Kankee Briefs

**Resolved: In the United States criminal justice system, plea bargaining is just**.

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## Letter From The Editor

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## Topic Analysis

### 1.1 Introduction

#### Introduction

Resolved: In the United States criminal justice system, plea bargaining is just.

The Sept-Oct resolution is fundamentally one regarding whether plea bargaining is bargain bin justice, prioritizing efficiency and expediency over potential claims of fairness, evidentiary standards at trial, and the avoidance of potential prosecutorial coercion. This resolution is an inverse repeat of the 2018 Jan-Feb plea bargaining topic (my second debate topic ironically), but the 2025 redux has aff supporting maintain the status quo plea bargaining system and neg supporting the abolition and/or major reform of plea bargaining in favor of a trial system.

However, unless you routinely slumber to *CSI* or *Law and Order,* or you had pre-existing contact with the criminal justice system, you’re likely suffering from the “what is this thing” phase of many topics. This is oddly horrifying given that ~90-95% of people arrested will go through the plea bargaining process they know virtually nothing about and were likely not informed about in school (however, ironically, in the process of you reading this, I may be negating my statement about you not being informed about plea bargaining in schools). Aren’t we educated about our 6th, 7th, and 8th amendment rights to a jury trial, our 14th amendment due process rights, etc.? One might ask, what is plea bargaining?

#### 1.1.2 What is plea bargaining?

#### Plea bargaining defined

DOJ No Date [Department of Justice Office of the United States Attorneys, No Date, "Legal Terms Glossary", Department of Justice Office of the United States Attorneys, https://www.justice.gov/usao/justice-101/glossary]/Kankee

plaintiff - The person who files the complaint in a civil lawsuit. plea - In a criminal case, the defendant's statement pleading "guilty" or "not guilty" in answer to the charges in open court. A plea of nolo contendere or an Alford plea may also be made. A guilty plea allows the defendant to forego a trial. plea deal (or plea bargain or agreement) - Agreement between the defendant and prosecutor where the defendant pleads guilty in exchange for a concession by the prosecutor. It may include lesser charges, a dismissal of charges, or the prosecutor’s recommendation to the judge of a more lenient sentence. pleadings - Written statements of the parties in a civil case of their positions. In federal courts, the principal pleadings are the complaint and the answer.

Per the DOJ, plea bargains are more contractual and bargaining focused, following the philosophy of “Let’s Make a Deal” as opposed to the traditional trial that is inclusive of due process, truth-seeking, and a desire to prove guilt/non-guilt. A trial for both the prosecutor and defendant are expensive, timely endeavors, which explains why in civil court, parties routinely agree to a settlement or enter arbitration to avoid a court proceeding.

However, a contractual settlement amongst equals in a free market is an imperfect analogy to a criminal trial, as the stakes are *much higher,* potentially involving life and death, and there’s a major power imbalance with you and your defense attorney compared to the prosecutor, as you too are beholden to how willing the prosecutor is to work with you. Unlike trials, the prosecutor is the most important actor. The judge is minimally involved—with some counties outright banning judges being involved given potential misconduct.

The prosecutor sets the baseline sentencing value, which can be arbitrarily high due to his ability to add additional charges and apply more punitive sentencing guidelines (see the charge bargaining and sentence bargaining cards below for a more in-depth explanation). The proposed punishment could be outrageously high, even including the death penalty in some states, so often it’s in the best interest of everyone, including innocents, to bargain with the prosecutors to avoid the greater punishment. The difference in punishment between the plea bargain and the trial is often called the “trial penalty” or the “plea discount.”

#### Sentence bargain – maybe replace w/ list of all types of plea bargain subtypes

Bagaric et al. 19 [Mirko Bagaric, Director of the Evidence-Based Sentencing and Criminal Justice Project, Swinburne University Julie Clarke, Associate Professor, University of Melbourne Law School, William Rininger, researcher with a JD from the University of Akron School of Law, 2019, “Plea Bargaining: From Patent Unfairness to Transparent Justice,” Missouri Law Review, https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=4364&context=mlr]/Kankee

One tack that the prosecution may take in the negotiation process is the use of charge bargaining. Broadly, charge bargaining is the process whereby the prosecution agrees to drop certain charges in exchange for the defendant’s guilty plea on other charges.95 In rare cases, the prosecution and the defendant will come to an agreement under which all pending charges against the defend- ant are dropped or no charges are brought at all.96 Further, in some instances the prosecution will withdraw certain charges against the defendant where the defendant would face mandatory consequences in subsequent collateral pro- ceedings if found guilty of the to-be-dismissed charges.97 However, in the more typical case, the prosecution will agree to reduce the number of charges brought, charge less serious offenses, or dismiss certain charges against the defendant in exchange for the defendant’s guilty plea.98 Alternatively (and often in conjunction with charge bargaining), the pros- ecution may employ sentence bargaining to encourage the defendant to enter a guilty plea. Sentence bargaining is the process whereby the prosecution and defendant agree, and the prosecution recommends to the court, that the defend- ant will receive a specified sentence or a sentence within a specified range, which is less onerous than the sentence that the defendant would have other- wise received had he or she been found guilty following a trial.99 With sen- tence bargaining, the prosecution has a wide array of tools at its disposal. The prosecution can agree to recommend a particular sentence or particular sen- tence range (in federal cases or states with analogous sentencing guidelines), to suggest that a sentence be reduced by a fixed percentage, or to refrain from opposing a particular sentence requested by the defendant.100 Finally, the pros- ecution may offer the defendant the possibility of using a particular section of a sentencing guideline which, unlike the bulk of other plea agreements,101 is binding on the sentencing court once it accepts the bargained plea.102 In the process of negotiating the plea, United States Attorneys (and other prosecuting authorities for that matter) “have wide discretion in negotiating guilty pleas . . . .”103 One manner in which this discretion could be exercised is by withdrawing more serious charges in exchange for a guilty plea even if the prosecution’s case against the defendant on the dropped charge is strong.104 However, at least in the federal jurisdiction, this typically does not occur.105 In federal criminal trials, prevailing practice dictates that United States Attorneys pursue negotiations that will produce a guilty plea to the most serious charge provable by the prosecution. The United States Attorney General set forth this principle in a 2010 memorandum as follows: Plea agreements should reflect the totality of a defendant’s conduct. These agreements are governed by the same fundamental principle as charging decisions: prosecutors should seek a plea to the most serious offense that is consistent with the nature of defendant’s conduct and likely to result in a sustainable conviction, informed by an individual- ized assessment of the specific facts and circumstances of each partic- ular case. Charges should not be filed simply to exert leverage to induce a plea, nor should charges be abandoned to arrive at a plea bargain that does not reflect the seriousness of the defendant’s conduct.106 As alluded to above, the presiding trial judge, for the most part, plays no role in the actual process of negotiating the plea. The Federal Rules of Crimi- nal Procedure mandate that “the court must not participate in [plea bargaining discussions].”107 As such, the judge, at least in the federal system, is almost completely absent from the actual process of determining (in negotiations) which charges a defendant will plead guilty to, which charges the prosecution will drop, and what sentence is appropriate.108 However, the judges retain the role of manager of cases before the court and decide how much time to give the parties to negotiate.109 Most importantly, the judge retains ultimate control over whether to accept or reject the plea ultimately produced as a result of the negotiations.110 As to the requirements that the judge must adhere to when accepting or rejecting a plea agreement, the Federal Rules of Criminal Proce- dure provide comprehensive guidelines, and the federal guidelines are illustra- tive of what judges must do in both the federal and state systems alike.111

#### Overview relation charge bargaining and incarceration – involves three-step prosecutorial of “piling on” charges closely related to the crime, “overreaching” to add questionable, but threatening charges, and “sliding down” from the large sentence to a smaller one achievable via a guilty plea.

