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## A Distant Mirror: American-Style Plea Bargaining Through the Eyes of a Foreign Tribunal

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Each year, American prosecutors request the extradition of between 350 and 600 people from foreign countries to be tried in US courts for alleged crimes.<sup>1</sup> Based on my experience as an expert witness in such a proceeding, I have concluded that foreign judges should no longer grant those requests as a matter of course, but should instead make a careful study of the way criminal charges are *actually* adjudicated in American courts. What foreign judges will find is that American courts have largely jettisoned the constitutionally prescribed mechanism for adjudicating criminal charges in favor of an informal, unregulated, and often astonishingly coercive system of plea bargaining that regularly produces false convictions and severely punishes people for exercising their right to trial. Indeed, as this Article explains, coercion has become such an intrinsic part of criminal adjudication in America that it is doubtful whether our system meets the minimum levels of fairness required before foreign courts—particularly those of other liberal democracies like Great Britain—can lawfully render their citizens into US authorities’ custody for prosecution on American soil.

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† My credentials for writing the expert report discussed in this piece are as follows: Adjunct Professor, George Mason University Antonin Scalia Law School; Member, American Bar Association’s Plea Bargaining Task Force and Head of the Subcommittee on Impermissibly Coercive Plea Bargains and Plea Practices; Member, New York County Lawyers Association Justice Center’s Plea Bargaining Task Force; Member, Advisory Board of New York University Law School’s Policing Project; Member, American Law Institute’s Principles of Law Policing Project. I have also appeared as a speaker and panelist at hundreds of legal, academic, and public policy events since 2000, including a panel titled *The Pros and Cons of Plea Bargaining* at the Federalist Society’s 2018 National Lawyers Convention. I have also litigated civil forfeiture cases against the US Department of Justice, which provided me with the opportunity to observe how federal law enforcement agents perform investigations and how federal prosecutors litigate cases involving allegations of criminal conduct.

<sup>1</sup> Jonathan Masters, *What is Extradition?*, COUNCIL ON FOREIGN RELATIONS (Jan. 8, 2020), <https://perma.cc/WRX7-USB5>.

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The notion that foreign judges might plausibly find that our criminal justice system fails to satisfy minimal standards of due process ought to be deeply concerning to all Americans. I describe that system in some detail below, and in assessing the strength of this critique, I invite the reader to do two things: (1) provisionally accept that the purely factual description of how American-style plea bargaining works is not seriously disputed; and (2) imagine looking at our current system through the eyes of a judge who has never heard of plea bargaining and has only ever worked in a system where all criminal charges are adjudicated according to the constitutionally prescribed process that culminates in a public trial before an impartial jury.<sup>2</sup>

The importance of jury trials was among the small handful of things about which the entire Founding generation agreed, Federalists and Anti-Federalists alike.<sup>3</sup> We should not lightly cast aside that wisdom, particularly with respect to such weighty questions as when the government may deprive someone of their liberty by putting them in a cage. But that is precisely what we have done, and I believe no judge—foreign or domestic—should allow themselves to be complicit in American-style plea bargaining without a clear understanding of how it actually works.

There are three parts to this Article. Part I sets the stage by explaining my involvement in an extradition proceeding where my role was to offer an opinion to a British tribunal on whether coercive plea bargaining has effectively rendered the right to a fair trial illusory here in America. Part II provides a slightly edited and updated version of the report that I prepared in connection with the case, which documents and discusses the role of coercion in American-style plea bargaining. The report concludes that, if the extradition request were granted, “it is quite likely that the U.S. government will subject [the Defendant] to intolerable pressure designed to induce a waiver of his fundamental right to a fair trial.”<sup>4</sup> Finally, Part III concludes with some proposals for addressing the role of coercion in our system and ameliorating, at least to some extent, its pernicious influence

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<sup>2</sup> See U.S. CONST. art. III, § 2, cl. 3 (“The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury . . .”); *Id.* at amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .”).

<sup>3</sup> Vikrant P. Reddy & R. Jordan Richardson, *Why the Founders Cherished the Jury*, 31 FED. SENT’G REP. 316, 316 (2019) (“You would be hard-pressed to find a Constitutional issue that garnered more agreement among the Founders than the right to trial by jury.”).

<sup>4</sup> Decl. of Clark M. Neily III in the City of Westminster Magistrates Court, *US v. Auda* (2020).

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on the presumptively innocent defendants against whom it is routinely deployed.

### I. Background and Introduction

In February of 2020, a London solicitor sought my assistance in connection with his representation of a British citizen pseudonymously referred to here as Nigel Smith, whom the US Department of Justice was trying to extradite to the Southern District of New York, where he had been indicted for various financial crimes. The solicitor asked me to prepare a report describing how plea bargaining works in the United States and to express my professional opinion as to whether our system provides a “fair hearing” to criminal defendants, as required by Article VI of the European Convention on Human Rights and British extradition law.<sup>5</sup>

Writing this report provided a remarkable opportunity to describe the reality of American-style plea bargaining to a judge with similar conceptions of due process and the rule of law, but scant professional investment in propping up that system. After I agreed to write the report, the solicitor sent me a packet of information, including the indictment and the government’s extradition request, along with its supporting affidavit. The package also included information about how the British system handles guilty pleas, which is to provide a statutorily prescribed discount depending on the stage of the proceeding at which the plea is entered. Unlike our system, there is no haggling.

I prepared the report, a slightly edited version of which forms the heart of this Article, and Mr. Smith’s counsel filed it with the City of Westminster Magistrates Court. The Department of Justice filed a perfunctory letter brief in response, and a hearing on the extradition request was set for late July 2020. Before the hearing, Mr. Smith, who had been denied bail in the UK, chose to waive extradition and submit himself to the jurisdiction of the United States. Thus, I was unable to testify about American-style plea bargaining before a British judge who would have had the opportunity to candidly assess our system—particularly the extent to which concerns about coercive plea bargaining do or do not seem well-founded—to a jurist with a largely shared history and understanding of due process, but no vested professional interest in validating or perpetuating a system that has come to depend on resolving the vast majority of cases through guilty pleas. Hopefully an opportunity for

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<sup>5</sup> European Convention on Human Rights, Sec. 1, Art. 6.

offering this assessment will arise again in the future, as an outside opinion on the legitimacy of American-style coercive plea bargaining—which causes more than ninety percent<sup>6</sup> of criminal defendants in the federal system to waive their constitutional right to a trial and thereby exchange the possibility of acquittal and freedom for the certainty of conviction and punishment via a guilty plea—would be useful to American judges.

## II. Expert Report on Coercive Plea Bargaining in *United States v. Smith*

### A. *Relevant Issues*

This expert report addresses the issue of whether there is a real risk that Mr. Smith will be deprived of his right to a fair trial if he is extradited to the United States and prosecuted for various financial crimes by the US Department of Justice in the Southern District of New York. In particular, this report addresses whether plea bargaining in the US federal criminal justice system has become so pervasive and so coercive that it has effectively nullified the right to trial. The report also considers: (1) whether the differential between the sentence offered to those who plead guilty and the much more severe sentence typically imposed after trial may fairly be characterized as a “penalty” for exercising the right to trial; and (2) whether the amount of pressure that US prosecutors exert during plea bargaining may be sufficiently intense to cause innocent people to plead guilty to crimes they did not commit (“the innocence problem”).<sup>7</sup> The answer to both questions is plainly yes.

### B. *The Origin and Role of Plea Bargaining in the United States*

In the US criminal justice system, the term “plea bargain” refers to a contract between the prosecution and the defense whereby the defendant agrees to plead guilty to one or more criminal charges in exchange for some benefit or concession from the government.<sup>8</sup> Those benefits can take any number of forms, including a reduction in anticipated sentence (“sentence bargaining”); dismissal of particular charges (“charge

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<sup>6</sup> LINDSEY DEVERS, PLEA AND CHARGE BARGAINING, DEP’T OF JUSTICE 3 (2011).

<sup>7</sup> See generally Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant’s Dilemma: An Innovative Empirical Study of Plea Bargaining’s Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1 (2013).

<sup>8</sup> *Plea Bargaining*, DEP’T OF JUSTICE, <https://perma.cc/H3YY-F8YM>.

bargaining”); the omission or recharacterization of various facts regarding the alleged offense (“fact bargaining”); and an agreement to advise the court of the defendant’s having provided “substantial assistance” to the government, which, in the federal system, normally triggers a significant reduction in sentence.<sup>9</sup>

Plea bargaining as practiced in the United States differs markedly from trial-waiver procedures in other countries, including England. In England, sentence reductions are fixed by statute and are determined by the stage at which the defendant elects to plead guilty—the earlier the plea, the greater the reduction in sentence, with a maximum available discount of one-third.<sup>10</sup> In the United States, by contrast, plea bargaining is essentially unregulated,<sup>11</sup> and there are no statutory or common-law limits on the size of the discount the prosecution may offer, nor on the overall mix of benefits and burdens the government may present to the defendant in an effort to elicit a guilty plea. As explained below, this broad discretion creates a dynamic in which the plea-bargaining process can—and frequently does—become highly coercive.

