption. Thus, in the early 20th century, bribes were sometimes used to secure “bargains” containing reduced sentences. This was particularly prevalent in Chicago, where “fixers,” located in front of the courthouse, arranged deals for defendants.³⁰ Second, as overcriminalization became more prominent in the United States after the turn of the century, court systems in the early 1900s became overburdened and unable to process the increasing number of cases appearing on the dockets. This issue was particularly pronounced during the prohibition era as the number of offenses and offenders swelled.³¹ In response, prosecutors began offering defendants incentives to plead guilty to help clear dockets and reduce caseloads.

While the practice of plea bargaining grew more common in the trenches during the first half of the 1900s, the Supreme Court

²⁷ *Bram v. United States*, 168 U.S. 532, 548 (1897) (emphasis added). It is worth noting that both *Warickshall* and *Bram* involved police confessions. However, until the mid-20th century, a plea of guilty was treated using the same law. See Alschuler, *supra* note 23.

²⁸ *People v. McCrory*, 41 Cal. 458, 462 (1871).

²⁹ *Wight v. Rindskopf*, 43 Wis. 344, 354 (1877).

³⁰ See Alschuler, *supra* note 23, at 24–25.

³¹ See Fisher, *supra* note 23, at 210–12.

remained relatively inactive in this area of law. In the few cases involving bargained-for guilty pleas that came before it prior to 1970, the Supreme Court typically went no further than to indicate that guilty pleas must be voluntary and note that it generally did not favor deals creating significant incentives for defendants to waive their right to trial. The Court, however, failed to rule definitively on the question of the constitutionality of bargained justice more broadly.³² Without a direct ruling from the Court echoing the skeptical sentiments from *Warickshall* and *Bram*, the use of incentives to induce defendants to plead guilty became more widely accepted and began to emerge from the shadows. In 1968, for example, the American Bar Association wrote about the supposed benefits of plea bargaining in an overwhelmed criminal justice system.

[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. Moreover, 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.³³

These words from the ABA in 1968 revealed the challenge the Supreme Court would face three years later when asked to definitively determine the legitimacy of plea bargaining in the seminal case of *Brady v. United States*.³⁴ Were the cautionary words from *Warickshall*, *Brams*, and the post-Civil War cases still relevant in a criminal justice system that had come to rely on plea bargaining to function? Not surprisingly, the answer was no.

The defendant in the 1970 *Brady* case pleaded guilty to kidnapping after being charged under a statute that permitted the death penalty

³² See, e.g., *Machibroda v. United States*, 368 U.S. 487 (1962); *Walker v. Johnston*, 312 U.S. 276 (1941).

³³ A.B.A. Project on Standards for Crim. Just., *Standards Relating to Pleas of Guilty 2* (1968).

³⁴ 397 U.S. 742 (1970).

only if recommended by a jury. By pleading guilty, Brady ensured that he would not be executed. After pleading guilty, however, the defendant changed his mind and argued that the plea should be withdrawn because the incentives to acquiesce were so large that his “confession” was involuntary. The defendant’s argument relied on the requirement that pleas be voluntary, something discussed in those few early 20th-century Supreme Court cases that explicitly addressed pleas of guilty, and which is still present in plea-bargaining jurisprudence and expressly provided for in Rule 11 today.³⁵ Given that Brady faced losing his life if he exercised his right to trial, as opposed to a term of imprisonment if he pleaded guilty, many assumed that the Supreme Court would allow the plea to be withdrawn and rule that such incentives to plead guilty were impermissible. The Court, however, determined that Brady’s plea was voluntary and went on to explain that offers of leniency and threats of punishment are permissible, as long as they do not overbear the will of the defendant.

While the *Brady* decision was a shift away from the language of *Warickshall*, *Brams*, and the post-Civil War cases, it should not have been surprising given the Court’s limited options by that time. By 1970, almost 90 percent of cases in the United States were being resolved through pleas of guilty.³⁶ As the ABA had pointed out, plea bargaining offered a solution to the growing problem of overburdened dockets, and a decision by the Court prohibiting the practice would certainly have thrown the system into disarray. The necessity of relying on plea bargaining became even more pronounced around this time because the Supreme Court’s due-process revolution of the 1960s had substantially increased the complexity, length, and cost of trials. One study, for example, demonstrated that the length of criminal trials almost doubled from the beginning to the end of that decade.³⁷ The Court also likely recognized that plea bargaining would persist regardless of whether it received the Court’s blessing. In the 1978 case of *Bordenkircher v. Hayes*, the Court

³⁵ Fed. R. Crim. P. 11(b)(2) (“Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).”).