Crespo 18 [Andrew Manuel Crespo, Assistant Professor of Law, Harvard Law School, 2018, “The Hidden Law of Charge Bargaining,” Columbia Law Review, https://www.columbialawreview.org/wp-content/uploads/2018/06/Crespo\_The-Hidden-Law-Of-Plea-Bargaining.pdf]/Kankee

Against this received wisdom, this Article offers a different account. Plea bargaining, it contends, appears lawless only if by “law” one refers to those two familiar legal pillars of the American criminal justice system— substantive and constitutional criminal law—that together consume aca- demic discussions, in classrooms and in legal scholarship alike.9 Beyond those twin pillars, however, lies a third, unseen but essential body of law that has long been obscured by some of criminal justice scholarship’s most familiar blind spots: It is a creature primarily of state law (not federal law), of court rules and statutes (not constitutional doctrine), and of procedures often seen as relevant only to a bygone era of trial-based litigation (not to the system of pleas that has replaced it). 10 And yet, as this Article will show, it is this subconstitutional state law of criminal procedure—the hidden law of plea bargaining—that time and again establishes the mechanisms and legal frameworks through which prosecutorial plea bargaining power is generated and deployed Take, for example, charge bargaining, the primary mechanism by which prosecutors control defendants’ sentencing exposure, and with it the so- called trial penalties defendants face if they dare refuse a prosecutor’s invitation to plead guilty. Long criticized as an illicit form of coercion, charge bargaining presents a conundrum under the traditional scholarly account: Given the breadth and depth of substantive criminal law, charge bargaining is routinely diagnosed as a major driver of plea bargaining’s pathology;11 but given prosecutors’ constitutional authority—indeed, their responsibility—to select the charges a defendant will face, it is also seen as an inevitable feature of criminal law’s administration. 12 If one looks beyond substantive and constitutional criminal law, however, charge bargain- ing’s power dynamics become far more complex, for the essential particulars of the practice—ranging from the number of charges the prosecutor can file, to their severity, to their relationship to the defendant’s sentencing exposure, to the ease with which they can be traded away—all directly impact just how much leverage the prosecutor truly has. And crucially, those particulars are in turn dictated by the subconstitutional procedural law of the states—an interlocking set of legal frameworks that comprises the law of joinder and severance, the law of preclusion, the law of cumulative sentencing, the law of pretrial charge review, the law of dismissal and amendment, and the law of lesser offenses.13 Almost entirely unexamined in existing plea bargaining literature, these hidden legal frameworks address issues that every system of criminal justice administration simply must resolve as it determines, for example, how many charges can be filed in a given case, or whether the sentences associated with those charges will run concurrently or consecutively. And yet, the answers to these inescapable questions, while necessarily shaping prosecutorial power, are neither hardwired nor predetermined. Rather, the choice of which procedural regime to adopt— from a range of potential options—inherently, if often implicitly, presents an important policy choice about how prosecutorial plea bargaining power ought to be structured.14 As Professor Kenneth Culp Davis explained half a century ago, that core question poses one of the central challenges of governmental administration: Too much discretionary power, and “justice may suffer from arbitrariness or inequality”; too little, and “justice may suffer from insufficient individualizing.”15 In a pluralist criminal justice system such as ours, no fixed formula can prescribe exactly the right amount of prosecutorial power for every jurisdiction, as no two communities confront the same challenges when balancing their citizens’ competing rights to liberty and security.16 And yet, as Davis observed—and as a growing chorus of academics, activists, and politicians from both parties now agree—too often our criminal justice system gets that balance wrong, tolerating an unacceptable excess of prosecutorial power, and with it an unacceptable excess of incarceration, doled out in troublingly unequal ways.17 As recognition of these systemic failings turns criminal justice reform into the rallying cry of a generation, the need to understand the regulatory levers hidden within subconstitutional procedural law—and to recognize which institutional actors are responsible for crafting these regulatory regimes—grows only more significant.18 For in a system of pleas such as ours, in which nearly every sentence of incarceration arises from a plea of guilt, criminal justice reform and plea bargaining reform are of necessity one and the same.19 The central goal of this Article is thus to draw this hidden law of plea bargaining into the open, subjecting it for the first time to sustained scholarly analysis. 20 That analysis proceeds here in five Parts. Part I begins by deconstruct- ing charge bargaining, the central and most criticized mechanism of prosecutorial power, into its three constituent components, which this Article terms piling on, overreaching, and sliding down. Those components, in turn, form the organizing framework for the three Parts that follow, Parts II, III, and IV, which are the Article’s core and which together offer its two initial contributions: First, they excavate the complex and inter- locking set of procedural levers that serve as charge bargaining’s hidden regulatory framework, analyzing how each lever can be deployed to either facilitate or restrict prosecutorial power, depending on how its accompanying procedural law is structured. Second, by surveying the variety of procedural frameworks employed across the states, the Article exposes the surprising degree of procedural—and thus regulatory— heterogeneity currently in place, and thereby destabilizes assumptions about where the boundaries of feasible reform might lie.21 With those expanded horizons of potential reform in mind, Part V reflects on the underlying practical and political forces of the current plea bargaining regime, offering three final contributions: First, it provides a concrete example of what a coordinated suite of subconstitutional procedural reforms might look like. Second, it lays the foundation for future empirical analyses of how these various procedural levers might interact with broader sociolegal forces to impact plea bargaining practices on the ground. Finally, it casts the underlying political economy of plea bargaining in a new light, exposing a previously hidden but ultimately central set of lawmakers: state courts, acting here not in their familiar capacity as adjudicators deciding cases but rather in a fundamentally distinct and ultimately surprising role—as quasi-legislatures, responsible for crafting the heretofore hidden law that governs our criminal justice system of pleas. I. THE HIDDEN LAW OF CHARGE BARGAINING The ability to control a defendant’s sentencing exposure by manipu- lating the charges against him—that is to say, the ability to charge bargain—is widely recognized by scholars as “the core of prosecutorial power in the United States.”22 The practice itself is simple enough to describe: A criminal defendant’s sentencing exposure is a function of his likelihood of conviction and his likely sentence if convicted. Those two factors, in turn, are heavily influenced by the charges he faces, which define the possible grounds for conviction, the maximum potential sentence, and frequently the minimum sentence as well.23 A charge bargain is thus simply an agreement to replace a higher charge with a lower one in exchange for the defendant’s promise to plead guilty, which guarantees the prosecutor a conviction without the expense of trial.24 Yet while such an exchange may sound like an actual bargain, with each party gaining, to quote the Supreme Court, a “mutuality of advantage” from the deal,25 most knowledgeable observers describe it as something else: a fundamentally coercive practice (occasionally analogized to torture) that produces involuntary pleas, sometimes to crimes the defendant did not commit.26 The core problem is twofold. First, while defendants always want to minimize their potential sentences, prosecutors rarely want to maximize them, hoping instead to obtain only their preferred sentence, in the most efficient way possible.27 This asymmetry allows prosecutors to trade away “extra” years of incarceration that the defendant desperately wants to avoid but that the prosecutor doesn’t particularly value. As for the second problem: This free leverage is typically overwhelming, because most criminal codes authorize sentences much higher than what a typical prosecutor—or a typical person, for that matter—would actually want to see imposed in a given case.28 Thus, by threatening a seriously inflated set of charges and then offering to replace it with the charges that she truly desires, the prosecutor is able to control the defendant’s incentive to plead guilty, and with it the outcome of any subsequent “negotiation.”29 In the aggregate, prosecutors so empowered can obtain more convictions, with longer sentences, at lower costs—all preconditions for mass incarceration.30 In practice, charge manipulation involves three interrelated moves. First, the prosecutor can inflate the quantity of charges the defendant faces, by piling on overlapping, largely duplicative offenses—increasing with each new charge the defendant’s potential sentence, his risk of conviction, and the “sticker shock” of intimidation that accompanies a hefty charging instrument.31 Second, the prosecutor can achieve similar effects by inflating the substance of the charges themselves, overreaching beyond what the law, the evidence, or the equities of the case support.32 Finally, after deploying these tactics to “jack up the threat value of trial,”33 the prosecutor can capitalize on the ensuing leverage by sliding down from her initial threat to the lower set of charges that she actually prefers. Indeed, it is the difference between the threat and the subsequent offer that constitutes the prosecutor’s power: The larger the differential, the more likely the defendant is to plead guilty—whether he is in fact guilty or not.34 To make these three moves more concrete, consider a straightforward example, to which we will return throughout the discussion to follow: Imagine a defendant suspected of approaching someone on a street corner at night, of pointing a gun at that person, of ordering them to move a few steps to the left (out from under a streetlamp), and, finally, of taking their wallet and running off with it. To any lay observer, the crime alleged here is straightforward: armed robbery. And yet, in practice, a prosecutor could and routinely would commence a prosecution against such a defendant by piling on a host of additional charges, including (to list just some examples) aggravated assault, theft, threats, possession of a weapon, and using a firearm during a crime of violence.35 Moreover, given the defendant’s alleged command to move out from under the streetlamp, the prosecutor might also overreach, tacking on the far more serious but questionably applicable charge of kidnapping for good measure.36 Finally, bringing her leverage to bear, the prosecutor would then offer to slide down from these inflated charges to the charge that she— and she alone—deems appropriate, based on her personal assessment of the evidence and of the defendant’s culpability: Plead guilty to a single count of armed robbery, she tells the defendant—or, even more enticingly, to misdemeanor counts of theft and possession of a weapon—and everything else will go away.37 As plea bargaining scholars consistently recognize, prosecutorial charging discretion exercised in this fashion “translates into power in the plea bargaining context.”38 And yet this is also the point at which plea bargaining scholarship starts to run out, for it frequently assumes that such power is an intractable feature of criminal justice administration in a system that does not (and arguably cannot) tell prosecutors what charges to file in a given case.39 The true scope of prosecutors’ charge-bargaining power, however, is contingent on much more than just the decision of what charges to file, turning instead on a broader set of procedural questions: With respect to piling on, how many charges can a prosecutor threaten and how much will each additional charge increase the defendant’s sentencing exposure? With respect to overreaching, what standards must be satisfied before substantively inflated charges can proceed beyond the filing stage, and how will those standards be enforced ? With respect to sliding down, what restrictions, if any, will be placed on the prosecutor’s ability to replace one set of charges with another? Too often, these essential questions go overlooked—perhaps because their answers are found not in the familiar constitutional law of criminal procedure but rather in its unexamined counterpart: the subconstitutional procedural law of the states. The following three Parts excavate and analyze that unexamined body of law, mapping for each of the three charge-bargaining components just described the mechanisms by which prosecutors exercise their authority and the procedural law through which that authority is structured. The following table gives an overview of the discussion to come II. PILING ON