Plea bargaining was unknown at the time of America’s founding and is nowhere mentioned in the text of the US Constitution or in any contemporaneous legal sources.<sup>12</sup> The practice of resolving criminal charges through a negotiated guilty plea seems to have arisen informally in the mid-19th century, and was initially viewed with great suspicion and even disdain by many judges, as well as the general public.<sup>13</sup> Thus, while “plea bargaining now accounts for an overwhelming majority of case

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<sup>9</sup> *Guilty Plea: Plea Bargaining*, LAW LIBRARY – AMERICAN LAW AND LEGAL INFORMATION, <https://perma.cc/UL8E-YE9L>.

<sup>10</sup> SENT’G COUNCIL, REDUCTION IN SENTENCE FOR A GUILTY PLEA: DEFINITIVE GUIDELINE (Jun. 1, 2017), <https://perma.cc/5RE9-6UTB>; see also Carol A. Brook, Bruno Fiannaca, David Harvey, Paul Marcus & Jenny McEwan, *A Comparative Look at Plea Bargaining in Australia, Canada, England, New Zealand, and the United States*, 57 WM. & MARY L. REV. 4 (2016).

<sup>11</sup> See, e.g., Gregory M. Gilchrist, *Trial Bargaining*, 101 IOWA L. REV. 609, 612 (2016) (“Extensive procedural protections make trials expensive, while prosecutorial discretion and negotiation tactics are cheap and unregulated.”).

<sup>12</sup> See Reddy & Richardson, *supra* note 3, at 318–20.

<sup>13</sup> For example, an 1877 opinion from the Supreme Court of Wisconsin described plea bargaining as “hardly, if at all, distinguishable in principle from a direct sale of justice.” *Wight v. Rindskopf*, 43 Wis. 344, 354 (1877). See also H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, 80 (2011) (noting that reports of plea bargaining “spawned widespread public disapproval”). For a comprehensive discussion of the history of plea bargaining in America and initial judicial reactions to the practice, see Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUMBIA L. REV. 1 (1979).

dispositions [in America], the process was almost unheard of throughout the history of the common law.”<sup>14</sup>

“Plea bargaining did not gain ‘an aura of respectability in the [US] criminal justice system’ until the latter part of the twentieth century,” and even into “the late 1950s, speculation remained that the Supreme Court would find the practice unconstitutional.”<sup>15</sup> That is hardly surprising, given the Supreme Court’s recognition of the principle that “[a] guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void.”<sup>16</sup> Indeed, even when it finally did uphold the practice of plea bargaining in 1970, the Supreme Court expressed the following caveats:

(1) “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.”<sup>17</sup>

(2) “It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.”<sup>18</sup>

The Supreme Court has acknowledged that when a defendant pleads guilty, he forgoes the right to a “fair trial” along with “other accompanying constitutional guarantees,” such as the production of exculpatory evidence by the prosecution.<sup>19</sup> Thus, in assessing whether the process currently provided in the United States for adjudicating criminal charges may accurately be described as “fair” within the meaning of Article 6 of the European Convention on Human Rights,<sup>20</sup> a reviewing court must answer two related questions: (1) how likely is it that the prosecution will attempt to induce the defendant to waive his right to a fair trial and plead guilty instead; and (2) if the prosecution does seek to induce a guilty plea,

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<sup>14</sup> Caldwell, *supra* note 13, at 78.

<sup>15</sup> *Id.* at 81.

<sup>16</sup> Machibroda v. United States, 368 U.S. 487, 493 (1962).

<sup>17</sup> Brady v. United States, 397 U.S. 742, 758 (1970).

<sup>18</sup> *In re Winship*, 397 U.S. 358, 364 (1970).

<sup>19</sup> United States v. Ruiz, 536 U.S. 622, 628–29 (2002).

<sup>20</sup> European Convention on Human Rights, Sec. 1, Art. 6.

will the means it uses to do so be fair or unfair? The answers to those questions are: (1) it is a demonstrable fact that plea bargaining occurs in the vast majority of cases in the American criminal justice system;<sup>21</sup> and (2) taken as a whole, the full suite of tactics available to—and regularly employed by—prosecutors to elicit a guilty plea raise significant fairness concerns.<sup>22</sup> In other words, prosecutors in the US system seek to induce nearly every defendant to waive his right to a fair trial by pleading guilty, and the means they use to achieve that result are so frequently coercive that the overall process of plea bargaining in the United States cannot accurately be described as “fair” according to any reasonable definition of that term.

### C. *Plea Bargaining in America Is Pervasive and Often Coercive*

As the US Supreme Court recognized eight years ago, American “criminal justice today is for the most part a system of pleas, not a system of trials.”<sup>23</sup> The data bears this out. According to the Pew Research Center, of the 80,000 defendants in federal criminal cases in fiscal year 2018, just *two percent* went to trial, while “[t]he overwhelming majority (90%) pleaded guilty instead.”<sup>24</sup> (The remaining eight percent had their cases dismissed for various reasons.) According to the US Sentencing Commission’s 2018 Annual Report and Sourcebook of Federal Sentencing Statistics,<sup>25</sup> 97.4% of all federal criminal convictions in 2018 were obtained through guilty pleas, the highest percentage since the Commission began keeping records, which represents a trend of increasing trial waivers that has continued unbroken since at least 1991.<sup>26</sup> The proportion of criminal convictions obtained through guilty pleas in the Southern District of New York is slightly below average at 94.7%.<sup>27</sup>

On their face, those numbers are both suspicious and suggestive. Simply put, what would move a criminal defendant to exchange the possibility of acquittal via trial for the certainty of conviction via guilty

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<sup>21</sup> John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, PEW RSCH. CTR. (June 11, 2019), <https://perma.cc/ZW97-AN25>.

<sup>22</sup> See *infra* Part II.E and II.F.

<sup>23</sup> *Lafler v. Cooper*, 566 U.S. 156, 170 (2012).

<sup>24</sup> Gramlich, *supra* note 21.

<sup>25</sup> U.S. SENT’G COMM’N, 2018 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2018), <https://perma.cc/2Y5B-TSLP> [hereinafter 2018 ANNUAL REPORT].

<sup>26</sup> *Id.* at 56, 60; see also Ripley Rand & David M. Palko, *Year One of Trump’s DOJ: The National Criminal Sentencing Statistics*, THE NAT’L L. REV. (June 4, 2019), <https://perma.cc/D5PP-TA2M>.

<sup>27</sup> 2018 ANNUAL REPORT, *supra* note 25, at 56.

plea? The answer, of course, is that those who plead guilty have been induced by the government to do so. The strength of those inducements can vary markedly along a spectrum that runs from mildly tempting to irresistibly coercive, and it is axiomatic that the more valuable the thing to be relinquished—in this case, the possibility of acquittal and freedom following a public jury trial—the stronger the inducement must be to give it up.

It is an article of faith among most US judges, prosecutors, and legislators that American-style plea bargaining seldom, if ever, crosses the line from noncoercive to coercive. As documented below, however, that faith is clearly misplaced. The reality is that plea bargaining in the United States—and particularly in the federal system—has become pervasively coercive.

D. *The Federal Criminal Justice System Lacks the Resources to Provide a Fair Trial to the Very Defendant Whom It Indicts*

US practitioners, scholars, and policymakers widely acknowledge that it would be impossible to provide every defendant who enters the system with the jury trial to which he or she is constitutionally entitled.<sup>28</sup> Indeed, it is frequently remarked that America's criminal justice system would "grind to a halt" without plea bargaining because it lacks the resources to provide trials to more than a tiny fraction of those who pass through the system.<sup>29</sup> The problem is particularly acute in the federal system, where cases tend to be more complex and trials correspondingly longer and more resource intensive, and where "the total number of federal cases has basically tripled from 29,011 in 1990 to 83,946 in 2010."<sup>30</sup>

This dynamic prompted one federal district court judge to opine that the Department of Justice has become "so addicted to plea bargaining to leverage its law enforcement resources . . . that the focus of our entire criminal justice system has shifted far away from trials and juries and

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<sup>28</sup> Tina Peng, *I'm a Public Defender. It's Impossible for Me to Do a Good Job Representing My Clients*, WASH. POST (Sept. 3, 2015), <https://perma.cc/YQQ2-SA5D>.

