Written Testimony of Lucian E. Dervan
Assistant Professor of Law
Southern Illinois University School of Law

Before the House Committee on the Judiciary
Over-Criminalization Task Force,
United States House of Representatives

"Regulatory Crime: Solutions"

Delivered November 14, 2013

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Thank you Mr. Chairman, Ranking Member Scott, and members of the Task Force.

My name is Lucian Dervan, and I am an assistant professor of law at the Southern Illinois University School of Law.[1] Before joining Southern Illinois University, I practiced law for seven years, including as a member of the white collar criminal defense team at King & Spalding LLP and as a law clerk on the United States Court of Appeals for the Eleventh Circuit. I currently write and teach in the area of criminal law, including sentencing, and I appreciate the invitation to speak today.

Let me begin by commending the members of this task force for the important work you have undertaken regarding the significant and pressing issue of overcriminalization in the American criminal justice system.[2] As has been noted by many individuals testifying before this body,

[1] The views expressed in this testimony are my own and should not be construed as representing any official view of Southern Illinois University.

[2] "Overcriminalization" refers to the claim that governments create too many crimes, including crimes that are duplicative and overlapping, crimes that are vague and overly broad, and crimes that lack sufficient *mens rea* to protect innocent conduct. *See Reining in Overcriminalization: Assessing the Problem, Proposing Solutions*, Written Statement of Jim E. Lavine, President, National Association of Criminal Defense Lawyers, Before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Committee on the Judiciary, 111th Cong. (2010), available at http://judiciary.house.gov/hearings/printers/111th/111-151_58476.PDF (last visited Nov. 12, 2013).

> [The trend of overcriminalization] takes many forms, but most frequently occurs through: (i) enacting criminal statutes absent meaningful mens rea requirements; (ii) imposing vicarious liability for the acts of others with insufficient evidence of personal awareness or neglect; (iii) expanding criminal law into economic activity and areas of the law traditionally reserved for regulatory and civil enforcement agencies, (iv) creating mandatory minimum sentences that fail to reflect actual culpability; (v) federalizing crimes traditionally reserved for state jurisdiction; and (vi) adopting duplicative and overlapping statutes.

there are currently over 4,450 criminal offenses in the United States Code and as many as 300,000 federal regulatory crimes.[3] Not only are these criminal laws expansive, they are often drafted in ways that are broad, vague, and lack a specific *mens rea* element to ensure that these provisions are only applicable to culpable defendants and not innocent citizens.[4] Finding a solution to this issue is of vital importance and must be accomplished to affirm our commitment to the American tradition of justice.

As much attention during these hearings has focused on the issue of regulatory crimes, I feel it is important to offer my own anecdote regarding the sheer volume of these offenses. As part of my white collar crime course at Southern Illinois University School of Law, I teach a section regarding regulatory crimes. Inevitably, as the class begins to work through various examples of these criminal provisions, a student will ask, "How many regulatory crimes are there?" My answer is always the same. "We just don't know." My response is not that I personally don't know, rather I am forced to admit to the students that we as legal professionals and we as a country don't know. That is a very troubling thing to have to say about our criminal laws. It is troubling to me as a law professor who studies this area, it is troubling to the students as future lawyers who may one day be asked to prosecute or defend someone for violating such a regulation, and it should be troubling to the American people who may one day innocently and without a guilty mind violate one of these obscure crimes.

And so again, I commend the Task Force for its work, shining a light on the issue of overcriminalization and working to correct this fundamental problem in our criminal justice system.

Before beginning a discussion of the possible solutions to the numerous problems associated with overcriminalization that have been identified by this Task Force during prior hearings, I think it is also important to consider once again the far reaching consequences stemming from the phenomenon of overcriminalization. As reported by the American Bar Association in a 1998 study, forty-percent of the criminal laws passed since the Civil War were enacted after 1970.[5] Since the release of this ABA report, it is estimated that the federal government has created

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Id; *see also* Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 704 (2005) ("Over time, however, the United States has experienced a dramatic enlargement in governmental authority and the breadth of law enforcement prerogatives."); Brian W. Walsh & Tiffany M. Joslyn, *Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law* 5-6, *available at* http://www.nacdl.org/criminaldefense.aspx ?id=10287&terms=withoutintent (2010)

[3] *See* John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, THE HERITAGE FOUNDATION LEGAL MEMORANDUM No. 26 (June 16, 2008); Task Force on Federalization of Criminal Law, Criminal Justice Section, Am. Bar Ass'n, *The Federalization of Criminal Law*, at 9 n.11, app. C (1998); John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U.L. Rev. 193, 216 (1991).