Assuming you’re guilty, you get a better deal if you save everyone the effort, avoid the due process in trials, and then because you saved the justice system time and money, you’ll be rewarded via the bargain discount. However, in a glass half-empty view, you would have been penalized for using your constitutional rights. Plea bargaining proponents say you got off with a lower punishment then what was deserved, while some neg authors have analogized this to a gunman threatening you with bullets for brains if you don’t hand over your wallet, implying the plea decision was made under duress and no free choice at all. Some behavioral psychology experiments have actually tested plea bargain-like scenarios, finding that the best choice is to minimalize risk and plead guilty, even if you’re innocent, to be guaranteed lower punishment.

To some degree, prosecutors with plea bargains are roughly analogous to health insurance companies and hospitals. Both the plea bargain and the discount cost from health insurance benefit from the fact that the original, pre-discount number is extraordinarily large. A larger number implicitly coerces people into signing up for health insurance or plea bargain to avoid the uninsured medical costs or the trial penalty, both of whom reflect the pre-discount price, and a larger discount from the inflated larger number makes the discount seem more desirable. Simply put, if your job performance is dependent on people being highly encouraged to pick the discounted option (in the case of prosectors, the quick-and-easy plea bargain), don’t be surprised if they make the original price less attractive to make the discounted option more enticing by comparison.

#### Seemingly efficient plea bargains can cause retaliation for extra work and coercion out of threat of greater penalties

Lippke 12 [Richard L. Lippke, Emeritus Professor, Criminal Justice at Indiana University Bloomington, 2012, "The Ethics of Plea Bargaining", OUP Academic, https://academic.oup.com/book/5498/chapter-abstract/148421852?redirectedFrom=fulltext]/Kankee

Suppose that defendant Henderson has been charged with armed robbery and that the statutorily defined sentence range for such an offense is a three- to six-year prison term. The lead prosecutor in the case comes to Henderson (or, more likely, Henderson’s attorney) and offers to recommend a sentence at the low end of that range (say, three years) if Henderson will agree to plead guilty. The prosecutor also assures Henderson that she has spoken with the presiding judge in the case and received assurances that the judge is willing to go along with such a sentence recommendation. Against his attorney’s advice, Henderson declines to take the deal and insists on going to trial. He is convicted by a jury and, post-trial, the prosecutor recommends a five-year sentence to the judge which the judge accepts. On the face of it, it would seem that the waiver reward in Henderson’s case is two years and that therefore, on the flipside, his trial penalty—the extra measure of punishment Henderson receives because he elected trial adjudication of the charge against him—is likewise two years. Yet this way of looking at things obscures two different factors that might affect Henderson’s final sentence. To distinguish them, I borrow an analogy from Kenneth Kipnis. In explaining what he took to be unjust about plea bargaining, Kipnis employed an analogy involving a college professor who engaged in grade bargaining.9Here is how grade bargaining works: Students submit papers to which the professor gives a cursory reading. The professor then tells students that if they will waive their right to a more careful and thorough reading of their papers, she will award them a better grade than her cursory reading suggests is warranted. Suppose that student Thompson’s paper appears to merit a grade of C based on the professor’s cursory reading. Thompson is offered a grade of B if she will waive her right to a second reading of her paper. If Thompson refuses the grade proffer, she takes her chances with the professor’s more careful reading of her paper. It might turn out that the professor will see virtues in (p.14) the paper that she missed the first time, in which case she will assign the paper a better grade than the C which she initially thought it deserved. It is even possible that the second, more thorough reading will convince the professor to give Thompson a grade of A on the paper. Obviously, Thompson risks losing out on the A grade if she takes the professor’s bargained grade proffer. But it could also turn out that the professor’s second reading of the paper will confirm the cursory reading grade or, worse, will convince the professor that the paper is a poorer effort than she initially believed it to be. Many students, faced with the choice between accepting a grade that may be somewhat better than the one they deserve and risking receiving a grade that is worse, though perhaps more in accordance with what they deserve, will jump at the opportunity to obtain the higher grade. In this way they are like many criminal defendants who are charged with crimes of which they know or suspect that they are guilty. Such defendants are willing, if not eager, to plead if they can thereby gain some measure of lenity from the court.10 Of course, a few defendants will believe that they are innocent or hope that though they are guilty a judge or jury will acquit them. The former defendants are akin to students who believe that their papers are significantly better than the professor’s cursory reading found them to be—indeed so much better that the proffered higher grade still does not, in their view, give them what they deserve. The latter defendants—ones who know that they are guilty but who hope that trials will produce acquittals—are like students who know or suspect that the cursory reading was on the mark but who hope that demanding a second reading will yield a grade outcome that is no worse than the proffered grade. Perhaps they believe, or vainly hope, that the professor will be intimidated by students who insist on a second reading, fearful that such students will turn out to be belligerent grade-grubbers who will demand conferences at which the professor must explain and justify the assigned grade in laborious detail. Such students surmise that, rather than risk having to endure such conferences, the professor will be more generous in her second reading than the paper warrants. There might also be some students who are indifferent about their grades, at least to the extent that the proffered higher grade does not succeed in motivating them to waive their right to a second reading. Such students, for whatever reasons, insist on the second reading and are prepared to live with the outcome. They are like criminal defendants who know they are guilty as charged, suspect that trials will yield convictions, but are indifferent to the sentencing deals offered by state officials. Such defendants are grimly determined to make the state go through the motions of trial conviction. One suspects that defendants of this kind are exceedingly rare. (p.15) Kipnis offers the grade-bargaining analogy to convince us that there is something deeply suspect about plea bargaining. Grade bargaining is inappropriate because grades should be determined based on a professor’s honest and careful assessment of the merits of student work. The grading of student papers is a practice that is strongly governed by desert norms, in the sense that considerations other than what students deserve because of their work are almost always irrelevant, or hardly count at all. So too, Kipnis suggests, there is something wrong with having criminal offenders’ sentences determined by bargaining between them and prosecutors or judges. State officials have a responsibility to see to it that offenders are punished commensurately with the seriousness of their crimes.11 We will subsequently spend considerable time analyzing the arguments that might be given to justify waiver rewards, including ones that defend it within a deserved-punishment framework. But, if nothing else, Kipnis’s analogy helps us to see the way in which soliciting pleas with offers of waiver rewards appears troubling. Kipnis’s analogy can be developed further in order to refine our understanding of waiver rewards and trial penalties. One thing that the analogy provides is what we might term a student’s “presumptive grade.” This is the grade suggested by the professor’s cursory reading of the paper. It is presumptive in the sense that a second, more careful reading of the paper might convince the professor to change the grade. The second reading might yield a higher grade or a lower one. Either could be fully justified given the second reading. If a student demands a second reading and the professor supplies it, and does so fairly and conscientiously, then the student has no reasonable grounds for complaint if the second reading leads the professor to revise the presumptive grade downward. This was a risk that the student took in requesting the second reading. Importantly, the lowered grade is not a penalty for having requested the second reading if the second reading is done without malice; instead it is a reasonable and foreseeable possible outcome of the second reading. But what if the professor, irked at having to supply a second reading, consciously or even unconsciously evaluates the paper more negatively? She might actively search through the paper for flaws or shortcomings, or see the ones that she has already seen in a more negative light. Or she might decide to take out her annoyance with the student more directly by assigning her paper a lower grade than the cursory reading grade without bothering to find some pretext for doing so. It will, undoubtedly, be very hard to tell whether the professor has done things of this kind. We might even suspect that she is likely to do them, especially if she is prepared to shirk her responsibilities and engage in grade bargaining of the kind described in the first place. If she does penalize the student in one of these ways for having requested a second reading, then it would seem that the student has a legitimate complaint about the (p.16) outcome. Her lowered paper grade is not one she risked by refusing the grade bargain and requesting a “fair” second reading. It is instead partly a function of the professor’s desire to retaliate against the student for having the temerity to request a more thorough reading of her paper. In this, we have an analogy with what I deem a trial penalty proper. Notice this also: Students confronted by professors who offer grade bargains might reasonably worry about what will happen to them if they refuse the bargain and insist on a second, more careful evaluation. What looks like an offer might plausibly be construed by students as harboring a threat. In some cases, a grade-bargaining professor’s tendency to be harder on students who request second readings will become common knowledge; word will get around that this is something students should expect. If this occurs, and the professor does nothing to combat the perception of vindictiveness on her part—or worse, encourages it by coyly denying that anything of the sort takes place when challenged by students unhappy with their second-reading grades—then at some point it will become clear that the professor is trading on her reputation for punishing students who are foolish enough to demand second readings. Provisionally, then, we can say that a trial penalty is an additional increment of punishment imposed on defendants who are convicted after trials, one that is unrelated to the seriousness of their crimes as these are revealed at their trials. The added measure of punishment is inflicted for the sole purpose of retaliating against defendants who have elected trial adjudication of the charges against them. Waiver rewards, by contrast, are downward departures from the punishment defendants merit for their crimes, at least on the assumption that a defensible sentencing scheme is in place and that state officials attempt in a serious and careful way to assign sentences according to relevant sentencing factors under that scheme. These accounts will need to be modified later on, but for now they will suffice. Detecting trial penalties