³⁶ See Dervan, *supra* note 23, at 81.

³⁷ See Alschuler, *supra* note 23, at 38.

wrote, “a rigid constitutional rule that would prohibit a prosecutor from acting forthrightly in his dealings with the defense could only invite unhealthy subterfuge that would drive the practice of plea bargaining back into the shadows from which it has so recently emerged.”³⁸

Important both to an understanding of the Court’s decision in *Brady* and to an analysis of where the Court might be moving today is a realization that the *Brady* decision contained both a significant assumption and a vital caveat. In the concluding paragraphs of the decision, the justices discussed their vision for how the now officially recognized plea-bargaining system might operate. In this regard, the Court envisioned a system in which plea bargains would assist jurisdictions in saving resources for “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.”³⁹ Further, the Court specifically emphasized the requirement that bargains be voluntary, which meant that the incentives should not be so large as to “overbear[] the will” of a defendant.⁴⁰ Finally, near the end of the opinion the Court addressed an issue that inevitably looms over the whole institution of plea bargaining and that will be addressed in some detail in the remainder of this essay, namely, the risk that plea bargaining poses to innocent defendants. Regarding this concern, the Court stated that it did not believe innocents would be convicted with any greater frequency as a result of plea bargaining. But this was not a statement based on any data or psychological research. Rather, it was merely the Court’s assumption about human behavior and decisionmaking. Apparently recognizing that this surmise could be mistaken or that the incentives used in plea bargaining might grow so large as to begin to capture a significant number of innocents, the Court offered this final thought: “we would have serious doubts about this case if the encouragement of guilty pleas by offers of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves.”⁴¹

³⁸ 434 U.S. 357, 365 (1978).

³⁹ *Brady*, 397 U.S. at 752.

⁴⁰ *Id.* at 750.

⁴¹ *Id.* at 758.

Thus, albeit with a caveat, the modern plea-bargaining system was born in 1970 as the Court brought official recognition to an institution that had previously operated in the shadows of the criminal justice system. There were several important plea-bargaining cases decided by the Supreme Court in the years following *Brady*, each of which focused on the same general principles laid down in the original decision. Plea bargaining was permissible, but there must be caution to ensure pleas remain voluntary. And to be voluntary, incentives should not be so large as to result in “overbearing the will” of defendants.

The Modern Era of Plea Bargaining

Though it is difficult to pinpoint the most appropriate moment in time at which to begin an analysis of what might be termed the modern era of plea-bargaining jurisprudence, I believe the best place to start is the 2010 case of *Padilla v. Kentucky*.⁴² Padilla had been a lawful permanent resident of the United States for 40 years when he was arrested for drug distribution in 2001. After conferring with counsel, Padilla decided to plead guilty pursuant to an agreement that resulted in the dropping of one charge. In reaching his decision to plead guilty, Padilla relied on his attorney’s advice that “he did not have to worry about immigration status since he had been in the country so long.”⁴³ Contrary to his counsel’s statement, however, Padilla’s conviction all but created a requirement that he be deported. On appeal, Padilla argued that his counsel’s failings amounted to ineffective assistance of counsel under the Sixth Amendment, and the Supreme Court agreed. The Court found that the Sixth Amendment did require that a criminal defense attorney advise a client when the client’s decision to plead guilty might result in deportation. While the *Padilla* decision was limited to matters involving immigration consequences, on another level the case represented the beginning of a realization by the Court that plea bargaining and its mechanics were more complex and significant than reflected in *Brady* and in *Brady*’s early progeny. Plea bargaining thus deserved more rigorous attention.

This more exacting scrutiny of plea bargaining came in a pronounced manner just two years later in *Lafler v. Cooper*⁴⁴ and *Missouri*

⁴² 559 U.S. 356 (2010).