<sup>29</sup> See, e.g., *Lafler v. Cooper*, 566 U.S. 166, 185 (2012) (Scalia, J., dissenting) (explaining that "we accept plea bargaining because many believe that without it our long and expensive process of criminal trial could not sustain the burden imposed on it, and our system of criminal justice would grind to a halt").

<sup>30</sup> Emilio C. Viano, *Plea Bargaining in the United States: A Perversion of Justice*, 83 REVUE INTERNATIONALE DE DROIT PENAL 109, 117 (2012). These figures are derived from US Sentencing Commission annual reports from 1990 (available at <https://perma.cc/H9FG-8BC5>) and 2010 (available at <https://perma.cc/T65T-ZMYW>).

adjudication to a massive system of sentence bargaining *that is heavily rigged against the accused citizen.*<sup>31</sup>

The knowledge that there are not nearly enough resources in any department of the US criminal justice system—prosecutorial, judicial, or administrative—to provide every defendant with a jury trial creates undeniable, perhaps even irresistible, pressure on prosecutors to ensure that the vast majority of their cases are resolved through guilty pleas instead of trials. And the fact that more than ninety percent of defendants in the federal system end up waiving their right to trial and tendering a guilty plea both creates and reinforces an institutional environment in which prosecutors correctly perceive that nearly any defendant can be persuaded to plead guilty given the proper inducements.<sup>32</sup>

E. *The Fact That Innocent People Regularly Plead Guilty to Crimes They Did Not Commit Is Compelling Evidence of Coercion in the Plea-Bargaining Process*

There is abundant, undisputed evidence that defendants in the US criminal justice system regularly plead guilty to crimes they did not commit.<sup>33</sup> This phenomenon of false guilty pleas is referred to by US scholars, attorneys, and activists as the “innocence problem.”<sup>34</sup>

For obvious reasons, the precise number of false guilty pleas in the US system is unknown, and it is difficult even to estimate the number with any precision.<sup>35</sup> According to the National Association of Criminal Defense Lawyers, “one of the most tragic aspects of the criminal justice system [is that] [t]he pressure defendants face to plead guilty can even cause *innocent* people to plead guilty. Of the 354 individuals exonerated by DNA analysis, 11% had pled guilty to crimes they did not commit . . . .”<sup>36</sup> Summarizing the relevant studies, Professor Lucian Dervan explains:

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<sup>31</sup> United States v. Green, 346 F. Supp. 2d 259, 265 (D. Mass. 2004), *vacated*, United States v. Pacheco, 434 F.3d 106 (1st Cir. 2006) (emphasis added).

<sup>32</sup> See DEVERS, *supra* note 6.

<sup>33</sup> See Jed S. Rakoff, *Why Innocent People Plead Guilty*, THE N.Y. REV. OF BOOKS (Nov. 20, 2014), <https://perma.cc/2HQZ-T62Q>.

<sup>34</sup> See generally Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant’s Dilemma: An Innovative Empirical Study of Plea Bargaining’s Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1 (2013).

<sup>35</sup> *Id.* at 17.

<sup>36</sup> NAT’L ASSOC. OF CRIMINAL DEFENSE LAWYERS, THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 10 (2018), <https://perma.cc/DKR5-SFKS> [hereinafter THE TRIAL PENALTY] (citing *DNA Exonerations in the United States*, INNOCENCE PROJECT, <https://perma.cc/46HN-SCQP>).

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[I]t is clear that plea-bargaining has an innocence problem. At least one study has concluded that as many as 27 percent of defendants who plead guilty would not have been convicted at trial, though this estimate seems exceptionally high. . . . Other studies have placed the number of defendants who plead guilty as a result of inducements by the government but who are factually innocent between 1.6 percent and 8 percent. Taking even the lowest of these estimates, the reality is striking and means that in 2009 there were over 1,250 innocent defendants forced to falsely admit guilt in the federal system alone.<sup>37</sup>

Remarking on the estimate that between two and eight percent of convicted felons falsely pleaded guilty to crimes they did not commit, US District Judge Paul L. Kane observed that “[w]ith over 2.2 million people in American prisons that is a haunting amount of injustice.”<sup>38</sup>

Although it is difficult to estimate with any precision the total number of false guilty pleas, what is certain is that documented exonerations represent merely the tip of the conviction-by-false-guilty-plea iceberg. The robust consensus among experts is that “[i]nnocent defendants who plead guilty have an exceptionally hard time convincing anybody of their innocence, or even getting a hearing. Judges, prosecutors, police officers, journalists, friends, lawyers, even innocence organizations are all less likely to believe in the innocence of a defendant who pleads guilty.”<sup>39</sup> Moreover, as noted by the leader of the Philadelphia District Attorney’s Office’s Conviction Integrity Unit, Patricia Cummings, it is particularly difficult to exonerate people who have pleaded guilty because there is no trial transcript to work with and often very little documentary record of any kind.<sup>40</sup>

Records of exonerations, together with the details of each case, are maintained by several organizations, including the National Registry of Exonerations<sup>41</sup> and the Innocence Project,<sup>42</sup> a New York City-based nonprofit that exonerates the wrongly convicted through DNA testing. Although false guilty pleas are most common in cases involving drugs and homicide,<sup>43</sup> exonerations occur in cases of alleged fraud as well, as in the

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<sup>37</sup> Lucian E. Dervan, *Bargained Justice: Plea-Bargaining’s Innocence Problem and the Brady Safety-Valve*, 2012 UTAH L. REV. 51, 84–85 (2012) (footnotes omitted) (emphasis added).

<sup>38</sup> John L. Kane, *Plea Bargaining and the Innocent*, THE MARSHALL PROJECT (Dec. 26, 2014, 1:05 PM), <https://perma.cc/P2AV-4YWX>.

<sup>39</sup> NAT’L REGISTRY OF EXONERATIONS, INNOCENTS WHO PLEAD GUILTY 2 (2015), <https://perma.cc/8DNA-7D8A> [hereinafter INNOCENTS WHO PLEAD GUILTY].

<sup>40</sup> Patricia Cummings, Address to the ABA Plea Bargaining Task Force (Nov. 15, 2019) (based on contemporaneous written notes of the author of this Article, who attended the presentation).

<sup>41</sup> THE NAT’L REGISTRY OF EXONERATIONS, <https://perma.cc/9SJF-CW7N> (last visited Aug. 12, 2020).

<sup>42</sup> INNOCENCE PROJECT, <https://perma.cc/R3F2-5DNG> (last visited Aug. 12, 2020).

<sup>43</sup> INNOCENTS WHO PLEAD GUILTY, *supra* note 39, at 1–2.

case of federal defendant Viken Keuylian, who pleaded guilty to wire fraud after prosecutors threatened not only to add charges to expose him to a much higher sentence, but also to charge his sister with fraud if he refused to plead guilty.<sup>44</sup>

Finally, it should be noted that the problem of coerced guilty pleas creates injustices not only for people who are demonstrably factually innocent, but also for people whose guilt or innocence is uncertain—whether because it is unclear what conduct they actually engaged in or because it is debatable whether the conduct they did engage in actually constitutes a criminal offense.<sup>45</sup> And while no one would suggest that prosecutors seek to elicit guilty pleas from people they know to be innocent, “[u]nquestionably, prosecutors use [plea bargains] to obtain convictions in their apparently weak cases.”<sup>46</sup> Based on a statistical analysis of federal prosecutions, Columbia Professor Michael Finkelstein concluded that “pressures to plead guilty have been used to secure convictions that could not otherwise be obtained,” and he estimated that “one-third of all defendants pleading guilty in high-rate districts would ultimately have escaped conviction if they had refused to consent.”<sup>47</sup> Whether that necessarily speculative figure is high or low, there can be no serious dispute that plea bargaining presents the government with an effective mechanism for obtaining convictions in doubtful cases, especially when prosecutors are equipped with powerful levers with which to elicit a plea.

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<sup>44</sup> THE TRIAL PENALTY, *supra* note 36, at 18.

<sup>45</sup> The Department of Justice has had a number of criminal convictions reversed by the Supreme Court based on a finding that the conduct at issue was not within the ambit of the relevant statute. See *Yates v. United States*, 574 U.S. 528 (2015) (rejecting an attempt to apply the destruction-of-documents provision in the Sarbanes–Oxley Act to a fishing boat captain who allegedly threw undersized fish overboard after being instructed to preserve them for inspection); *Bond v. United States*, 572 U.S. 844 (2014) (rejecting an attempt to charge a woman who placed caustic substance on the mailbox and door knob of her romantic rival with a violation of federal chemical-weapons law); *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005) (reversing the criminal conviction of now-defunct “Big Five” accounting firm arising from the alleged destruction of documents in connection with the Enron scandal).