Fundamentally, behaviors that inflate non-discount prices to maximize the discount price can be coercive given that people often are obliged to pay the non-discounted price, such as in the case of the trial penalty. Plea bargains may be more efficient for prosecutors, but long term, through the iterative process of slowly overcharging more and more for low-level crimes, we’ve created the biggest prison system in history by most metrics. Plea bargaining both allows for many, many more cases to be processed then otherwise could, allowing the prosecution of great swaths of low level offenders, and it causes increased pressure on the non-discounted price as prosecutors desire new ways to turn the screws to induce a plea bargain, causing people who do go to trial to have much higher punishments. Historically, we see a trend of increased criminalization of low-level crimes like Prohibition or particularly the War on Drugs being a cause for plea bargaining needing to exist, which also corresponds with the increased incarceration rate, particularly after the 1970s.

#### Plea bargaining was considered legal chicanery and unconstitutional for most SCOTUS jurisprudence, but came to be accepted after a deluge of new cases after Prohibition. More cases increase pressure for prosectors to get plea bargains to lower the caseload

Dervan 24 [Lucian E. Dervan, former Chair of the ABA Criminal Justice Section and Professor of Law and the Director of Criminal Justice Studies at Belmont University College of Law, 1-22-2024, "Fourteen Principles and a Path Forward for Plea Bargaining Reform", American Bar Association, https://www.americanbar.org/groups/criminal\_justice/resources/magazine/2024-winter/fourteen-principles-path-forward-plea-bargaining-reform/]/Kankee