⁴³ *Id.* at 359 (internal quotation marks omitted).

⁴⁴ 566 U.S. 156 (2012).

v. Frye.⁴⁵ The *Lafler* and *Frye* cases were similar to *Padilla* in that they involved Sixth Amendment ineffective assistance of counsel claims. The cases were unique, however, because the defendants rejected advantageous plea offers due to the alleged ineffective assistance of their attorneys. In ruling on the issue, the Supreme Court concluded that plea bargaining is a “critical stage” of a criminal prosecution and, therefore, the Sixth Amendment right to effective assistance of counsel applies. *Lafler* and *Frye* are particularly significant holdings in a sequence of modern plea cases that has worked to expand the protections afforded defendants during the plea-bargaining process. But the two cases are perhaps most significant for the Court’s remarks about the role of plea bargaining.

Lafler and *Frye* addressed the fundamental question of how significant plea bargaining has become in our modern criminal justice system. Justice Anthony Kennedy in *Lafler* wrote, “criminal justice today is for the most part a system of pleas, not a system of trials.”⁴⁶ In *Frye*, Justice Kennedy elaborated on this concept:

Because ours “is for the most part a system of pleas, not a system of trials,” it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process. “To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system.”⁴⁷

Far from the tenor of *Brady*, which focused on plea bargaining mostly as a tool for increasing the resources available for trials, *Lafler* and *Frye* shifted focus toward the bargains themselves. This recognition that we live in a world of pleas is vital in explaining the Court’s persistent focus on plea bargaining over the last decade, contemplating the Court’s recent plea-bargaining precedents, and speculating where the Court might go next.

While *Lafler* and *Frye* answered a fundamental initial question about modern plea practice, I believe that the *Class* decision, as well

⁴⁵ 566 U.S. 134 (2012).

⁴⁶ *Lafler*, 566 U.S. at 170.

⁴⁷ *Missouri*, 566 U.S. at 143–44 (internal citations omitted; ellipsis and brackets in original).

as *Lee v. United States*,⁴⁸ which was delivered just a few months earlier, serves to guide us in identifying additional fundamental issues the Supreme Court must address as it continues to shape modern plea-bargaining law. As noted above, the first of these issues is to consider defendant decisionmaking more closely, including reexamining the reliability of admissions of guilt in the plea context along with the phenomenon of false pleas. In the decades that have passed since *Brady*, a case in which the Court expressed concern about the possibility of an innocence problem, the justices have failed to return in a meaningful way to the early assumptions about the accuracy of plea bargaining in capturing guilty, not innocent, defendants. If one examines the Court's two most recent plea-bargaining cases, however, it appears that at least some of the justices might be amenable to taking up this issue in the near future.

In June 2017, just a few months before *Class* was argued, the Court delivered an opinion in *Lee*. This case examined whether a defendant who had agreed to plead guilty in reliance on his attorney's mistaken assurances that he would not be deported should be afforded relief. Writing for the majority, Chief Justice John Roberts wrote:

But for his attorney's incompetence, Lee would have known that accepting the plea agreement would *certainly* lead to deportation. Going to trial? *Almost* certainly. If deportation were the "determinative issue" for an individual in plea discussions, as it was for Lee; if that individual had strong connections to this country and no other, as did Lee; and if the consequences of taking a chance at trial were not markedly harsher than pleading, as in this case, that "almost" could make all the difference.⁴⁹

Applying this logic, the Court reversed the lower court, which had denied the petitioner's request to vacate his conviction and withdraw his guilty plea. Chief Justice Roberts's framing of the discussion as one about "determinative issues" is important because it reflects a realization that defendants plead guilty for a variety of reasons, some of which might have little to do with the underlying facts of the case. While *Lee* is only a small foray into the fundamental issue of defendant decisionmaking, one must wonder whether Chief Justice Roberts

⁴⁸ 137 S. Ct. 1958 (2017).

⁴⁹ *Id.* at 1968–69.

considered how far this idea might extend beyond the specific facts of the *Lee* case. Would an innocent defendant with a “determinative issue” separate from factual guilt, such as an offer of immediate release from pretrial detention, be willing to falsely plead?