[4] *See* Ellen S. Podgor, *Laws Have Overcriminalized Business Behavior*, NEW YORK TIMES ROOM FOR DEBATE, available at http://www.nytimes.com/roomfordebate/2013/11/10/prosecuting-executives-not-companies-for-wall-street-crime/laws-have-overcriminalized-business-behavior (Nov. 10, 2013).

[5] *See* American Bar Association, *The Federalization of Criminal Law* 7 (1998).

hundreds of additional criminal statutes and untold numbers of additional criminal regulatory provisions.[6]

One of the most visible results of overcriminalization in the last forty years has been the growth in the size of the American prison population.[7] In a report released in March 2009, the Pew Center on the States concluded that 2.3 million adults in the United States were in prison or jail.[8] This represented 1 out of every 100 adults. Further, when adults in the United States who were on probation or parole were included, the total number under correctional control reached 7.3 million, or 1 out of every 31 adults. Finally, as noted in a 2011 study, an estimated 65 million adults in the United States, which represents more than 1 in 4, have a criminal record.[9] Given these statistics, it should come as no surprise that the United States has the world's largest prison population. Though we represent only 5% of the world's population, we have "almost a quarter of the world's prisoners."[10]

It is also important to remember in this context that the consequences of conviction do not end when a prison sentence is completed. There are hundreds of collateral consequences that can flow from a misdemeanor or felony conviction, regardless of whether a prison or jail sentence is ever served. Further, such collateral consequences can impact not only the convicted but their family and community as well. The breadth and significance of these collateral consequences

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[6] *See* John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, HERITAGE FOUNDATION L. MEMO. No. 26, 1 (June 16, 2008). In this report, it was estimated that from 2000 to 2007, the Congress enacted criminal provisions at an average of 56.6 crimes per year. *See id.*

[7] As noted by Professor Rachel E. Barkow, it is estimated that less than 0.8% of federal prison inmates are serving a sentence for a regulatory crime. *See* Statement of Rachel E. Barkow, Before the House Committee on the Judiciary, Task Force on Over-Criminalization, "Regulatory Crime: Overview – Defining the Problem," (Oct. 30, 2013). Nevertheless, even if the number of individuals serving a prison sentence for violations of regulatory offenses is low compared to other federal offenses, these defendants are still subject to criminal punishment in the form of probation or fines, along with the stigma and collateral consequences of conviction. Further, the potential solutions to overcriminalization offered today are applicable to both the issue of regulatory overcriminalization as well as the broader issue of overcriminalization in federal law generally.

[8] Pew Charitable Trusts, *One in 31: The Long Reach of American Corrections*, available at http://www.pewcenteronthestates.org/uploadedFiles/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf (2009).

[9] *See* Rodriguez, Michelle N., and Maurice Emsellem, *65 Million 'Need Not Apply': The Case for Reforming Criminal Background Checks for Employment*, New York: National Employment Law Project, March 2011; *see also* Amy L. Solomon, *In Search of a Job: Criminal Records as barriers to Employment*, 270 NATIONAL INSTITUTE OF JUSTICE JOURNAL 42, Office of Justice Programs, available at http://www.nij.gov/journals/270/criminal-records.htm#noteReference29 (June 2012).

[10] Adam Liptak, *U.S. Prison Population Dwarfs that of Other Nations*, NEW YORK TIMES, available at http://www.nytimes.com/2008/04/23/world/americas/23iht-23prison.12253738.html?pagewanted=all&_r=0 (April 23, 2008).

cannot be understated, and I believe this is an important issue that this Task Force should consider addressing at a future hearing.