<sup>46</sup> Michael O. Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 HARV. L. REV. 293, 295 (1975).

<sup>47</sup> *Id.* at 309–10.

F. *American Prosecutors Have a Variety of Levers With Which to Exert Often Intolerable Pressure on Defendants to Plead Guilty*

The sheer number of innocent people who condemn themselves through false guilty pleas in the United States should cause anyone to wonder what forces are at work behind the scenes when prosecutors and defendants engage in so-called “plea bargaining.” It turns out that American prosecutors possess a wide array of levers that they can—and routinely do—bring to bear on defendants to persuade them to waive their right to trial and simply plead guilty instead.<sup>48</sup> As further discussed below, these levers include, but are not limited to: threatening massively disproportionate sentences to defendants who refuse to plead guilty (known as the “trial penalty”);<sup>49</sup> threatening to add charges to the existing indictment to increase the potential sentence should the defendant refuse to plead guilty;<sup>50</sup> the use of pretrial detention to discourage and enervate defendants awaiting trial;<sup>51</sup> withholding exculpatory evidence during plea negotiations;<sup>52</sup> threatening to use uncharged or even acquitted conduct to enhance a defendant’s sentence;<sup>53</sup> and threatening to prosecute family members should the defendant refuse to plead guilty.<sup>54</sup> As documented below, all of those levers, and many more besides, are perfectly commonplace in the United States, and it appears they often combine to render the plea-bargaining process irresistibly coercive.

1. The “Trial Penalty”

As acknowledged by many US judges and as documented by the National Association of Criminal Defense Lawyers in their 2018 report *The Trial Penalty*, it is a routine feature of the US plea bargaining process for prosecutors to threaten defendants with massively disproportionate sentences should they refuse to plead guilty and insist upon exercising their right to trial.<sup>55</sup> This so-called “trial penalty” is defined as “the substantial difference between the sentence offered prior to trial versus

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<sup>48</sup> See, e.g., THE TRIAL PENALTY, *supra* note 36, at 16 (“The federal sentencing laws in turn provide prosecutors with an arsenal of tools that can be manipulated to convince defendants to plead guilty.”)

<sup>49</sup> *Id.* at 5.

<sup>50</sup> *Id.* at 24.

<sup>51</sup> *Infra* note 76.

<sup>52</sup> *Infra* note 78.

<sup>53</sup> WILLIAM R. KELLY & ROBERT PITMAN, CONFRONTING UNDERGROUND JUSTICE 75 (2018).

<sup>54</sup> *Id.*

<sup>55</sup> THE TRIAL PENALTY, *supra* note 36, at 5.

the sentence a defendant receives after a trial.”<sup>56</sup> As noted in the report, “data regarding plea offers is largely unavailable, so there is no way to accurately calculate the full extent of the trial penalty.”<sup>57</sup> Nevertheless, using data from the US Sentencing Commission, it is possible to calculate the discrepancy between average sentences imposed upon those who exercise their right to trial and sentences imposed following a guilty plea.<sup>58</sup> As relevant to Mr. Smith’s case, “in 2015, the average sentence for fraud was *three times* as high for defendants who went to trial versus those who pled guilty.”<sup>59</sup>

Notably, the US Supreme Court has not only recognized but essentially endorsed this practice by effectively embracing the proposition that no differential between the sentence offered for pleading guilty and the sentence threatened for going to trial can ever be unduly coercive. Thus, in *Bordenkircher v. Hayes*,<sup>60</sup> the Supreme Court rejected a constitutional challenge from a check-fraud defendant who, when facing a sentence of two to ten years, was told that if he rejected the prosecution’s five-year plea offer he would be reindicted as a habitual offender, which would increase his exposure from ten years to a mandatory life sentence.<sup>61</sup> Mr. Hayes refused the plea offer and was found guilty at trial and sentenced to life in prison.<sup>62</sup> Rejecting Mr. Hayes’s due process challenge, the Supreme Court began by noting that “the guilty plea and the often concomitant plea bargain are important components of this country’s criminal justice system.”<sup>63</sup> The Court then held that there is no due process violation so long as the sentence threatened by the prosecution for going to trial is one that might lawfully be imposed for the alleged offense.<sup>64</sup> Nowhere in its opinion does the Court mention the potentially coercive effect of threatening defendants with such a massive differential as the difference between spending the next ten years in prison and remaining there for the remainder of one’s natural life.<sup>65</sup> It is difficult to reconcile that omission with the Court’s earlier holding that “[a] guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act,

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<sup>56</sup> *Id.* at 11.

<sup>57</sup> *Id.* at 16.

<sup>58</sup> *Id.* at 17.

<sup>59</sup> *Id.* (emphasis added).

<sup>60</sup> 434 U.S. 357 (1978).

<sup>61</sup> *Id.* at 358–59.

<sup>62</sup> *Id.* at 359.

<sup>63</sup> *Id.* at 361–62 (quoting *Blackledge v. Allison*, 431 U.S. 63, 71 (1997)).

<sup>64</sup> *Id.* at 364.

<sup>65</sup> *See generally Id.*

is void.”<sup>66</sup> And yet, this studied indifference to the potentially coercive effect of massive sentencing differentials upon defendants from whom the government seeks to elicit a guilty plea remains the rule in American jurisprudence.

Far from disputing the existence of an often-massive differential between the sentence offered for a guilty plea and the sentence threatened against those who exercise their right to trial, the Department of Justice considers the use of those differentials for plea leverage to be a perfectly legitimate prosecutorial tactic.<sup>67</sup> Thus, for example, in responding to public criticism of the Department’s handling of the Aaron Swartz computer-hacking case—during which Mr. Swartz took his own life in the midst of plea negotiations—the US Attorney responsible for that prosecution, Carmen Ortiz, defended her subordinates’ conduct, which included exposing Mr. Swartz to a thirty-five-year prison sentence<sup>68</sup> and then offering to recommend a six-month sentence if he agreed to plead guilty.<sup>69</sup>

## 2. Mandatory Minimums

As suggested in the discussion of *Bordenkircher* above, mandatory sentences provide prosecutors with significant leverage when seeking to elicit a guilty plea. According to interviews conducted by Professor William Kelly and US District Judge Robert Pitman, “Defense attorneys concur that the threat of a mandatory sentence is commonly used by prosecutors as a way to motivate a plea. . . . A couple of prosecutors acknowledge using mandatory sentences as leverage.”<sup>70</sup> Indeed, federal prosecutors have even lobbied for mandatory-minimum sentences precisely *because* “[t]hey provide us leverage to secure cooperation from defendants” and are thus a “critical tool in persuading defendants to cooperate.”<sup>71</sup>

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<sup>66</sup> *Machibroda v. United States*, 368 U.S. 487, 493 (1962).

<sup>67</sup> See Carmen M. Ortiz, United States Attorney, U.S. Dep’t of Justice, Statement Of United States Attorney Carmen M. Ortiz Regarding The Death Of Aaron Swartz (Jan. 16, 2013), <https://perma.cc/4TEL-XMVZ>.

<sup>68</sup> Andrea Peterson, *The Law Used to Prosecute Aaron Swartz Remains Unchanged a Year After His Death*, WASH. POST (Jan. 11, 2014, 12:52 PM), <https://wapo.st/39tWcQk>.

<sup>69</sup> Ortiz, *supra* note 67.

<sup>70</sup> KELLY & PITMAN, *supra* note 53104, at 75.

<sup>71</sup> Letter from National Association of Assistant United States Attorneys to Attorney General Eric Holder (Jan. 24, 2014), <https://perma.cc/V35U-86Q4>.

### 3. Charge Stacking

It is widely acknowledged that US prosecutors engage in “[c]harge stacking, or charging multiple offenses for the same criminal conduct,” to enhance their opening position in plea negotiations.<sup>72</sup> As Professor H. Mitchell Caldwell explains, the prosecutor “has a powerful incentive to begin the inevitable negotiating process from a position of strength, which often results in overcharging.”<sup>73</sup> Thus, “[i]t makes sense for prosecutors to overcharge because it allows the prosecutor to gain leverage at the outset and control the parameters of the bargaining process.”<sup>74</sup>

### 4. Pretrial Detention

Research indicates that pretrial detention represents a powerful plea-bargaining lever because individuals who are incarcerated while awaiting trial are demonstrably more likely to plead guilty than people who are free.<sup>75</sup> The reasons for this include the physical and emotional discomfort of incarceration; the sense of psychological isolation; anxiety about loss of employment, housing, or childcare; and the increased difficulty in conferring with counsel and contributing to one’s own defense.<sup>76</sup>

### 5. Withholding Exculpatory Evidence

In the US system,

[t]here is . . . substantial variation in the scope of evidence the prosecution discloses prior to negotiating a plea deal, meaning that by waiving the right to trial, defendants are also

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<sup>72</sup> KELLY & PITMAN, *supra* note 53, at 32.