Interestingly, while Chief Justice Roberts’s discussion in *Lee* appeared to open the door to a fresh review of defendant decisionmaking, Justice Clarence Thomas offered a dissent in *Lee* that harkened to the assumptions found in early plea-bargaining cases. Justice Thomas argued in his dissent that the Sixth Amendment does not require “counsel to provide accurate advice concerning the potential removal consequences of a guilty plea,” a position he has held since dissenting in *Padilla*.⁵⁰ During his discussion, Justice Thomas raised the issue of the reliability of guilty pleas by referring to two cases. First, he quoted from the 1985 case of *Hill v. Lockhart* for the premise that “guilty pleas are themselves generally reliable. Guilty pleas ‘rarely’ give rise to the ‘concern that unfair procedures may have resulted in the conviction of an innocent defendant.’”⁵¹ He then went on to quote the 1975 case of *Menna v. New York* for the proposition that “a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case.”⁵²

Justice Sonia Sotomayor also touched on the issue of defendant decisionmaking in her questioning of the government in the *Class* case just over three months after the *Lee* decision. Taking an approach in sharp contrast to Justice Thomas in *Lee*, Justice Sotomayor expressed concern regarding the coercive power of plea bargaining during an exchange with the government regarding appeal waivers. She said, “Mr. Feigin, all you are saying is how much power you have and how much power to coerce you have.”⁵³ Justice Sotomayor later went on to describe one such tool of the prosecution in creating strong incentives. In discussing the ability of prosecutors to deny defendants acceptance of responsibility credit under the Federal Sentencing Guidelines, she said, “And I know of many prosecutors’ offices

⁵⁰ *Id.* at 1969 (Thomas, J., dissenting) (quoting *Padilla v. Kentucky*, 559 U.S. 356, 388 (2010) (Scalia, J., dissenting, joined by Thomas, J.)).

⁵¹ *Id.* at 1973 (Thomas, J., dissenting) (quoting *Hill v. Lockhart*, 474 U.S. 52, 58 (1985)).

⁵² *Id.* (quoting *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975)).

⁵³ Transcript of Oral Arg. at 33, *Class v. United States*, 138 S. Ct. 798 (2018) (No. 16-424).

who routinely tell Judges if a defendant seeks to preserve an appeal right, they have not accepted responsibility.”⁵⁴ If having “determinative issues” is one factor potentially leading to unreliable admissions of guilt and false pleas, “coercion” and the creation of incentives that might “overbear the will” of defendants is certainly another. What the varying perspectives from Justices Roberts, Thomas, and Sotomayor might mean is unclear, but the broader issue at least appears to be in the wind.

Whether the justices will further explore issues surrounding the reliability of plea bargaining in the future is unclear, but if they are interested, an amicus brief in *Class* makes clear that those in the trenches of the criminal justices system are ready for that discussion. Although *Class* was styled by many as mostly concerning the Second Amendment or basic pleading practice under Rule 11, at least one group thought the case represented an opportunity to begin examining the issue of defendant decisionmaking more closely.

In its amicus brief in *Class*, the Innocence Project directly raised not only the issue of defendant decisionmaking, but the related issue of plea bargaining’s innocence problem—that is, the very real possibility that coercive plea bargaining results in the convictions of nontrivial numbers of innocent people. The timing and content of the brief are fascinating. Though submitted one month before the decision in *Lee*, the Innocence Project brief seemed to speak to the concept of “determinative issues” proposed by Chief Justice Roberts in that case. Further, the brief soundly refuted the surmise regarding the reliability of guilty pleas expressed in *Brady*, *Menna*, and *Hill*, as well as Justice Thomas’s subsequent dissent in *Lee*. The Innocence Project explained:

The criminal justice system’s reliance on pleas places pressure on all defendants to plead guilty. . . . Neither innocent nor guilty defendants want to receive the most severe punishments available under the law or endure the stress and uncertainty of trial, and their decisions to plead guilty or not are informed by these pressures. Put differently, life and liberty are often the prevailing considerations, rather than guilt or innocence.⁵⁵

⁵⁴ *Id.* at 39.

⁵⁵ Brief of the Innocence Project as Amicus Curiae in Support of Petitioner at 6, *Class v. United States*, 138 S. Ct. 798 (2018) (No. 16-424).