As evidenced by the work of this Task Force, there is now a deep and bipartisan appreciation for the significance of overcriminalization in our criminal justice system. Therefore, let us consider several solutions that might be adopted by Congress to both reduce the negative impacts of past overcriminalization and prevent a return to overcriminalization in the future. While this hearing is focused on solutions to regulatory crime, it is important to note that the solutions I propose below are applicable to all criminal offenses in the federal system and should be considered potential solutions to the broader issue of overcriminalization, not just regulatory overcriminalization.

Adopt a Default Rule for *Mens Rea*

First, *mens rea* is a cornerstone of our criminal justice system and conveys the idea that individuals should be prosecuted where they have acted with a guilty mind. As Justice Jackson wrote in *Morissette v. United States* in 1952, "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."[11] Today, as a result of overcriminalization, there are many federal offenses for which there is no *mens rea* or only weak *mens rea.*[12] Where adequate *mens rea* is lacking, innocent and mistaken conduct can be criminalized under circumstances in which Congress never intended a person's liberty to be put in jeopardy.

To correct this problem, Congress should adopt a default *mens rea* rule. Such a rule would correct unintentional omissions of a *mens rea* term in existing and future legislation and ensure that those without a guilty mind are protected from unwarranted prosecutions. When adopting such a default rule, the Task Force should carefully consider the appropriate level of *mens rea* for incorporation as the default. While many current federal criminal statutes utilize the lower-level *mens rea* standard of "knowingly," this term generally only requires proof that the defendant had "knowledge of the facts that constitute the offense."[13] Therefore, the utilization of the term "knowingly" will likely fail to achieve the Task Force's goal of preventing application of regulator crimes and other offenses to individuals unless they intentionally engaged in inherently wrongful conduct or acted with knowledge that their conduct was unlawful. A stronger and more appropriate term for utilization would likely be the term "willfully," which would require some proof that the individual was aware his or her "conduct was unlawful."[14]

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[11] Morissette v. United States, 342 U.S. 246, 250 (1952).

[12] *See* Walsh & Joslyn, *Without Intent*, *supra* note 2, at IX.

[13] Dixon v. United States, 548 U.S. 1, 5 (2006) (*quoting* Bryan v. United States, 524 U.S. 184, 193 (1998)).

[14] Bryan v. United States, 524 U.S. 184, 193 (1998).

Adopt a Default Rule Applying *Mens Rea* to All Material Elements of an Offense

In addition to adoption of a default *mens rea* rule as described above, consideration must be given to codification of rules of construction that will assist in protecting the constitutional rights of defendants. As one such example, the Task Force should consider adoption of a provision requiring courts to apply any *mens rea* term contained in or applicable to a statutory or regulatory offense to all material elements of that offense.[15]

There are several advantages to adopting such a rule. First, this type of provision will assist in clarifying ambiguities if a default *mens rea* rule is adopted. Second, such a provision will assist in preventing costly litigation regarding existing statutes that already contain a *mens rea* requirement but which are vague as to whether the *mens rea* applies to each of the material elements of the offense. Third, adoption of a default rule will assist in creating greater uniformity amongst the various courts and their interpretations of statutes containing ambiguities as to the *mens rea* element. Finally, such a provision will further the goals of this Task Force by helping to ensure that individuals are not prosecuted where they have not acted with a guilty mind.

As an example of the need for the codification of the Rule of Lenity, consider the case of *Flores-Figueroa v. United States*, which was decided by the United States Supreme Court in 2009.[16] The case involved a prosecution for aggravated identity theft under 18 U.S.C. section 1028A(a)(1) and whether a *mens rea* term applied to the last three words in the statute. The statute created an offense where an individual "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." The government argued that the term "knowingly" applied only to the first portion of the statute, requiring that the defendant "knowingly transfers, possesses, or uses, without authority, a means of identification." The government argued, however, that the term "knowingly" did not apply to the last three words of

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[15] Such a provision is contained in the Model Penal Code, which states in subsection 2.02(4):

> When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.