<sup>73</sup> H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, 65 (2011).

<sup>74</sup> KELLY & PITMAN, *supra* note 53, at 72.

<sup>75</sup> See, e.g., Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J. LAW, ECON & ORG. 511, 512–13 (2018) (finding that “pretrial detention leads to a 13% increase in the likelihood of being convicted,” which is “largely explained by an increase in the likelihood of pleading guilty among those who would otherwise have been acquitted, diverted, or had their charges dropped”).

<sup>76</sup> See, e.g., Samuel R. Wiseman, *Pretrial Detention and the Right to be Monitored*, 123 YALE L.J. 1344, 1351–56 (2014) (noting that “[b]eing jailed . . . substantially impacts the quality of [one’s] defense” and collecting sources in support of the conclusion that “those detained pretrial [are] more likely to be convicted and imprisoned than those released on bail”). See also E. Euvard & C. Leclerc, *Pre-trial Detention and Guilty Pleas: Inducement or Coercion?*, 19 PUNISHMENT & SOCIETY 525 (2017) (concluding that the criminal justice system itself “engenders coercion through the use of custodial remand thereby implying that all people on remand suffer a degree of pressure to plead guilty”).

waiving the right to confront the evidence against them, and indeed to appreciate the likelihood of conviction at trial. The normal rules of disclosure are linked to trial, and there is no established baseline of evidence that must be disclosed prior to a plea deal being concluded.<sup>77</sup>

Although it does not officially endorse the practice, it is notable that the Department of Justice felt moved to submit an amicus brief in a recent appellate court proceeding in which it argued that defendants have no constitutional right to obtain exculpatory evidence from the prosecution before pleading guilty.<sup>78</sup> In a controversial decision, a divided US Court of Appeals for the Fifth Circuit, sitting en banc, agreed.<sup>79</sup>

## 6. Use of Uncharged or Acquitted Conduct at Sentencing

According to retired US District Court Judge Nancy Gertner, prosecutors can exert plea leverage by threatening to

introduce evidence of uncharged conduct at the sentencing, or even evidence of counts for which the defendant was acquitted, so long as the defendant is convicted of something. No other common law country in the world enables the prosecutor to seek a sentence based on criminal conduct never charged, never subject to the adversary process, never vetted by a grand jury or a jury, or worse, charges for which a defendant was acquitted.<sup>80</sup>

## 7. Threatening to Indict Family Members

Perhaps the most nakedly coercive tactic in US plea-bargaining practice is the use of threats against a defendant's family members to induce a guilty plea. As noted by Professor Kelly and Judge Pitman, "courts have generally approved other forms of persuasion in plea negotiation such as threatening to indict family members."<sup>81</sup> Because no managerial approval or case-specific documentation is required, it is impossible to know for sure how often prosecutors use this tactic to leverage guilty pleas, but the consensus among experienced practitioners is that the practice is routine, particularly in the federal system.<sup>82</sup> Abundant

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<sup>77</sup> *The Disappearing Trial: Towards a Rights-Based Approach to Trial Waiver Systems*, FAIR TRIALS & FRESHFIELDS BRUCKHAUS DERINGER LLP ¶ 23 (2017), <https://perma.cc/TT9N-8WWQ>.

<sup>78</sup> See Brief for the United States as Amicus Curiae Supporting Appellant City of Brownsville and Reversal, *Alvarez v. City of Brownsville*, 904 F.3d 382 (5th Cir. 2018), <https://perma.cc/DK9D-FPEL>.

<sup>79</sup> See *Alvarez*, 904 F.3d 382.

<sup>80</sup> Nancy Gertner, Bruce Brower & Paul Sheckman, *Why the Innocent Plead Guilty: An Exchange*, THE N.Y. REV. OF BOOKS (2015) (emphasis added).

<sup>81</sup> KELLY & PITMAN, *supra* note 53, at 75.

<sup>82</sup> *Id.*

anecdotal evidence supports this claim. To take just one example, in announcing the recent presidential pardon of financier Michael Milken, a White House press statement noted that “[t]hough he initially vowed to fight the charges, Mr. Milken ultimately pled guilty in exchange for prosecutors dropping criminal charges against his younger brother.”<sup>83</sup> Remarkably, federal courts have uniformly ratified this manifestly coercive practice, explaining that “[a]lmost anything lawfully within the power of a prosecutor acting in good faith can be offered in exchange for a guilty plea,” including threats to indict—or promises not to indict—a defendant’s family members for the sole purpose of eliciting a guilty plea from the defendant.<sup>84</sup>

G. *Psychological Studies Suggest That It Is Far Easier to Elicit False Guilty Pleas Than Previously Believed*

The official position of the US federal judiciary is that defendants are unlikely to be coerced into pleading guilty “as long as the accused is free to accept or reject the prosecutor’s offer.”<sup>85</sup>

As documented by Professors Lucian Dervan and Vanessa Edkins, however, laboratory experiments focusing on false accusations have repeatedly shown that a majority of demonstrably innocent people will agree to less severe punishments to avoid the risk of losing an evidentiary hearing and receiving more severe punishments.<sup>86</sup> In a pathbreaking study, Dervan and Edkins created a simulation in which students were invited to participate in a project that they were told was designed to test individual work versus group work.<sup>87</sup> Using a confederate in the room, the authors managed to get about half the students to cheat by violating certain rules.<sup>88</sup> They then accused *all* the students of cheating and offered leniency to any

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<sup>83</sup> Press Release, White House, Statement from the Press Secretary Regarding Executive Grants of Clemency (Feb. 18, 2020), <https://perma.cc/2ZMU-6RMP>; see also THE TRIAL PENALTY, *supra* note 36, at 18 (recounting the story of exoneree Viken Keuylian, who claims he was told by prosecutors that if he refused to plead guilty his sister would be charged with fraud as well).

<sup>84</sup> United States v. Pollard, 959 F.2d 1011, 1021 (D.C. Cir. 1992).

<sup>85</sup> Miller v. Superintendent, Otisville Corr. Facility, 480 F. Supp. 858, 861 (S.D.N.Y. 1979) (citing Bordenkircher v. Hayes, 434 U.S. 357, 362–63 (1978)); see also *The Troubling Spread of Plea-Bargaining from America to the World*, THE ECONOMIST (Nov. 9, 2017), <https://www.economist.com/international/2017/11/09/the-troubling-spread-of-plea-bargaining-from-america-to-the-world> (noting that “[w]hen America’s Supreme Court gave its seal of approval to plea bargains in 1970, it did so on the understanding that they would not be used to press innocent defendants falsely to admit guilt”).

<sup>86</sup> See Dervan & Edkins, *supra* note 34, at 34 tbl.1.

<sup>87</sup> *Id.* at 28.

<sup>88</sup> *Id.* at 28–30.

who agreed to confess.<sup>89</sup> Remarkably, some fifty-six percent of innocent subjects chose to plead guilty to avoid the harsher punishment that (they were told) would be imposed had they challenged the accusation and lost.<sup>90</sup> As Professor Dervan explains, “[t]he results of the study were groundbreaking and brought to an end the longstanding debate regarding whether innocents will falsely plead guilty.”<sup>91</sup>

H. *There Is Widespread Recognition That Plea Bargaining in the United States Can Be, and Often Is, Highly Coercive*

Apart from the US Supreme Court and the federal courts of appeals, virtually everyone—including the Department of Justice—recognizes that coercion plays a significant role in American-style plea bargaining. Thus, for example, a 2011 report prepared by the Bureau of Justice Assistance (a component of the Office of Justice Programs within the US Department of Justice), notes that “[p]rosecutors have been found to use threats that coerce defendants into accepting pleas to secure a conviction when the evidence in a case is insubstantial.”<sup>92</sup> Similarly, a 1985 report by another Department of Justice component, the National Institute of Justice, explained that “[w]hile pleas today appear to be more likely to be ‘intelligent’” in the sense that defendants were aware of all the consequences, “they have not lost their *coercive character*. The majority (77 percent) of the defendants [surveyed] said they *felt they had to accept the plea bargain*.”<sup>93</sup> The authors of the report suggested that a “partial remedy” to the problem of coercive plea bargaining would be to “keep the inducement as small as possible.”<sup>94</sup> Thus, “it appears that if the state offered defendants a reduction in the length of sentence of about 15 percent to 30 percent, that would be sufficient to keep pleas coming.”<sup>95</sup> Finally, former Deputy Assistant Attorney General for the Department of

<sup>89</sup> *Id.* at 30.