The Innocence Project brief then went on to discuss our growing understanding of the psychology of defendant decisionmaking, including the findings of my 2013 study on innocence with Dr. Vanessa Edkins.

The available evidence confirms the disparity between sentences handed down after trial and those entered in connection with guilty pleas. . . .

Defense attorneys make their clients aware of these sentencing differentials in presenting the potential costs of exercising their right to trial, and “defendants would be a good deal less willing to plead guilty in the absence of a sentence-related inducement.” Such inducements appeal to guilty and innocent defendants alike, as demonstrated by a recent empirical study that attempted to replicate the choice put to an innocent defendant who is offered a lenient plea bargain or a hearing on more severe charges.⁵⁶

While the Supreme Court in *Class* did not specifically address the innocence issues raised in the Innocence Project brief, the empirical research it discussed, along with other studies from recent years, are exactly what the Court must consider if and when it takes up this fundamental issue. It seems worthwhile, therefore, to take a moment to consider how much we have learned about defendant decisionmaking since those early years and the—we can now assert with some confidence, deeply flawed—assumptions about the reliability of plea bargaining that appeared in the *Brady* decision nearly 50 years ago.

The Psychology of Plea Bargaining

Our understanding of the psychology of plea bargaining has advanced enormously in recent years. For example, in the pathbreaking study discussed above by the Innocence Project, Dr. Edkins and I asked students to participate in a research project that would compare group work to individual work through a series of test questions.⁵⁷ Unbeknownst to the students, the study was not really about group work, but was designed to employ a deception paradigm that would

⁵⁶ *Id.* at 8–9 (internal citations omitted).

⁵⁷ See Lucian E. Dervan & Vanessa A. Edkins, The Innocent Defendant’s Dilemma: An Innovative Empirical Study of Plea Bargaining’s Innocence Problem, 103 *J. of Crim. L. & Criminology* 1 (2013).

explore the issue of false guilty pleas. To examine this phenomenon, all of the students who participated in the test were accused of cheating on the individual work portion. Through the use of a confederate in the room, the study was structured so that only about half of the students actually engaged in cheating. The other half completed the test without any misconduct occurring. Regardless of factual guilt or innocence, and without yet knowing which of the participants had actually cheated, all of the participants were offered a bargain in return for confessing to the alleged offense. If the student admitted to cheating, they would lose their compensation for participating in the study. This was viewed as akin to probation or time served.

The participant was also informed that if they refused the deal, the matter would be referred to an "Academic Review Board." This board was described to the participants in a manner that made it sound very similar to a criminal jury trial, including the right to present evidence and testify. If convicted before the board, the participants were told that they would lose their compensation, their faculty adviser would be notified, and they would be required to attend an ethics course. This ethics course was viewed as a loss of time, akin to a period of incarceration. While this scenario did not perfectly recreate the actual criminal justice system, the anxieties experienced by participants were similar to, though presumably not as intense as, those experienced by people facing criminal charges. Further, this research advanced our understanding of defendant decisionmaking in ways that earlier studies utilizing only hypothetical scenarios could not.

In response to our cheating paradigm, 89 percent of the guilty participants took the plea offer. With regard to the innocent students, 56 percent of the participants were willing to falsely confess to an offense they had not committed in return for the benefits of the bargain. For the majority of innocent students who knew definitively that they had not violated the rules, it appears that accepting the deal simply made more sense. As the Innocence Project wrote in its brief, "Innocent defendants, like guilty defendants, plead guilty in exchange for lighter sentences because the benefits of doing so outweigh the costs of facing trial."⁵⁸ It is interesting to further consider

⁵⁸ Brief of the Innocence Project as Amicus Curiae in Support of Petitioner at 9, *Class v. United States*, 138 S. Ct. 798 (2018) (No. 16-424).

the application of these findings in the actual criminal justice system, where laws are often unclear and where factual guilt or innocence is sometimes less than certain even in the mind of the defendant.