Under the Model Penal Code, the term "material element of an offense" means "an element that does not relate exclusively to the statute of limitations, jurisdiction, venue or to any other matter similarly unconnected with (i) the harm or evil, incident to conduct, sought to be prevented by the law defining the offense, or (ii) the existence of a justification or excuse for such conduct." Model Penal Code section 1.13(10). In the comments to the Model Penal Code, the drafters acknowledged the need for such a clarifying rule given the ambiguities that might exist as to the application of culpability requirements to various elements of an offense. The drafters stated, "The Model Penal Code agrees… that these 'problems can and should be taken care of in the definition of criminal intent.'" *See* Model Penal Code 2.02 comment 6.

[16] *See* Flores-Figueroa v. United States, 556 U.S. 646, 648 (2009).

the statute. Thus, the government believed it was not required to prove that the defendant knew the identification belonged to "another person." Disagreeing with government, the Supreme Court applied the *mens rea* term to both elements of the offense and ruled that the government must prove that the "defendant knew that the means of identification at issue belonged to another person."

Another example of a case in which the government argued for a restricted application of the *mens rea* term in a statute was *United State v. Bronx Reptiles, Inc.*[17] In this case, the defendant was charged with a violation of a portion of the Lacey Act that made it a crime "for any person, including any importer, knowingly to cause or permit any wild animal or bird to be transported to the United States, or any Territory or district thereof, under inhumane or unhealthful conditions or in violation of such requirements" as the Secretary of the Interior may prescribe. The government argued that the term "knowingly" only applied to the transportation of a wild animal or bird. In ruling that the *mens rea* term also required that the defendant knew the conditions of the transportation were "inhumane and unhealthful," the Second Circuit Court of Appeals stated that the government's interpretation of the statute would result in a "vast range of remarkably innocuous behavior [being] rendered criminal."[18] The costly and unnecessary litigation present in the *Flores-Figueroa* and *Bronx Reptile* cases can be prevented through adoption of a default rule applying *mens rea* to all material elements of an offense.

It is important to note, of course, that Congress could still limit the application of a particular *mens rea* term in a particular statutory or regulatory offense. In such cases, the specific legislation would simply need to include a clear indication of Congressional intent to limit the applicability of the *mens rea* term. The default rule as described above would only apply in those cases where no such indication was present.

Adopt a Codification of the Rule of Lenity

As a second rule of construction, the Task Force should consider codifying the Rule of Lenity, a doctrine with a long and respected history in American law.[19] The Rule of Lenity states that "ambiguous criminal laws [are] to be interpreted in favor of the defendants subjected to them."[20]

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[17] *See* United State v. Bronx Reptiles, Inc., 217 F.3d 82 (2d Cir. 2000).

[18] *See id.* at 86.

[19] The Rule of Lenity has already been codified in some state statutes. *See e.g.* F.S.A. section 775.021(1) (1988) ("The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused."). The Rule of Lenity has also been adopted in the international setting. *See e.g.* The Rome Statute of the International Criminal Court, Art. 22(2) ("The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definitional shall be interpreted in favour of the person being investigated, prosecuted or convicted.").

[20] United States v. Santos, 553 U.S. 507, 513 (2008) (*citing* United States v. Gradwell, 243 U.S. 476, 485 (1917)). The Rule of Lenity is a common law doctrine described by Chief Justice Marshall in the 1820 case of United States v. Wiltberger, 18 U.S. 76 (1820).

Recently, in the case of *United States v. Santos*, Justice Scalia remarked regarding the Rule of Lenity:

> This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.[21]

Unfortunately, the application of the Rule of Lenity by lower courts has not been consistent. Therefore, the codification of this important doctrine is necessary to ensure its uniform application consistent with the doctrines that the government must sustain its burden of proof and defendants are presumed to be innocent. Importantly, codification of the Rule of Lenity alone is not sufficient to correct the problems emanating from overcriminalization. Rather, codification of the Rule of Lenity should be viewed only as an additional safeguard in combination with the above proposed solutions.