Plea bargaining accounts for almost 98 percent of federal convictions and 95 percent of state convictions in the United States. So prevalent is the American plea-bargaining system that the US Supreme Court wrote in 2012 that ours “is for the most part a system of pleas, not a system of trials.” Missouri v. Frye, 566 U.S. 134, 143–44 (2012). But this has not always been the case. The American system, it turns out, began as a system of trials, much like that found in the English common law that served as its predecessor. Gradually, however, the concept of plea bargaining took root in the United States and grew in the shadows until, by the latter half of the 20th century, it had come to dominate. As might be expected from a system that grew in the shadows, plea bargaining evolved without much oversight, regulation, or monitorship by the bar, the courts, or the legislatures. As a result, plea bargaining evolved in different ways from one jurisdiction to another. Further, as plea bargaining gained ground, jurisdictions failed to establish guiding principles or guardrails to ensure that plea practices were appropriate and did not infringe defendants’ constitutional rights, particularly the right to trial found in the Sixth Amendment. Recently, the American Bar Association adopted a new set of guiding principles crafted to provide an avenue to a more consistent plea-bargaining system and to establish guardrails to help ensure that plea practices are consistent with the Constitution and a thoughtful system of criminal justice. The principles, which cover a host of topics such as the use of impermissibly coercive incentives, the use of pretrial detention in plea bargaining, the provision of adequate discovery before a defendant pleads guilty, and the collection of plea-bargaining data by the courts, are the result of almost four years of work by the ABA Criminal Justice Section Plea Bargaining Task Force. This article tells the story of plea bargaining’s rise to dominance, discusses the costs of bargains, and introduces the 14 principles that are now ABA policy and that provide a path forward to a fairer, more transparent, and more just system of criminal adjudication. The Early Rejection of Bargains It is not surprising that many people believe plea bargaining has a deep common law history, particularly given how dominant plea bargaining is in today’s criminal justice system. But the actual history of plea bargaining reveals that this form of adjudication is a relatively modern American invention that sprang from the need to create a more efficient criminal system in the face of the over-criminalization of the early 20th century. Prior to the 20th century, in fact, courts interpreting the common law were wholly averse to the concept of bargained justice. In the 1783 English case of Rex v. Warickshall, for example, the court examined a case in which the defendant had been offered a “promise of favor” in return for a confession. 168 Eng. Rep 234, 235 (1783). In response, the court wrote, “[A] confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape … that no credit ought to be given to it.” Id. This language reflected the importance placed by the common law in the jury trial. In the United States, the significance of the jury was captured in the Constitution and the Bill of Rights. Of the trial’s place in the American experiment, Thomas Jefferson wrote, “I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.” The combination of these sentiments from the American founders and the existing precedent from the British common law led inevitably to the adoption of language similar to Warickshall by the US courts. In Bram v. United States, for example, the US Supreme Court considered the appropriateness of incentives to confess. 168 U.S. 532, 584 (1987). The Court concluded that the “true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort.” Id. Despite the strong language in opposition to bargains contained in case law from the 18th and 19th centuries, examples of plea bargaining in the trenches of the American criminal justice system can be found as early as the late 1700s in sporadic geographic locations. For example, according to Professor George Fisher, forms of plea bargaining occurred in liquor law violations in Middlesex County, Massachusetts, during the late 1700s. Professor Dan Canon’s research also identifies early examples of plea bargaining in Massachusetts and, eventually, New England in the mid-1800s. Despite the use of early forms of plea bargaining in the trenches during this period, the courts continued to adhere to the British and American precedents and their critical view of offering incentives to plead guilty. In the late 1800s, for example, the California Supreme Court wrote, “When there is reason to believe that the plea has been entered through inadvertence … and mainly from the hope that the punishment to which the accused would otherwise be exposed may thereby be mitigated, the Court should be indulgent in permitting the plea to be withdrawn.” People v. McCrory, 41 Cal. 458, 462 (1871). Around the same time, the Wisconsin Supreme Court wrote that plea bargaining is “hardly, if at all distinguishable in principle from a direct sale of justice.” Wright v. Rindskopf, 43 Wis. 344, 353 (1877). Yet, despite these precedents, plea bargaining continued to gain a foothold in the American criminal justice system as it began its rise to dominance. A defining moment in the rise of plea bargaining was the over-criminalization of the early 20th century, particularly once the Prohibition era arrived. During this period of American history, the number of prosecutions swelled, and courts quickly became overwhelmed. As public officials searched for an answer to this growing crisis of resources, plea bargaining, and the efficiency it might offer, became a potential solution. In 1931, as the criminal justice system continued to strain under the weight of large dockets, President Herbert Hoover convened the Wickersham Commission to examine crime in America. The Commission’s findings included a specific discussion of the plea bargaining already occurring in the trenches and the potential that utilization of this system of adjudication might provide an answer for the whole system. [F]ederal prosecutions under the Prohibition Act terminated in 1930 had become nearly eight times as many as the total of all pending federal prosecutions in 1914. In a number of urban districts the enforcement agencies maintain that the only practicable way of meeting this situation with the existing machinery of federal courts . . . is for the United States Attorneys to make bargains with defendants or their counsel whereby defendants plead guilty to minor offenses and escape with light penalties . . . Lawyers everywhere deplore, as one of the most serious effects of prohibition, the change in the general attitude toward the federal courts. . . . [T]he huge volume of liquor prosecutions . . . has injured their dignity, impaired their efficiency, and endangered the wholesome respect for them which once obtained. Nat’l Comm’n on Law Observance & Enf’t, Report on the Enforcement of the Prohibition Laws of the United States 56 (1931). Although little data are available regarding the widespread growth of plea bargaining in the early 20th century, data on pleas of guilty are available. These data illustrate that between the early 20th century and 1925, the guilty plea rate in federal court rose from 50 percent to 90 percent. Lucian E. Dervan, Bargained Justice: Plea Bargaining’s Innocence Problem and the Brady Safety-Valve, 2012 Utah L. Rev. 51, 59 (2012). Much of this increase is likely attributable to the growth of plea bargaining in the shadows, as observed by the Wickersham Commission. Despite what appears to be a growing utilization of plea bargaining in the early 20th century, the US courts continued to view such behavior with suspicion. In fact, so inconsistent was the practice of plea bargaining with prior common law precedent that on several occasions the US Supreme Court appeared on the precipice of ruling it a wholly unconstitutional practice. In 1958, for example, the Court took up the case of Shelton v. United States. 356 U.S. 26 (1958), cert. granted. The Shelton case had originated in the Fifth Circuit, where the defendant had requested his plea be set aside as involuntary and coerced. In response, the Fifth Circuit, in granting the motion, wrote: There is no doubt, indeed it is practically conceded, that the appellant pleaded guilty in reliance on the promise of the Assistant United States Attorney that he would receive a sentence of only one year. The court, before accepting the plea, did not ascertain that it was in truth and in fact a voluntary plea not induced by such promise. It necessarily follows that the judgment of conviction must be set aside and the plea of guilty vacated. Shelton v. United States, 242 F.2d 101, 113 (5th Cir. 1957). The Fifth Circuit also wrote, “Justice and liberty are not the subjects of bargaining and barter,” a statement strikingly similar to the words written by the Wisconsin Supreme Court in Wright in 1877. Id. The case then went to the U.S. Supreme Court but was removed by the government prior to a ruling. Some believe this was a result of the Department of Justice counting heads and determining that the Court was likely to agree with the lower court and strike down plea bargaining once and for all. See Albert W. Alschuler, Plea Bargaining and Its History, 79 Colum. L. Rev. 1, 37 (1979). Eight years later in 1966, another case made its way to the US Supreme Court and, once again, the Court’s reluctance to embrace bargaining was on full display. The case, United States v. Jackson, 390 U.S. 570 (1968), involved a statute that contained an increased punishment for those convicted by a jury. Although not a plea bargain, the case put before the justices the issue of punishing those who proceeded to trial. In ruling the provision unconstitutional because it placed an “impermissible burden on the exercise of a constitutional right,” the Court wrote, “It is no answer . . . that federal trial judges may be relied upon to reject coerced pleas of guilty and involuntary waivers of jury trials. For the evil in the federal statute is not that it necessarily coerces guilty pleas and jury waivers but simply that it needlessly encourages them.” Id. at 583. The strength of this language, in combination with the various earlier precedents, would lead many to believe that plea bargaining’s days were numbered in 1968, but they would be wrong. Brady and Modern Plea Bargaining Just two years after Jackson, the case of Brady v. United States, 397 U.S. 742 (1970), made its way to the US Supreme Court. This case finally brought the issue of plea bargaining squarely before the justices. The defendant in Brady argued that his plea should be withdrawn because he was coerced into pleading guilty to avoid the possibility of receiving the death penalty. Rather than continue to enforce earlier precedents that prohibited pleas of guilty that resulted from the “flattery of hope” or the “torture of fear,” the Court embraced plea bargaining as a mechanism of efficiency that might free up resources for cases that did proceed to trial. This decision is striking for its inconsistency with the earlier precedents dating back to English common law, but there are several key elements that led to this result in 1970. First, the passage of time had created an opportunity for plea bargaining to survive review. For example, since the Shelton case had been removed from consideration in 1958, five new justices had taken the oath and would decide plea bargaining’s fate. Further, by 1970, 90 percent of cases in the United States were resolved through pleas of guilty. While the exact number that involved plea bargaining is unclear, the Justices must have understood the devastation that would be wrought on the criminal justice system had they ruled the practice entirely unconstitutional. Second, the Court believed that there was a need for a more efficient method of adjudication given that the court systems continued to be overburdened, just as the courts had been when plea bargaining grew in the trenches in the 1920s. Even the American Bar Association was adopting this line of reasoning during this period. In 1968, for example, the American Bar Association Standards Relating to Pleas of Guilty 2 (1968) said: [A] high proportion of pleas of guilty and nolo contendere does benefit the system. Such pleas tend to limit the trial process to deciding real disputes and, consequently, to reduce the need for funds and personnel. If the number of judges, courtrooms, court personnel and counsel for prosecution and defense were to be increased substantially, the funds necessary for such increases might be diverted from elsewhere in the criminal justice process. Moreover, the limited use of the trial process for those cases in which the defendant has grounds for contesting the matter of guilty aids in preserving the meaningfulness of the presumption of innocence. Id. In fact, the need to address the overburdened court systems was particularly pressing in 1970 as a result of the Due Process Revolution of the 1960s and the increasing lengths of trials that resulted. While the Brady decision brought plea bargaining out of the shadows, the ruling did not lead to robust oversight, regulation, or monitorship of this mechanism of adjudication that had come to dominate. Few, if any, significant restrictions were placed on the use or methods of plea bargaining going forward, and different jurisdictions adopted the practice in inconsistent ways. While plea bargaining in the decades following Brady offered some of the benefits envisioned by the Court in 1970, such as efficiency, the piecemeal adoption of plea bargaining has also resulted in costs and the development of troubling practices. For example, while the Court envisioned plea bargaining as a means to direct more resources towards the remaining trials, plea bargaining has actually contributed to the disappearance of the trial itself. By 2022, only 2.5 percent of convictions at the federal level were the result of trials. In some jurisdictions, years have gone by without a single criminal trial taking place. Another troubling aspect of plea bargaining is the presence of significant sentencing differentials, which are the differences between the sentence someone receives for pleading guilty versus the sentence they receive in return for utilizing their constitutional right to trial. In a 2019 piece on federal sentencing, the author found that those convicted at trial had a two to six times greater likelihood of incarceration and the sentencing lengths were 20 to 60 percent longer. See Brian Johnson, Plea-Trial Differences in Federal Punishment, 31 Fed. Sent’g Rep. 256 (2019). Similarly, a Vera Institute Report from 2020 entitled In the Shadows noted that the odds of incarceration were 2.7 times greater for those who went to trial and the sentences were 57 percent longer. See Ram Subramanain et al, Vera Inst. of Just., In the Shadows: A Review of the Research on Plea Bargaining (Sept. 2020).

#### The harms of plea bargaining include higher probabilities of incarceration, more severe punishments, innocents falsely pleading guilty, coercion, coverups of police misconduct, and worse outcomes for black and brown folk

Dervan 24 [Lucian E. Dervan, former Chair of the ABA Criminal Justice Section and Professor of Law and the Director of Criminal Justice Studies at Belmont University College of Law, 1-22-2024, "Fourteen Principles and a Path Forward for Plea Bargaining Reform", American Bar Association, https://www.americanbar.org/groups/criminal\_justice/resources/magazine/2024-winter/fourteen-principles-path-forward-plea-bargaining-reform/]/Kankee