<sup>90</sup> *Id.* at 34 tbl.1.

<sup>91</sup> Lucian E. Dervan, *Bargained Justice: The History and Psychology of Plea Bargaining and the Trial Penalty*, 31 FED. SENT’G REP. 239, 242 (2019).

<sup>92</sup> BUREAU OF JUST. ASSISTANCE, U.S. DEP’T OF JUST., PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY 2 (Jan. 24, 2011), <https://perma.cc/M6JT-SN5B> [hereinafter PLEA AND CHARGE BARGAINING].

<sup>93</sup> WILLIAM F. McDONALD, PLEA BARGAINING: CRITICAL ISSUES AND COMMON PRACTICES 132 (1985) (emphasis added).

<sup>94</sup> *Id.* at 105.

<sup>95</sup> *Id.* This observation tracks well with trial-waiver procedures in the UK, which state that “[w]here a guilty plea is indicated at the first stage of proceedings a reduction of one-third should be made (subject to the exceptions in section F). . . . After the first stage of the proceedings the maximum level of reduction is one-quarter.” SENT’G COUNCIL, *supra* note 10, at 5.

Justice's Criminal Division Mary Pat Brown notes that "[t]he threat of higher sentences puts 'enormous pressure [on defendants] to plead.'"<sup>96</sup>

A number of federal district court judges have likewise noted the role that coercion plays in maintaining the high rate of guilty pleas in the federal system. To take just a few representative examples:

\* Judge Jed Rakoff of the US District Court for the Southern District of New York published an influential article in *The New York Review of Books* in 2014 titled *Why Innocent People Plead Guilty* in which he notes nineteen percent of federal defendants went to trial in 1980, but by 2010, only three percent went to trial. "The reason for this," Judge Rakoff opines, "is that [federal sentencing] guidelines, like the mandatory minimums, provide prosecutors with weapons to bludgeon defendants into *effectively coerced plea bargains*."<sup>97</sup> As a result, says Rakoff, "[t]he Supreme Court's suggestion that a plea bargain is a fair and voluntary contractual arrangement between two relatively equal parties *is a total myth*."<sup>98</sup>

\* Judge John Gleeson of the US District Court for the Eastern District of New York explained in a written opinion that "[t]o *coerce guilty pleas* . . . prosecutors routinely threaten ultra-harsh, enhanced mandatory sentences that *no one*—not even the prosecutors themselves—thinks are appropriate."<sup>99</sup> Judge Gleeson went on to observe that mandatory minimums can "produce the sentencing equivalent of a two-by-four to the forehead. The government's use of them *coerces guilty pleas* and produces sentences so excessively severe they take your breath away."<sup>100</sup>

\* Former Judge Nancy Gertner of the US District Court for the District of Massachusetts recounts how there were times when

inquiring of a defendant as to the voluntariness of his guilty plea felt like a Kabuki ritual. "Has anyone coerced you to plead guilty," I would ask, and I felt like adding, "like thumbscrews or waterboarding? Anything less than that—a threatened tripling of your sentence should you go to trial, for example—doesn't count."<sup>101</sup>

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<sup>96</sup> *An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty*, HUMAN RIGHTS WATCH (Dec. 5, 2013), <https://perma.cc/VVE4-876P>.

<sup>97</sup> Rakoff, *supra* note 33 (emphasis added).

<sup>98</sup> *Id.* (emphasis added).

<sup>99</sup> *United States v. Kupa*, 976 F. Supp. 2d 417, 420 (E.D.N.Y. 2013) (first emphasis added).

<sup>100</sup> *Id.* at 420 (emphasis added).

<sup>101</sup> Nancy Gertner et al., *supra* note 80. Note that based on data presented in THE TRIAL PENALTY, the average differential for fraud defendants is a tripling of the sentence imposed after trial versus the sentence received by those who plead guilty. THE TRIAL PENALTY, *supra* note 36, at 17.

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Besides the preceding observations by federal district court judges and certain components of the Department of Justice, an essentially universal consensus has emerged among academics who have addressed the issue that American-style plea bargaining is extraordinarily—and illegitimately—coercive. As summarized by the National Association of Criminal Defense Lawyers in *The Trial Penalty*, “a combination of anecdotal evidence and an analysis of prosecutorial practices, sentencing laws, and judicial decisions strongly suggests that coercion plays a major role in the ever-increasing percentage of defendants who forego their right to a trial.”<sup>102</sup> Based on an exhaustive survey of the relevant academic literature, it appears no scholar seriously disputes that proposition.

I. *The US Department of Justice Has Never Meaningfully Addressed the Issue of Coercive Plea Bargaining*

“When so many innocent people are agreeing to their own wrongful convictions, it’s time to acknowledge that something is very wrong.”<sup>103</sup> In light of the overwhelming evidence of coercion and false guilty pleas presented above, it is difficult to dispute that statement. And yet, the Department of Justice has been essentially silent on the issue of coercive plea bargaining, even as federal judges decry it in their written opinions, and law professors and other commentators warn that the combination of coercion and the false convictions it regularly produces threatens the moral and political legitimacy of the US criminal justice system. As Professor Kelly and Judge Pitman relate in their recent book about plea bargaining, “[w]e had no difficulty obtaining interviews with defense counsel . . . . Prosecutors, however, were not eager to be interviewed. . . . We sought to interview assistant U.S. attorneys but did not receive a reply to our request to the U.S. Justice Department.”<sup>104</sup>

And it is not that the Department of Justice is unaware of the problem. Indeed, commenting on its own findings regarding the massive sentencing differentials between guilty pleas and trial convictions, the Bureau of Justice Assistance explained that “[t]hese findings are problematic because they demonstrate that if a defendant opts to invoke the Sixth Amendment right to a trial by jury, he or she will likely have a

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<sup>102</sup> THE TRIAL PENALTY, *supra* note 36, at 16.

<sup>103</sup> *Why Do Innocent People Plead Guilty to Crimes They Didn't Commit*, INNOCENCE PROJECT, <https://perma.cc/RZ97-52FH>.

<sup>104</sup> KELLY & PITMAN, *supra* note 53, at 40 (emphasis added).

more unfavorable outcome.”<sup>105</sup> Nor is it the case that the Department of Justice has an institutional policy of not commenting on potentially controversial or unsettled areas of law. For example, the Department released a 100-page memorandum in 2004 explaining the Department’s shifting understanding of the Second Amendment over the years and explaining its rationale for settling upon the individual-rights interpretation that the Supreme Court would embrace four years later in *District of Columbia v. Heller*.<sup>106</sup>

Given the Department of Justice’s persistent failure to confront the widely acknowledged problem of coercive plea bargaining, there is little reason to hope—let alone assume—that the Department will meaningfully address any of the issues raised in this report or that it will take any measures to ensure that the strength of the inducement offered to a particular defendant—such as Mr. Smith—does not cross the line from permissibly motivating to impermissibly coercive.

J. *Judges Make No Real Effort to Ensure the Defendant’s Guilt Before Accepting a Guilty Plea*

Nor is it plausible to depend on US judges to ensure that guilty pleas are truly voluntary and not the product of coercion. As noted above, the Supreme Court has consistently upheld the application of extraordinarily coercive inducements, including the threat to transform a ten-year maximum sentence into a mandatory life sentence if a defendant (with prior convictions) in a check-fraud case refused a five-year plea offer.<sup>107</sup>

Most judges and prosecutors put great faith in procedural rules as a mechanism to “protect” defendants from being coerced into waiving their Sixth Amendment rights. Thus, Federal Rule of Criminal Procedure 11(b)(2) provides that “[b]efore 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).”<sup>108</sup> Yet plea colloquies, in which this screening process purportedly occurs, tend to be pro forma events during which both sides simply go through

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<sup>105</sup> PLEA AND CHARGE BARGAINING, *supra* note 92, at 2.

<sup>106</sup> 554 U.S. 570, 592 (2008); *see also* OFF. OF LEGAL COUNS., U.S. DEP’T OF JUST., WHETHER THE SECOND AMENDMENT SECURES AN INDIVIDUAL RIGHT 128 (Aug. 24, 2004), <https://perma.cc/YH2J-MU85>.

<sup>107</sup> *See Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978).