Additional Possible Solutions

In addition to the above three solutions to the issue of overcriminalization and its impact on statutory and regulatory offenses, I believe consideration should also be given to several other ideas. These include passage of a Congressional rule requiring every law that adds or modifies criminal offenses or penalties be subject to automatic referral to the relevant judiciary committee, enactment of a law that would require the federal government to produce a public report that assesses the justification, costs, and benefits of any new criminalization, and enactment of a law that would require Congress to approve any new or modified regulatory criminal offenses or penalties proposed by the Executive Branch.

Plea Bargaining

In closing, I would like to address one additional issue.

Today, almost 97% of criminal cases in the federal system are resolved through a plea of guilty. As the number, breadth, and sentencing severity of federal criminal statutes increased over the last century because of overcriminalization, prosecutors gained increased ability to create

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> The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.

See id.; *see also* Written Statement of Ellen S. Podgor, Before the House Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security, *"Reining in Overcriminalization: Assessing the Problems and Proposing Solutions*," (Sept. 28, 2010).

[21] United States v. Santos, 553 U.S. 507 (2008).

overwhelming incentives for defendants to waive their constitutional right to a trial by jury and plead guilty. The power of the prosecution in this context has been made even greater by the presence of vague and esoteric regulatory offenses that require little or no *mens rea*. At the same time, the financial and emotional costs to defendants and their families of proceeding to trial have grown into often insurmountable obstacles.

Consider the examples already described in testimony before this Task Force.

In Mr. Lewis's testimony regarding allegations he committed a felony violation of the Clean Water Act related to a blocked sewage line at work, he offered the Task Force a clear glimpse at the options he believed he had after been accused of a crime. He stated, "I wound up pleading guilty to a federal misdemeanor because the prosecutors said that if I pled guilty, they wouldn't oppose probation. As a single dad, I was worried that if I went to prison there would be nobody to raise my children or care for my mother."[22]

Ms. Kinder's testimony regarding allegations that she had committed a felony violation of the Lacey Act related to the harvesting of paddlefish from the wrong side of the Ohio river also included a discussion of plea bargaining.[23] She stated, "We felt, and we still feel now, that we did nothing wrong. But, on January 17, 2012, we made the painful and humiliating decision to plead guilty because we didn't think we had a choice. We were facing a maximum penalty of up to five years in prison, a $250,000 fine, or both, on each of four counts… We couldn't suffer the emotional and financial trauma of a trial, and we didn't want to risk losing our freedom as well as our property." As a result, Ms. Kinder pleaded guilty to a misdemeanor.

In each of these cases, one is offered insights into the various issues that prevent individuals from challenging criminal allegations today and exercising their constitutional right to put the government to its burden of proof at trial. These challenges include steep sentencing differentials and penalties for proceeding to trial, along with significant financial and familial considerations.[24]

As the examples offered by the witnesses before this committee demonstrate, we must recognize that a symbiotic relationship exists between overcriminalization and plea bargaining. Plea bargaining and overcriminalization have perpetuated each other. Plea bargaining has shielded overcriminalization from scrutiny. At the same time, overcriminalization has provided the laws

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[22] *See* Written Statement of Lawrence Lewis, Before the House Judiciary Committee, Task Force on Over-Criminalization, "Regulatory Crime: Identifying the Scope of the Problem," (October 30, 2013).

[23] *See* Written Statement of Joyce Kinder, Before the House Judiciary Committee, Task Force on Over-Criminalization, "Regulatory Crime: Identifying the Scope of the Problem," (October 30, 2013).

[24] "Sentencing differential" is a term used to describe the difference between the sentence a defendant faces if he or she pleads guilty versus the sentence risked if he or she proceeds to trial and is convicted. *See* Lucian E. Dervan, *The Surprising Lessons from Plea Bargaining in the Shadow of Terror*, 27 GA. ST. U. L. REV. 239, 245 (2011) ("Key to the success of prosecutors' use of increasing powers to create incentives that attracted defendants was their ability to structure plea agreements that included significant differences between the sentence one received in return for pleading guilty and the sentence one risked if he or she lost at trial.").

that allow prosecutors such wide discretion in selecting charges and creating significant incentives for defendants to plead guilty. This relationship has lead us to our current state and created an environment in which we have jeopardized the accuracy of our criminal justice system in favor of speed and convenience.[25]

And this is not only occurring in regulatory cases. It is occurring in all manner of criminal cases throughout the country.