To assist in validating our study data, we compared the results of our experiment to data regarding false pleas in mass exoneration cases.⁵⁹ In the Rampart mass-exoneration case in California, for example, authorities determined that dozens of officers had engaged in misconduct, including “hundreds of instances in which evidence or contraband was planted on suspects, false statements were coerced or fabricated, and police officers offered perjured testimony in court.”⁶⁰ These findings led to approximately 156 felony convictions being dismissed or overturned, though it is clear from the evidence that not all of the exonerated defendants were actually innocent of the charged conduct. In examining this mass exoneration, Professor Russell Covey determined that the plea rate among those who were not actually innocent, though they were exonerated in the aftermath of the scandal, was 89 percent, exactly the same number as observed in our study. In that same research, Professor Covey concluded that actually innocent exonerees in the Rampart matter had pleaded guilty at a rate of 77 percent, much higher than that observed in our cheating paradigm. It is not surprising that fewer individuals falsely plead guilty when facing the possibility of an ethics class, however, as opposed to actual incarceration in jail or prison. But this only lends further support to concerns that when faced with the kinds of incentives typically involved, some significant percentage of innocent defendants in the criminal justice system will plead guilty.

Dr. Edkins’s and my 2013 deception study has been repeatedly replicated and validated in various forms as other psychology labs around the world continue exploring this and related issues to develop a broader understanding of plea bargaining. In fact, Dr. Edkins and I, along with members of a large international research team, have spent the last two years running an updated and expanded version of this cheating-paradigm study in the United States, Japan, and South Korea. In the new version of the study, we have amended certain aspects of the paradigm to gain deeper insights into defendant

⁵⁹ See Russell Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 Wash. U. L. Rev. 1133 (2013).

⁶⁰ *Id.* at 1138.

decisionmaking, including creating a role for defense counsel, requiring cooperation against codefendants, and further testing the impact of varying differential sizes. The term “differential” here describes the difference between the sentence or punishment a defendant receives in return for pleading guilty and the sentence or punishment a defendant risks if they proceed to trial.

Many have theorized that the larger the differential, the greater the likelihood a defendant—including an innocent one—will plead guilty. Creating research paradigms that examine the impact of differentials, therefore, is a critical step in better understanding defendant decisionmaking in the plea context. Our ongoing comparative research in Japan, South Korea, and the United States will help decide whether plea bargaining will be allowed in South Korea, where the practice is currently prohibited. In Japan, which only recently adopted plea bargaining, the study will be of significance in identifying risks associated with bargained justice and in creating a strategy for the implementation of new rules of criminal procedure to address these concerns. Early data from each country indicate that the plea rates by factually guilty and factually innocent participants are consistent with our earlier findings. Further, our results to date appear to demonstrate that the same innocence issues identified in our original 2013 study are present in different countries, cultures, and legal systems. The innocence issue, we are coming to find, is a global one.

Since the release of our cheating paradigm study results in 2013, the interest in plea-bargaining research within the psychology community has grown substantially. As new studies are released every year, we learn more and more about the psychology of defendant decisionmaking within the system of plea bargaining that now dominates the U.S. criminal justice system. Earlier this year, Dr. Edkins and I released a new plea-bargaining study that examined the issues of innocence, pretrial detention, and collateral consequences by utilizing several different hypothetical scenarios.⁶¹ The study asked participants to review three hypotheticals involving a student charged with a drug offense, a nurse charged with assault,

⁶¹ See Vanessa A. Edkins & Lucian E. Dervan, Freedom Now or a Future Later: Pitting the Lasting Implications of Collateral Consequences against Pretrial Detention in Decisions to Plead Guilty, 24 *Psychol., Pub. Pol’y, & L.* 204 (2018).

and an unemployed individual living with two children in public housing and charged with breaking and entering. For each, roughly half of the participants were asked to decide whether to accept a plea deal without being told the collateral consequences of conviction. The other half were informed of the specific collateral consequences that would apply after conviction, such as loss of the right to vote, ineligibility for students loans, loss of professional licenses, and ineligibility for public housing and food stamps. The research also tested whether the guilt or innocence of the defendants impacted the outcome, along with the effect of pretrial detention on plea decisionmaking.