<sup>108</sup> FED. R. CRIM. P. 11(b)(2).

the motions of what the rules require.<sup>109</sup> There is no presentation or consideration of corroborating evidence, and the judge makes no real effort to ensure the defendant is really acting voluntarily so long as the defendant asserts that he is. Indeed, as the Department of Justice's National Institute of Justice recognized in its 1985 report *Plea Bargaining: Critical Issues and Common Practices*:

Pleas that are "voluntary" under these standards are not free from pressures or inducements. Virtually all defendants still plead guilty to obtain the inducements offered by the state. . . . In responding to the plea acceptance inquiries of judges, defendants say what their counsel have told them to say in order to get the promised bargain.<sup>110</sup>

K. *Research Demonstrates Persistent Racial Disparities in the Quality of Plea Offers*

Given Mr. Smith's ethnicity, it may be relevant to note that research has shown a consistent pattern of racial disparities in the quality of plea offers made to defendants by US prosecutors.

As noted in the 2011 Bureau of Justice Assistance report cited above, "[t]he majority of research on race and sentencing outcomes shows that blacks are less likely than whites to receive reduced pleas."<sup>111</sup> More recent scholarship confirms that whites continue to receive more favorable plea offers than blacks in the US criminal justice system.<sup>112</sup> As summarized in a 2019 article in the Federal Sentencing Reporter: "Deep-rooted undercurrents of racism lurk at every turn in the legal system, severely tilting the process against people of color. Nowhere is the danger of unequal parties and disparities more prominent than in plea bargaining."<sup>113</sup>

Of course, it is unlawful for any government official to discriminate intentionally on the basis of race, and it does not appear that racially disparate plea offers are the result of conscious choices on the part of prosecutors. Instead, racial disparities in plea offers appear to be the result of unconscious decisions and actions by prosecutors that are not well understood. There is no evidence that federal prosecutors are less prone to such unconscious behaviors than other prosecutors, nor does it appear

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<sup>109</sup> MCDONALD, *supra* note 93, at 133–34.

<sup>110</sup> *Id.* at vi (emphasis added).

<sup>111</sup> PLEA AND CHARGE BARGAINING, *supra* note 92, at 3.

<sup>112</sup> See, e.g., Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187, 1190–92 (2018).

<sup>113</sup> Rick Jones & Cornelius Cornelissen, *Coerced Consent: Plea Bargaining, the Trial Penalty, and American Racism*, 31 FED. SENT'G REP. 265, 270 (2019).

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the Department of Justice has any policies designed to detect or ameliorate the racial disparities noted in the 2011 Bureau of Justice Assistance Report and the other studies cited above.

L. *Application of These Observations and Conclusions to the Case of Mr. Smith*

No facts specific to this case lead me to believe that Mr. Smith will be exempted from the standard litigation practices described in this Article. Accordingly, it is likely that US prosecutors will seek to elicit a guilty plea from Mr. Smith using some or all of the tactics described in this Article.

Without knowing more details about the alleged conduct (including specifically the amount of the alleged financial loss and the number of alleged victims) precisely calculating the sentencing range Mr. Smith will face should he exercise his right to trial and be convicted is impossible. My best estimate from the materials provided is that a sentence will be at least five years and potentially a great deal more. In any event, extradition to the United States will guarantee that Mr. Smith is subjected to a system of justice that routinely employs—but lacks any meaningful safeguards against—coercive plea bargaining. Once present, it is quite likely that the US government will subject Mr. Smith to intolerable pressure designed to induce a waiver of his fundamental right to a fair trial.

Accordingly, in my professional opinion and based on my personal experience, a fair hearing for adjudicating the charges against Mr. Smith is, for all practical purposes, unavailable in the United States.

### III. Proposals for Addressing the Problem of Coercive Plea Bargaining

The Founders would undoubtedly have been horrified to learn that plea bargaining would one day supplant the jury trial as the default mechanism by which criminal charges are resolved in America. Among their greatest objections would likely have been the reduction in civic participation as fewer and fewer citizens had the experience of serving on criminal juries; the loss of perceived legitimacy of a system that routinely convicts and punishes people without the imprimatur of the community;<sup>114</sup> vastly increased opportunities for abuse of government

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<sup>114</sup> See, e.g., Aliza Plener Cover, *Supermajoritarian Criminal Justice*, 87 GEO. WASH. L. REV. 875, 891, 894–98 (2019) (arguing that “[a] criminal law system that is consistent with the moral intuitions of a bare majority of the population would suffer from significant and sustained problems of legitimacy and moral credibility and, hence, would risk high levels of disrespect and noncompliance”).

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power; and the fact that inducing people to condemn themselves *as a matter of state policy* is an inherently illiberal enterprise that necessarily ends in squalor.<sup>115</sup>

Unfortunately, however, there seems little doubt that plea bargaining is here to stay—and with it the inevitable threat of coercion. Assuming, as I think we must, that we are stuck with plea bargaining as an extra-constitutional mechanism by which at least some criminal charges will be resolved, the question is whether there is anything we can do to ameliorate the role of coercion in that process. Here, the news is surprisingly good. Our collective failure to address the problem of coercive plea bargaining stems not from a lack of remedies, but rather from our collective indifference to the problem. In other words, it's not that we can't do anything about coercive plea bargaining—it's that we just don't care.

But what if we did care? What if we treated coercive plea bargaining like the highly aggressive, metastasizing, life-threatening cancer that it is? One does not typically say of a proposed treatment for stage IV cancer, "Gosh, that seems like pretty strong medicine with some scary side effects." Instead, one simply asks whether the proposed treatment has a reasonable chance of doing more good than harm. With that framing in mind (which I realize some readers will embrace and some will not), this concluding part briefly describes three responses that seem worth considering if the alternative is to allow the cancer of coercive plea bargaining to run its course in our body politic.

#### A. *Plea Integrity Units*

In May 2020, the Department of Justice moved to dismiss its prosecution of former National Security Adviser Michael Flynn on the grounds that it had concluded he had not in fact committed the crime of making false statements to government agents in violation of 18 U.S.C. § 1001.<sup>116</sup> This happened after the Department appointed the US Attorney for the Eastern District of Missouri, Jeffrey Jensen, to conduct an independent review of Flynn's case.<sup>117</sup> Among other things, Jensen identified discoverable documents that had not been produced to the

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<sup>115</sup> See, e.g., John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 12–19 (1978) (describing use of judicially sanctioned torture in pre-Enlightenment Europe and comparing it with American-style plea bargaining).

<sup>116</sup> Mot. to Dismiss at 1–2, *United States v. Flynn*, No. 17-232-EGS, 2020 WL 2213634 (D.D.C. May 7, 2020).

<sup>117</sup> Clark Neily, *Department of Injustice*, WASH. EXAMINER (May 14, 2020, 11:01 PM), <https://perma.cc/TDU7-LG7F>.

defense (and that prosecutors then belatedly produced), and concluded that the interview during which Flynn allegedly lied to FBI agents was not conducted in connection with any legitimate ongoing investigation, which, according to the Department's motion to dismiss, is among the necessary elements of the federal false-statements statute.<sup>118</sup> Putting aside whether that explanation was sincere or merely a cynical attempt to disguise a political decision, the Department's representation that it elicited a false guilty plea from one of the most powerful men on the planet—and that it only realized its mistake after conducting an independent review of his case—is surely significant.<sup>119</sup> And it raises a profound question: How many other Department of Justice prosecutions would fall apart as spectacularly as Flynn's if the defendants in those cases received the benefit of the same internal-review process that Flynn did? It stands to reason that the Flynn case—with its hand-picked team of elite prosecutors—received a relatively high-quality effort from the Department compared to other cases that are lower profile and perhaps less zealously litigated by both sides. And if Department of Justice prosecutors can make such fundamental mistakes—including failing to produce discoverable material and charging a crime for which not all the elements had been met—in that case, then surely they can make mistakes in other cases as well. The only difference is that other defendants with lower profiles and fewer political connections than Flynn do not benefit from the independent review that his case received. But why shouldn't they?

The Department of Justice could create—or Congress could mandate—a new “Office of Plea Integrity” designed to provide federal defendants the same sort of independent review of their cases that Michael Flynn received.<sup>120</sup> While it is probably not feasible to review all 80,000 annual federal prosecutions, a modest-sized office—five or ten attorneys—could certainly review two or three hundred cases per year. And given how catastrophic false guilty pleas are—for the defendant, of course, but also for the individual prosecutors, the Department of Justice, and the judiciary—preventing even a small handful of them would more than justify the modest cost of such an undertaking in an agency with a \$30 billion budget.

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<sup>118</sup> Mot. to Dismiss at 2, *Flynn*, 2020 WL 2213634.