Consider for example, the nationally publicized case of Brian Banks.[26] In 2002, Banks, who was sixteen years old at the time, was a top college football prospect. His world came crashing down, however, when he was wrongfully accused of sexual assault and kidnapping by an acquaintance. After his arrest, Banks was offered a choice. If he pleaded guilty, the government would recommend a three year sentence. Should he proceed to trial, he could risk receiving a sentence of 41 years to life. Banks, who some reports indicate was given only 10 minute to decide his fate, took the plea offer. After serving five years in prison, Banks was contacted by the accuser who admitted that she had lied about the incident. She allegedly refused to inform authorities of the falsity of her original allegations, however, because of a large financial settlement previously awarded to her in the case. After secretly taping the accuser's admission that the assault had not occurred, Banks was exonerated in 2012.

Consider also the case of Ada JoAnne Taylor.[27] In 1989, Taylor and five others were accused of killing a sixty-eight-year-old woman in Beatrice, Nebraska. The options offered to Taylor were starkly different. If she pleaded guilty and cooperated with prosecutors, she would be rewarded with a sentence of ten to forty years in prison. If, however, she proceeded to trial and was convicted, she would likely spend the rest of her life behind bars. The choice was difficult, but the incentives to admit guilt were enticing. A sentence of ten to forty years in prison meant she would return home one day and salvage at least a portion of her life. The alternative, a lifetime behind bars, was grim by comparison. After contemplating the options, Taylor pleaded guilty to aiding and abetting second-degree murder. In reality, however, she was innocent. After serving nineteen years in prison, Taylor was exonerated after DNA testing proved that neither she nor any of the other five defendants in her case were involved in the murder.

Through academic study, we now know that the actions of Brian Banks, Ada JoAnne Taylor and many others are not anomalies. Factually and morally innocent people facing tough circumstances, such as penalties for proceeding to trial or a realization of the financial costs of challenging an indictment, will falsely confess to something they have not done. As an example, in a recent article written by Dr. Vanessa Edkins (Assistant Professor, Department of Psychology, Florida Institute of Technology) and myself and published in the *Journal of*

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[25] *See* Lucian E. Dervan, *Over-Criminalization 2.0: The Role of Plea Bargaining*, 7 THE JOURNAL OF LAW, ECONOMICS, AND POLICY 645 (2011) (See *Attachment Page*).

[26] *See* Ashley Powers, *A 10-Year Nightmare Over Rape Conviction is Over*, L.A. TIMES, available at http://articles.latimes.com/2012/may/25/local/la-me-rape-dismiss-20120525 (May 25, 2012).

[27] *See Know the Cases: Ada JoAnn Taylor*, THE INNOCENCE PROJECT, www.innocenceproject.org/Content/Ada_JoAnn_Taylor.php (last visited November 11, 2013).

Criminal Law and Criminology, we discovered that more than half of the innocent participants in our study were willing to falsely admit guilt in return for a perceived benefit.[28]

As we now know the true power of plea bargaining from both actual criminal cases and from academic research, we must begin to examine the impact that overcriminalization has had on this most fundamental aspect of the American criminal justice system. I hope, therefore, that this Task Force and the Committee on the Judiciary will next turn its attention to modern day plea bargaining, one of the many outgrowths of the overcriminalization phenomenon.

Along with plea bargaining, there are many other issues currently being debated in the legal academy and legal profession that are appropriate for this Task Force's review. Those might include issues related to collateral consequences of conviction, mandatory minimum sentences, forfeiture provisions, and conspiracy laws. While those are not the topics of today's proceedings, I think they are topics ripe for investigation and analysis at future hearings considering overcriminalization and the state of the American criminal justice system.

Thank you for the opportunity to testify today. I welcome any questions the Task Force might have regarding my remarks.

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[28] *See* Lucian E. Dervan and Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 1 (2013) (See *Attachment Page*).