For example, while the Court envisioned plea bargaining as a means to direct more resources towards the remaining trials, plea bargaining has actually contributed to the disappearance of the trial itself. By 2022, only 2.5 percent of convictions at the federal level were the result of trials. In some jurisdictions, years have gone by without a single criminal trial taking place. Another troubling aspect of plea bargaining is the presence of significant sentencing differentials, which are the differences between the sentence someone receives for pleading guilty versus the sentence they receive in return for utilizing their constitutional right to trial. In a 2019 piece on federal sentencing, the author found that those convicted at trial had a two to six times greater likelihood of incarceration and the sentencing lengths were 20 to 60 percent longer. See Brian Johnson, Plea-Trial Differences in Federal Punishment, 31 Fed. Sent’g Rep. 256 (2019). Similarly, a Vera Institute Report from 2020 entitled In the Shadows noted that the odds of incarceration were 2.7 times greater for those who went to trial and the sentences were 57 percent longer. See Ram Subramanain et al, Vera Inst. of Just., In the Shadows: A Review of the Research on Plea Bargaining (Sept. 2020). The types of sentencing differentials described above also impact defendant decision-making and have led to the phenomenon of false pleas of guilty by the innocent. By the end of 2022, the National Registry of Exonerations had 3,284 exonerations within its dataset, and 25 percent of those involved a false plea of guilty. Of the entire dataset, more than 40 percent are “no-crime exonerations,” which are exonerations where the exoneree was convicted of a crime that never actually occurred. In this category, a startling 48 percent of the cases involved false pleas of guilty by the innocent. See Nat’l Registry of Exonerations, 2022 Annual Report, at 11 (May 8, 2023). Modern plea practice has also seen the use of impermissibly coercive incentives to induce defendants to plead guilty beyond the sentence in the case. For example, prosecutors have used threats to indict children, spouses, or other family members to induce pleas of guilty, including in cases where the pleas served to cover up pervasive law enforcement misconduct that would have been revealed at trial. United States v. Seng Cheng Yong, 926 F.3d 582 (9th Cir. 2019). In other examples, modern plea practices have included the use of the power of plea bargaining to force defendants to accept inappropriate conditions as part of the deal. In Tennessee, for example, a prosecutor only offered favorable pleas to women in certain abuse and neglect cases if they agreed to forced sterilization. See ABA CJS, 2023 Plea Bargain Task Force Report (Feb. 22, 2023). Finally, another example of the impact of an unregulated and unguided system of pleas is that plea bargaining exacerbates existing racial inequality in the criminal justice system. For example, Black defendants in drug cases are less likely to receive favorable plea offers that avoid mandatory minimum sentences. The same was found in gun cases, where Black defendants are more often subjected to charge stacking than white defendants. Further, white defendants who face initial felony charges are less likely than Black defendants to be convicted of a felony, and white defendants facing misdemeanor charges are more likely than Black defendants to have the cases dismissed or resolved without incarceration. See id. Though this is a nonexhaustive list of some of the costs of bargains and troubling practices that have developed, these examples serve to demonstrate the need for better guidance regarding how our system of pleas should operate and what our expectations should be for our system of criminal justice. The Fourteen Principles

#### Plea bargains exclude pleading guilty without prior negotiation with the prosecutors. This means post-aff, if people dislike trials still, they can informally plea bargain hoping to get in the prosecutors’ good graces

Canon 22 [Dan Canon, civil rights lawyer and a law professor at the University of Louisville in Kentucky., 2022, “Pleading Out : How Plea Bargaining Creates a Permanent Criminal Class,” Basic Books, ISBN-139781541674684]/Kankee

This book will argue that despite its nearly universal acceptance in the United States, the practice of plea bargaining is not natural, necessary, or beneficial. In fact, no other country on Earth relies on plea bargaining to the extent that the United States does, and it’s no coincidence that so many legal systems function much better than ours. Some US jurisdictions have also experimented with ending plea bargaining, with surprising results. This book will look at those examples to expose plea bargaining for what it really is: a means to perpetuate centuries-old class conflict, a tool for satisfying the appetite of the prison-industrial complex, and a chief enabler of the ills that plague our criminal justice system today. JUST WHAT IS A PLEA BARGAIN ANYWAY? FOR OUR PURPOSES, A plea bargain means that someone charged with a crime makes a deal with a prosecutor in which they give up the right to go to trial (and a whole host of other rights). In exchange, the person charged gets a reduced sentence of some kind (“sentence bargaining”), a change in the charge (“charge bargaining”), or both. A plea bargain is not the same thing as a simple guilty plea, or what is sometimes called an “open plea,” where the defendant is offered, and expects, nothing in return for an admission of guilt. The practice of plea bargaining has changed somewhat over time, but it has basically always been a prosecutor telling the defendant “Make this quick, and I’ll give you a break.” Or rather “Make this difficult for me, and I’ll make it really difficult for you.” That’s what happened to Paul Hayes, and it’s what happens to countless people in US courtrooms every day. The specifics of how plea bargaining got its start are unclear. There is no “first” plea bargain to examine, nor is there any substantial empirical data on the practice for around a hundred years after it began. I owe much of the foundational material in the first two chapters of this book to sociologist and legal scholar Mary Vogel, who has written extensively on the history of the practice in the United States and on its English roots. According to Vogel, the first recognizable records of plea bargaining in America are from Boston in the 1830s.4 At that time, “records” of criminal cases didn’t amount to much, so there isn’t a lot of detail about how or why the practice became acceptable, but we know that it was officially forbidden, or at least strongly discouraged, by courts around the country before that time. Soon after plea bargaining caught on in Boston, courts nationwide began an about-face on this issue. Within a century, judges developed a nearly universal line of reasoning that likened plea agreements to plain old contracts like the kind you would sign to get a credit card or to buy health insurance. But these “contracts” are what lawyers might call “contracts of adhesion.” Defendants don’t really have much choice about whether to enter such a “contract.” A fast-food worker with a marijuana charge doesn’t have the same bargaining power as the ubiquitous state and all its resources. In bargaining, the state risks nothing whereas a defendant risks every liberty under the sun. Nevertheless, the law persists in pretending that the two are on equal footing as negotiators

#### 1.1.3 Note on Contention Cross Applicability

Given the interwovenness of the criminal justice system, most contentions somewhat blend into each other, with elements of coercion, mass incarceration, innocent pleas, and racial impacts being found in other contentions not directly related to the issue. If you’re looking for cards for a specific issue, remember to look at other contentions given they too might have utilizable evidence for your contention.

#### 1.1.4 Note on Kritik Commonality

Criminal justice topics have kritiks as an extremely commonplace neg (and often aff) position. This is particularly due to how aff probably perpetuates the prison industrial complex, an option unpalatable to some, which encourages them to run kritikal affirmatives (k-affs). Similarly, neg solvency is often related to ending the prison industrial complex, such as crashing/sabotaging the justice system by ending plea bargains.

Kritik literature is very good on this topic given that critical theory related to antiblackness and biopower has focused particularly on the development of the modern prison and carceral state, creating a renaissance for authors like Foucault, Sexton, Wilderson, etc. Perhaps more so than any other point in history, antiblackness, racial capitalism, abolition, and Foucault scholarship is the most relevant, recent, and developed, all of whom mutually reinforcing each other. These concepts are also interconnected; for instance, antiblackness scholarship often relies on Foucauldian ideas in relation to identity construction of criminality, which is applied to black folks via the prison industrial complex to continue the current perception of social death.

Kritiks on this topic are more likely now then perhaps ever in your debate career to be a go-to position. My advice is that you ought to become familiar with at least 1-2 of these kritiks’ literature bases and understand the arguments; I recommend Foucault/abolition and/or racial capitalism for starters. You also ought to prepare for an off-case position besides topicality for kritikal affs—there is obvious choice of capitalism (which has great links on this topic in relation to the prison industrial complex as well as commodity fetishism). Remember that these authors and literature bases speak to and criticize each other, allowing answers to arguments like abolition with antiblackness or Afro-pessimism with Foucault.

#### 1.1.5 Note on Counter Plans and Required Neg Advocacy

The plea bargaining topic’s aff/neg ground distinction is quirky, which necessitates an explanation on its implications on counterplans.

Normally, the aff proposes that the status quo is unjust or immoral, implicitly or explicitly implying policy changes to rectify those justice/morality harms, which is easily found in common-place resolutions stating “X actor ought to Y” or “Y practice in the status quo is unjust.” For example, resolutions like wealth tax (Nov-Dec 2024) or living wage (Sept-Oct 2024) are premised on the fact that in current practice, a wealth tax or living wage requirement do NOT exist, implying that aff ought to adjust the status quo in order to make present-day conditions more moral. The space appropriation topic (Jan-Feb 2022) had the aff argue that a current practice (commercial space appropriation) is unjust, again implying the status quo is undesirable and change is needed. As a general rule, aff is almost always the side that advocates for a resolution-based change from the status quo.

Similarly, ordinarily neg is obliged to defend the status quo or a different (usually non-resolutional) change from the status quo, justifying their counterplan with a net benefit that the aff causes, but the counterplan does not. The aff proposes a change per the resolution, and the neg either rejects that change or finds a different, more desirable means of solving the harms of the status quo via a counterplan.

The aff/neg advocacy reversal has four major implications:

First, neg’s obligation is to argue that plea bargaining is either unjust or merely morally permissible. Assuming the former, neg has an implied unconditional advocacy of plea bargaining being unjust and it is in need of major reform and/or abolition to maximize justice. Unlike normal, usually conditional counterplans, in which neg can kick the counterplan and no longer defend the advocacy without consequence, plea bargaining being unjust is an unconditional advocacy, even if only implied. It’s the premise of most aff harms related to plea bargain abolition, so skirting out of the link to aff advantages via a non-reformative neg advocacy has some theory-related issues.

Second, the unconditional implied “don’t do plea bargaining” advocacy is not the only advocacy available to the neg (though its defense is necessary to negate). Other counterplan(s) can exist concurrently with the implied advocacy of not doing plea bargaining, and importantly, these counterplans can resolve the problems with the other advocacy in order to minimize aff ground reform. As seen in the below “advantage counterplan” contention, core aff justifications for plea bargaining is beneficial primarily because of efficiency/low resource, wait times, and the trial tax. These are somewhat easily resolved via a counterplan that increases funding, hires additional justices/attorneys, ends pretrial detention, and decreases/eliminates the benefits of plea bargaining by changing sentencing laws and prosecutorial overcharging.