The results of this new study confirm in several ways Justice Sotomayor's concern about the power of plea bargaining and speak directly to Chief Justice Roberts's notion of potentially "determinative issues," which are issues other than the underlying facts of the case that might lead a defendant, including an innocent one, to plead guilty. First, the study found participants assigned to both the factually guilty and factually innocent conditions electing to plead guilty, thus once again confirming the innocence phenomenon. Second, direct knowledge of relevant collateral consequences did not alter defendant decisionmaking, despite the sometimes life-long impact of these measures. Though disturbing, this finding is consistent with psychological research on temporal discounting, which posits that later consequences have less impact on decisionmaking than immediate ones. Here, more immediate considerations, such as reduced sentences or release from pretrial detention, drove the participants' choices. Third, the study found that pretrial detention significantly influenced plea decisions. Of particular importance here, the rate of innocent individuals who pleaded guilty tripled in the pretrial scenarios. The data in this recent study suggest, therefore, that sentencing differentials and pretrial detention are two examples of "determinative issues" in the plea context that might lead a defendant's will to be overborn, regardless of factual guilt.

As noted in a recent article examining research in the area of defendant decisionmaking in the plea-bargaining context, "it is beyond dispute that factually innocent defendants have pled guilty."⁶²

⁶² Allison D. Redlich, Vanessa A. Edkins, Stephanos Bibas & Stephanie Madon, *The Psychology of Defendant Plea Decision Making*, 72 *Am. Psychologist* 339, 348 (2017).

Beyond the numerous studies discussed above that confirm the unreliability of plea bargaining and the fact that innocents are willing to falsely confess, there is empirical evidence from actual cases. Consider, for example, a 2015 report from the National Registry of Exonerations on the issue of “Innocents Who Plead Guilty.”⁶³ Of the first 1,700 exonerees in the database, 15 percent had pleaded guilty to an offense they had not committed. The rates in certain areas are staggering.

For example, drug crimes comprised 40 percent of all guilty-plea exonerations, with 66 percent of exonerations involving a false plea of guilty. In Harris County (Houston), Texas, the report noted that there had been 71 drug exonerations since 2014, and the defendant in every case had pleaded guilty. Consistent with the new defendant decisionmaking and collateral-consequences study described above, the National Registry of Exonerations reported that “most of these defendants accepted plea bargains to possession of illegal ‘drugs’ because they faced months in jail before trial, and years more if convicted.”⁶⁴ These defendants decided that their “determinative issue” was the finality of release from pretrial detention, despite the fact that they had not engaged in the alleged conduct. As noted in a 2017 report, the large number of exonerations from Harris County is due to the work of the district attorney’s office’s Conviction Integrity Unit and a practice of testing drug samples even after the entry of a guilty plea.⁶⁵ One can only wonder what the rate of false pleas might look like nationally if all jurisdictions employed these practices in drug cases.

The impact of incentives on false pleas was also present elsewhere in the National Registry of Exonerations data set, including in murder cases. The 2015 report found that the larger the sentencing differential—something achieved through, for example, allowing a defendant to plead guilty to a reduced charge—“the higher the proportion of exonerated homicide defendants who plead guilty.”⁶⁶

⁶³ Innocents Who Plead Guilty, Nat’l Registry of Exonerations (Nov. 24, 2015), <http://www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article1.pdf>.

⁶⁴ *Id.* at 2.

⁶⁵ See Exonerations in 2016 Report, Nat’l Registry of Exonerations (Mar. 7, 2017) at 8, http://www.law.umich.edu/special/exoneration/Documents/Drug_Cases_2016.pdf.

⁶⁶ See Innocents Who Plead Guilty, *supra* note 63.

As an illustration, 49 percent of those exonerated for manslaughter had pleaded guilty.⁶⁷ In considering this data from the National Registry’s database, it is important to note that actual rates of false pleas are likely much higher than reflected in the data set because of the many hurdles defendants who have pleaded guilty face in demonstrating their actual innocence. Regarding self-reported rates of false pleas, studies have found numbers ranging from 18 percent for juvenile offenders to 37 percent for offenders with mental illness.⁶⁸

These various studies and anecdotes demonstrate that the assumptions in *Brady*, *Hill*, *Menna*, and countless other early plea-bargaining cases about the reliability of this institution were wrong. The idea that people only plead guilty because they are in fact guilty, and for no other reason, ignores the many other “determinative issues” that might be driving these decisions. During his plea hearing, Class engaged in the standard colloquy with the Court.