<sup>119</sup> *Id.* at 19.

<sup>120</sup> See Neily, *supra* note 117 (introducing the idea of an “Office of Plea Integrity” in the context of critiquing the Michael Flynn prosecution).

B. *Trial Audit with Professional Consequences for Prosecutors*

Another potential way to address coercive plea bargaining is to randomly select some number of cases in which a guilty plea was entered and have the case go to trial anyway to see whether the government can prove its case beyond a reasonable doubt to the satisfaction of a unanimous jury. And to encourage prosecutors to use plea bargaining more sparingly than they do now—and only when they are so confident of the defendant's guilt that they are willing to put personal skin in the game the way many other professionals do (e.g., pilots, firefighters, and fishing boat captains)—acquittal of a defendant via trial audit could be treated as a presumptively career-ending event for the prosecutor who induced the defendant to falsely plead guilty. Prosecutors who prefer not to expose themselves to that risk—under any circumstances, or in particular cases—could simply decline to make a plea offer and avail themselves of the constitutionally prescribed mechanism for adjudicating criminal charges, which is of course a jury trial.

This proposal admittedly raises myriad concerns, both practical and conceptual, that will not all be addressed or even identified here. Many of the practical challenges presented by the trial-audit process are discussed by Professors Kiel Brennan-Marquez, Stephen E. Henderson, and Darryl K. Brown in their article *The Trial Lottery*.<sup>121</sup> A co-author and I are working on another forthcoming paper that will develop the idea of subjecting prosecutors who induce false guilty pleas to a process akin to a court martial (technically a board of inquiry since there are no criminal consequences, but court martial is the more familiar concept) where the prosecutors will have to justify their conduct in the face of a strong presumption that such a catastrophic outcome represents a professional failure for which the standard consequence should be the loss of one's career. Suffice it to say that there appear to be no insurmountable obstacles to this proposal; and while it may seem like strong medicine, whether it is too strong depends upon the nature of the disease, as suggested above.

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<sup>121</sup> Kiel Brennan-Marquez, Stephen E. Henderson & Darryl K. Brown, *The Trial Lottery*, VA. PUB. L. AND LEGAL THEORY RES. PAPER SERIES 2020-03 28, 41-47 (Jan. 2020), <https://perma.cc/6LLN-DGVH>. Although the idea of a trial audit occurred to me independently, I am indebted to Professor Brennan-Marquez and his co-authors for their extraordinarily thoughtful presentation of the concept in their working paper.

### C. *Founding-Era-Informed Juries*

The final proposal for combatting coercive plea bargaining is at once the most modest and the most revolutionary: call it the “Founding-era-informed jury.” This solution would ensure that modern jurors understand, just as Founding-era jurors would have, that they have not only the right, but even the duty, to acquit a defendant whom they believe to be factually guilty if they believe it would be unjust to convict. Commonly referred to—pejoratively and inaccurately—as “jury nullification,” other ways to describe this practice are “acquitting against the evidence” and “conscientious acquittal.” They all refer to the same thing, which is the power of a jury to acquit a factually guilty defendant in order to limit government power, discourage malfeasance, or otherwise prevent the defendant from suffering an injustice—for example, the application of a mandatory minimum sentence that bears no relationship to the defendant’s actual culpability and is mostly intended to punish the defendant for exercising his right to trial and make an example of him in order to discourage others from doing likewise.

The old-fashioned way of providing potential jurors with this information is to hand out “jury nullification” brochures outside courthouses—an activity that some people still participate in today and that is both encouraged and facilitated by an organization called the Fully Informed Jury Association.<sup>122</sup> But it also turns out to be a good way to draw the ire of prosecutors, and several activists have been charged in recent years with jury tampering for doing nothing more than distributing non-case-specific information regarding jurors’ unquestioned authority to acquit against the evidence.<sup>123</sup> The attempt to censor communications with fellow citizens who have not yet been empaneled as jurors raises grave First Amendment concerns, and it is perhaps unsurprising that neither prosecutors nor judges seem to have any clear idea where to draw the line between publishing an editorial in the *New York Times* encouraging citizens of Arizona to acquit activist Scott Warren on charges of illegally harboring illegal migrants by leaving water for them in the

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<sup>122</sup> FULLY INFORMED JURY ASS’N, <https://perma.cc/FBW4-U3E8>.

<sup>123</sup> See, e.g., *United States v. Hecklen*, 858 F. Supp. 2d 256, 276 (S.D.N.Y. 2012) (rejecting government’s attempt to prosecute individual for distributing nullification literature outside federal courthouse); *People v. Wood*, No. 159063, 2020 WL 4342281 (Mich. July 28, 2020) (reversing on statutory grounds conviction for jury tampering arising out of defendant’s distribution of jury-nullification brochures outside Michigan trial court); *People v. Iannicelli*, 449 P.3d 387, 397 (Colo. 2019) (rejecting, on statutory grounds, an attempt to prosecute two men for distributing jury-nullification literature outside a Colorado trial court).

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desert—which everyone seems to agree would be fully protected—and handing out copies of that same editorial outside a courthouse on the first day of jury selection, which at least some prosecutors consider to be a criminal act for which the First Amendment provides no protection.<sup>124</sup>

Now imagine someone created a video with superb production values and A-list Hollywood talent that explained, in compelling and accessible terms, how people could protect one another from our system's many injustices—including not just coercive plea bargaining but also racial biases, rampant overcriminalization, and mass incarceration, to name a few—by exercising their power as jurors to acquit fellow citizens whenever the government has failed to make the moral case both for conviction *and* the punishment it seeks to inflict. The video could remind jurors not just of their right to acquit against the evidence to prevent injustice, but also of their right to ask any questions they have about the case, such as what the consequences will be for the defendant if they convict and what the substance of any plea offer was. The video could also suggest some of the reasons why this information might be withheld from them—some potentially legitimate, some plainly illegitimate, and some debatable—and remind them that ultimately it is up to them alone to decide whether they are persuaded that it would be just to convict a particular defendant.

Given modern methods for precisely disseminating particular media to a desired audience, prosecutors might well find it difficult or even impossible to completely eliminate from the jury pool citizens who had seen the video. Prosecutors would also find it difficult to suppress the distribution of the video (though some would doubtless try), and if the campaign were successful, they would eventually have to live with the fact that their days of trying cases to criminal juries that have been assiduously purged of potential “nullifiers” are over. Based on conversations with numerous criminal defense attorneys, it seems clear that this would radically transform the existing power dynamic and incline a larger share of defendants to exercise their right to trial instead of condemning

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<sup>124</sup> See Teo Armus, *After Helping Migrants in the Arizona Desert, an Activist Was Charged With a Felony. Now, He's Been Acquitted.*, WASH. POST (Nov. 21, 2019, 7:03 AM), <https://perma.cc/P6R3-324N>. As it happens, it does not appear that any major paper called for jury nullification in the trial of Scott Warren, but a columnist for the Arizona Republic approached that line when she wrote that “[i]t’ll be up to a jury—again—to decide whether . . . to convict and imprison a man who acted not out of a profit motive but out of a Christian motive, a belief that coming to the aid of his fellow man is the good and right thing to do.” Laurie Roberts, *The ‘Crime’ Is Treating Migrants As Humans*, ARIZONA REPUBLIC, Nov 13, 2019, at A1.

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themselves, as most are induced to do now. For those who prefer the constitutionally prescribed method of jury trials for adjudicating criminal charges to the modern practice of coercive plea bargaining, this would be a welcome change.

### **Conclusion**

Most Americans are in denial about the true nature of our criminal justice system. Popular media, like the *Law & Order* franchise, have perpetuated the false impression that criminal prosecutions proceed the way one would think from reading the Constitution—that is, both sides are zealously represented by lawyers in a fundamentally adversarial process that culminates in the public jury trial promised by the Sixth Amendment. But modern criminal adjudication has little to do with that idealized portrayal and more resembles either an assembly line or the floor of a stock exchange where people's futures are negotiated by harried professionals trying to make as many deals as rapidly and efficiently as they can.

By looking at our system through the eyes of a foreign magistrate, perhaps we can better appreciate what we have allowed it to become and make a conscious decision about whether ours is a system we can be proud of for the way it honors our lofty constitutional ideals. A system that routinely coerces people into waiving their right to one of the most hallowed and hard-won rights in the entire Constitution—and one that every member of the Founding generation considered indispensable to a just and well-functioning polity—is flatly inconsistent with our national commitment to due process, justice, and the rule of law. It is time we squarely confronted the role of coercion in the adjudication of criminal charges in America. It would be a hell of a thing if another country's judiciary beat us to it.