Counterplans’ relative ease in solving aff problems related to how plea bargaining is a contrived, socially constructed problem beyond perhaps a potential shortage in legal staff — some authors have described not critiquing plea bargaining as “The Emperors New Clothes” for that very reason. Most aff justifications for plea bargaining suffer from limited imagination (and limited fiat), such as plea bargaining being bad because trials have worse punishments or causes court clog, ignoring the fact those are easily solvable, yet self-created problems fixed by decreasing punishment severity for trials and decreasing the amount of low-level crime we prosecute. It’s often framed as we have plea bargaining because we have a lot of cases, and we have a lot of cases because we have plea bargaining, which is fundamentally a circular justification.

Third, for aff, the vulnernability to counterplans necessitates the finding the rare evidence arguing for the intrinsic goodness of avoiding the trial process. Your harms need to be specific to the trial process itself, not merely the effects of the trial process like court clog or worse sentences (as both those impacts are easily solved by advantage counterplans). Some contentions in this brief with “trials bad” warrants include the aff “trials bad (pathologized subject)” contention and to a lesser degree, the “trials bad (waiting times)” contention. For example, a rape or domestic violence victim appearing on the stand and being cross-examined, with the defense attorney’s intent being to undermine her credibility and potentially victim blame, is a traumatic process and an obstacle to the prosecution of these crimes. As described in the “trials bad (pathologized subject)” contention, the trial process often retraumatizes the victim all the while jury trials can be an obstacle to justice due to their propensity to not believe victims of sexual violence. Plea bargaining avoids the traumatic process of testifying and increases the likelihood of prosecution with lower standards of evidence at prosecution, both of whom reducing the risks of these crimes occurring.

Fourth, neg needs to avoid running a counterplan when neg garners offense via the effects of abolishing plea bargaining when the counterplan would also solve that impact. For instance, do not run a “plea bargaining solves mass incarceration” argument AND an advantage counterplan that results in mass incarceration ending due to lower sentencing. Pick and choose what planks of a counterplan you need to run to both solve the identified impacts from the 1AC AND minimize the potential for the counterplan solving your own contentions.

If the resolution’s advocacy reversal and its relationship to neg advocacy and counterplan ground is bewildering and difficult to grasp, congratulations; you now know why the overwhelming majority of resolutions do NOT have the aff defend the status quo. Ordinarily, an aff advocacy is limited in its fiat capabilities to the confines of the resolution, with neg possessing great flexibility in terms of counterplan ground to attack the aff from multiple angles. This includes advantage counterplans, which seek to solve aff impacts. With the advocacy reversal, neg flexibility has a high potential for abuse given that the neg can both propose a policy (end plea bargaining), and then fiat away the harms of that policy via an additional counterplan (i.e. the “advantage counterplan” contention).

I have little expertise in the subject, and this explanation will be minimal given that the history of debate’s theoretical justifications for counterplans is over 100+ years old. Look at Bill Batterman’s series on debate counterplan history linked [here](https://the3nr.com/2021/07/04/the-evolution-of-plans-in-policy-debate-part-6-policy-testing-planicality-and-hypothesis-planning/) if you desire more context beyond “advocacy reversal means counterplans might not be justified.” Most neg positions, such as counterplans or even disadvantages, were not created in a vacuum at the initial creation of policy debate, which is the theoretical foundation of circuit debate’s counterplans. Rather, policy resolutions had a history of the aff being the side that advocated for change, which led to theories of flexibility for the negative in order to better answer potentially unpredictable affs and attack the aff from multiple angles with counterplans. The plea bargaining topic breaks from tradition from most LD and policy topics with its advocacy reversal, which is a proximate cause for why this topic’s counterplans have high potency for abuse that harms aff ground.

Debate history and theory aside, the main lessons to take away are the following:

For the aff, remember these three things (a) have intrinsic trial bad evidence for aff to have intrinsic advantages not vulnerable to counterplans, (2) don’t assume counterplans are theoretically justified merely because they’ve existed for a long time or common practice, (3) be very wary of advantage counterplans and design your aff to beat them (alongside the normal preemptive link turns to neg disadvantages that you *always* should have in 1AC).

For the neg, you possess four advantages: (a) the typical aff ground with moral and emotional appeals related to poor, minority, and disadvantaged folks suffering from horrible things, forcing many aff debaters to focus on cold, efficient, and brutal utilitarianism, (b) advocacy proposal and not needing to defend an undesirable status quo (c) neg fiat for counterplans that can solve most of the harms the change from the status quo causes, and (d) the time split favorability for neg that normally exists to compensate for an unpredictable aff advocacies, which is not the case here because you are advocating a change from the status quo.

### 1.2 Affirmative Topic Analysis

#### 1.2.1 Trials Bad (Pathologized Subject)

The idea was ‘not to punish less, but to punish better; to punish with an attenuated severity perhaps, but in order to punish with more universality and necessity; to insert the power to punish more deeply into the social body’ - Foucault

Contention 1 is Trials Bad (Pathologized Subject). Foucault’s theories described in *Discipline and Punish* (as well as the later developments on Foucauldian theory) are paramount to know about on criminal justice reform topics, particularly if you feel the slightest risk of hitting a kritik on your debate circuit. Foucault is the go-to author for criminal justice topics – he was one of the first prison abolitionist authors and his theories are the foundation for follow-up critical scholarship about societal power and the construction of criminality (a useful concept in antiblackness studies). If you’re interested in Foucauldian literature or heavily prioritize this contention as main aff offense, I would recommend having a higher-order understanding of how Foucault fits into more modern scholarship on theories of power, which I will provide below. However, on a fundamental level, it’s not paramount for you to know the broader context, as Foucault-specific scholarship, particularly on prisons, is remarkably good.

#### Basic Foucault Explanation

On a basic level, Foucault wrote on the historical transition in how societies justified the state punishing crimes, and more strikingly, how the methods of punishment were useful for state power. This transition involved the slow, partial swap from sovereign power to disciplinary power. Sovereign power was a concept originally derived from Hobbes that described most of human history. Punishment was a public spectacle, with both the act of violence as well as its long-term damage to the body having important messaging effects to show how powerful the state was. Highly graphic quasi-historical movies that I ought not to have seen as a child, such as *The Son of God,* are a worthwhile showcase of sovereign power in action with the example of Roman crucifixion. The cruelty is the point; you’ll likely remember (especially if you were an impressionable child when watching it) both the action causing suffering (whipping/flogging, cross-carrying, hammering in nails, etc.) as well as the bodily reminders of the suffering (whip marks, crucified body, nail-holes, etc.). The event itself is to be burned into your memory, while the publicly displayed “body of the condemned,” with its scars, maims, bruises, etc., is the active, daily reminder of how the state controls life and death. Under sovereign power, there’s a dual interest for the state in having highly memorable, spectacularized, and novel means of hurting people as well as elongating the act itself and the recovery and/or dying process. The purpose is for to understand your fealty and inability to prevent the horrific atrocity of someone you may have cared for (or at least knew tangentially) and for that memory being forever embedded in your head in order for you to understand the potential consequences.

Sovereign power allowed the maintenance of monarchies for most of history, yet several developments occurred in the 18th to mid-20th centuries that changed how states justify their existence. Obviously, these centuries are some of the most-action packed in history, so this inherently will be generalities, both in terms of history and Foucauldian theory. Human capital became increasingly important as capitalism became more fully fledged out with industrial revolutions – it became compelling for states to develop institutions like schools in order to increase skilled labor and an educated workforce. Similarly, the scientific revolution offered new prospects in the human sciences (i.e. psychoanalysis, medicine, psychiatry). As you may already know from framework debates, social contract theory became increasingly popular from the likes of Hobbes, Rousseau, and Locke, which questioned the traditional rationale for governments. People were increasing interested in self-governance reasoned via natural law, and they were unhappy with theological or traditional justifications for the state. The Enlightenment’s individualism and desire to respect human dignity and personhood (highly motivated by Kant and German Idealism) desired everyone to be treated humanely. These are all factors that motivated the transition or necessitated it, as sovereign power was no longer sustainable, and new methods of state power gained popularity due to new technology and philosophy.