THE COURT: Are you pleading guilty because you are guilty and for no other reason?

THE DEFENDANT: All right. Yeah.

THE COURT: Is that a yes?

THE DEFENDANT: Yeah.

THE COURT: All right.⁶⁹

Although every defendant is made to stand and utter these words, we know there is much more at work than a mere desire to confess guilt and that there are, in fact, “other reason[s]” for a defendant deciding to take this path. Even the government admitted as much in its summary of the argument in *Class*. “A defendant who voluntarily pleads guilty,” the government wrote, “has made a strategic choice in which he accepts an adverse legal judgment in return for sentencing considerations and other potential benefits.”⁷⁰

⁶⁷ *Id.* at 1, table 1.

⁶⁸ See Redlich et al., *supra* note 62, at 348.

⁶⁹ Joint Appendix at 79, *Class v. United States*, 138 S. Ct. 798 (2018) (No. 16-424).

⁷⁰ Brief for the United States at 9, *Class v. United States*, 138 S. Ct. 798 (2018) (No. 16-424).

Where Do We Go from Here?

We know today, based on the research described above along with a steadily increasing number of real-world examples, that the incentives to plead guilty can be overpowering—indeed, so overpowering that even innocent defendants will sometimes take this path. When the Court addresses the fundamental question of defendant decisionmaking, it will have to wrestle with this reality and decide how best to proceed with the development of its plea-bargaining jurisprudence. Recall that in *Brady*, the Court said, “[W]e would have serious doubts about this case if the encouragement of guilty pleas by offers of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves.”⁷¹ Yet, that is exactly where we find ourselves almost 50 years later, waiting on the Court both to recognize and to address that fact in light of all that we now know.

Does this portend that the Court might one day reverse course and decide that its 1970 approval of what has since become a veritable plea-bargaining machine was a mistake? I think not. Even if some of the justices desired this path, the Supreme Court of today stands in an even worse position than the Court of 1970 to stop plea bargaining’s triumph. Plea bargaining has become a fully accepted part of our criminal justice system and, because of that acceptance, our system has grown even more reliant on bargained justice for its continued functioning. But completely prohibiting plea bargaining is likely an unnecessary step, and indeed a step too far, if our focus is plea bargaining’s innocence problem. That concern is best addressed, I believe, through more focused efforts to fill in the various gaps that were created over the many years during which plea bargaining evolved and expanded in the shadows without much consideration of its operation or ramifications. Given that all but three to five percent of convictions each year in America come from guilty pleas, the Court must provide defendants greater rights before, during, and after the plea-bargaining process. Examples might include meaningful grand jury reform; better access to information, including exculpatory information, before pleading guilty; and reasonable limitations on the size of sentencing differentials sometimes used to punish those who exercise their constitutional right to trial.

⁷¹ *Brady v. United States*, 397 U.S. 742, 758 (1970).

Fortunately, this is the type of work the Court has been focused on in the plea-bargaining context for a number of years as it has worked to provide defendants greater rights. We must now encourage the continuation of this journey so that the Court might expand on its previous work and reach these and other new and important topics.

Finally, before concluding, one must also observe that embracing the realities of plea bargaining's innocence issue raises another fundamental question the Court must address in this long journey to create modern plea-bargaining law. If, even knowing the alarming power of plea bargaining to ensnare the innocent, we continue forward, are we not conceding that beyond being merely a system of pleas, today's criminal justice system is, for the most part, actually a system of efficiencies? As a recent article regarding plea bargaining observed, "Though there are several reasons underlying the rise in plea bargains, the primary reason—efficiency—remains true today and is the most-often-cited reason for maintaining the practice."⁷² What does it mean to concede that the criminal justice system today is more about efficiency and less about justice than our Founders might ever have envisioned? What does it mean that in a system that values individual liberty, we have marginalized the right to a jury trial because of our inability to operate an overcriminalized system without bargained justice? While I do not know how those questions will be answered, I do think they are the concerns to which a deep examination of plea bargaining must eventually lead us—and the Court.

⁷² Redlich et al., *supra* note 62, at 340–341. The role of efficiency in the criminal justice system more generally is discussed at length in Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 Va. L. Rev. 183 (2014).