Foucault writes broadly on biopower, which is concerned with the state’s control of bodies motivated via the “will to knowledge.” The state has a desire to know everything about its population as well as you in particular, as if they can individualize you as a person via knowing the traits that define you, these traits can be used to objectify you and predict your behavior via the generalities of knowing how other people with those traits in the population also behave. An increase in legalistic biopower was accomplished via the humane prison movement – prisons were seen as unjustifiable, treating people inhumanely and as a mere means. Similarly, the state wishes to reform their previously incarcerated citizens, especially given their high association with the mentally ill due to the “Great Confinement.” These conditions allowed the reformulation of state power from sovereign power to disciplinary power, where liberal, human rights-centric advocates for prison reform advocated utilizing the new human sciences to better understand inmates in order to rehabilitate them and reform their natures. This came to be known as disciplinary power, where the legitimation of state punishment was undergirded by the ideals of it being a source for good by seeking to alter deviant behavior via rehabilitation, thereby allowing the state to change the “souls” of people deemed perverse.

#### This card explains the older Foucauldian ideas on the value of trials for disciplinary power (as a coerced confession doesn’t tell you anything about the person).

Bragg 22 [Hunter Bragg, researcher at the Drew Theological School Graduate Division of Religion, 2022, “On Condemning Whom We Do Not Know: Confession of Sins, Plea Bargains and Apophatic Anthropology,” Political Theology, [https://sci-hub.se/https://www.tandfonline.com/doi/abs/10.1080/1462317X.2022.2064096]/Kankee](https://sci-hub.se/https://www.tandfonline.com/doi/abs/10.1080/1462317X.2022.2064096%5d/Kankee)

\*NOTE: this card is for the topic analysis and is for reference only – do not use this card when aff given it says plea bargains reaffirm Foucauldian identity constructions (like trials do)

The fifth century monk Jean Cassian’s description of monastic confessions signaled a move away from the exteriority of exomologesis to the interiority of exagoreusis.12 Monks verbally confessed to an elder both the acts they committed and their accompanying thoughts, motives, and desires. Cassian highlights the internal focus of exagoreusis, writing “The chief concern and instruction of [the elder], whereby the young man who was brought to him may be able to ascend even to the loftiest heights of perfection, will be, first of all, to teach him to conquer his desires.”13 This practice, which Foucault calls “veridiction” or “truth-telling,” was foundational to monastic life. The interchange between elder and monk was, therefore, “an ever present and permanent relationship” focused on “discovering what was hidden deep within oneself.”14 Although methods and forms of confession changed significantly from Tertullian to Cassian, the practice maintained an overarching concern with self-renunciation: the Christian discovered the truth of oneself by destroying the self one had become through sin.15 This began to change in 1215 with the Fourth Lateran Council. Canon 21 required that “all the faithful … individually confess their sins in a faithful manner to their own priest at least once a year.”16 The emphasis upon the “faithful manner” of con- fession hints at the emergence of a particular kind of human being as a “confessing animal.”17 “Faithful confession” entailed increased – and, in the case of clergy and some scrupulous laity, constant – self-examination of one’s thoughts, desires, and actions. 18 More importantly, it sedimented a concept of a self with a “conscience [that was] subject both to self-examination and to external policing.”19 Literary and legal scholar Peter Brooks has observed that the introspection of confession contributed to a “proto-modern” awareness of the self.20 The fully modern subject, which according to Brooks comes into view in Rousseau’s Confessions, establishes confession as the act of a self-possessed individual who alone can bear witness to what she is in truth.21 In this sense, we may understand the developments of Lateran IV to be a watershed moment in the emergence of the modern subject: increasingly after 1215, to be a human being is to hold within oneself the unimpeachable truth about who one is. Moreover, the canons of Lateran IV joined the religious command to confess one’s sins with the legal proscription of priestly involvement in ordeals.22 These two practices – confes- sions and ordeals – share a common function in the legal sphere as forms of proof. By for- bidding priests from participating in ordeals, the Roman Catholic Church created a lacuna in the legal process of determining the truth of a particular case.23 Beginning in the thirteenth century, avowals of wrong-doing came to replace the ordeal as a mechanism for extracting proof. This began a proliferation of confession in the modern European state. By the eight- eenth century, the modern European state had endowed judges with the power to determine the truth of a case, leaving confessions of guilt by the supposed author of the crime as irre- futable and thus highly coveted evidence.24 The insatiable need for avowal in modern European courts points the way toward Foucault’s second hermeneutics of the self, which was concerned not with renunciation but with the essence of the newly-formed modern subject. In search of something that could give meaning to crimes committed seemingly without reason, European law made use of the nineteenth and twentieth century interventions of psychiatry, psycho- analysis, and criminal anthropology in order to focus upon the subject of the act. It is here we see the emergence of a criminal subjectivity.25 As these new fields crept into the courtroom, their concern to name and treat the subject suffering from mental illness resulted in a legal need to punish that same subject. These burgeoning fields shaped an image of an “enemy of society” who posed an ever-present threat to social orders, leading to the emergence of “social defense” as a driving factor in legal punishment. 26 It was this modern claim to know the subject without recourse to the subject’s attes- tation that formed the new hermeneutics of the self.27 Through psychiatric examination and eventually, Freudian psychoanalysis, crimes without explanation could be integrated with and made intelligible in relation to a criminal subject who was always and already a risk to society. 28 In contrast to the prior hermeneutics in which self-renunciation had been a crucial element for arriving at the truth of the self, this new hermeneutics sought knowledge of one’s essential criminality through external examination. One might think that the move away from self-incrimination signals the end of con- fession in criminal law. However, European law still required avowals of wrongdoing, creating a unique mix of the first and second hermeneutics of the self. The twentieth century European courts concerned themselves with those who posed a risk of social harm. Avowal in these settings was concerned neither with what one had done nor with the renunciation of the self one had become. It was concerned, rather, with who one was. In Foucault’s account, the criminal subject made visible in the avowal provides the necessary explanation for the crime committed: the accused has committed the crime because he is, in his essence, a criminal. This constitutes a doubling of avowal: one’s admission of a crime is simultaneously a confession to a particular crime and a confes- sion of the kind of person one is, namely a criminal who must be punished and against whom society must be defended.29 Foucault’s conclusion to his lectures illuminates this doubling of avowal. Foucault tells of the French lawyer and future Minister of Justice, Robert Badinter’s advocacy against the use of the death penalty in the sentence of Patrick Henry, a man accused of kidnap- ping and killing a child. Foucault finds the way Badinter makes his case striking: [Badinter] turned toward the jurors and said to them: “But in the end, the accused, of course, he acknowledged his crime. He confessed. But what did he tell you about this crime? What information did he give you about his crime, about the reasons for his crime, about who he is? You have no idea … He did not say anything. He did not want to say anything. He could not say anything. In any case, you, you know nothing about him” … he closed with this sen- tence: “In the end, can you condemn to death someone whom you do not know?”30 In this case, the first avowal, which established the guilt of the defendant for a particular crime, is not in question. It is the second avowal, the essentialization of the criminal subject, that is at stake. By asking the jurors whether they actually know who Henry is, Badinter questions whether a single confession can perform both tasks. It further shows the legal necessity for a confession to speak to one’s identity, since as Badinter implies, only saying what one has done leaves the legal process unfulfilled. This anecdote provides insight into Michael Phillips’s case as well. While Henry failed to provide a satisfactory double confession, Phillips’s false confession met both requirements: he both admitted his guilt and confirmed his criminal identity. His lawyer’s advice to take the plea deal because a jury is unlikely to “believe a Black man over a white girl” suggests that court actors, possibly even the lawyer himself, had already determined who Phillips was. His confession confirmed their suspicions and, as I will show in later sections, made him into the very criminal they thought him to be. The narrative I have told here is necessarily incomplete. For one thing, it focuses entirely on developments in Europe and not in England, where much of American crim- inal law derives. However, what this Foucauldian genealogy illustrates is the extent to which Christian confessional practices are implicated in the development of a confessing legal subject whose self-implication speaks not only of one’s actions at a given time and place but also, and more importantly, of one’s essence. This brief Foucauldian genealogy points out the fundamental need of criminal justice systems to identify a criminal subject as the object of punishment. What remains to be seen, however, is the way that the con- temporary American criminal justice system constructs racialized criminal subjects who are, as Sylvia Wynter puts it, “not-quite-human,” and for this reason, in need of punishment.

For the purposes of the contention, the potency of disciplinary power is related to how the state produces knowledge about you via the “hermeneutics of the self,” which allows the pathologization of behavior and the social construction of criminality based on your background (such as your mum not loving you enough or having a mental illness). The human sciences entered trials as a means of expert-testimony to testify on the psycho-biological nature of both the defendant and victim, producing knowledge about them in an “examination” that increases the state’s control over them. This allows the construction of normalcy as the state can now defined what abnormal and deviant bodies are, given their worthiness of rehabilitation and classification of criminality, and the good, normal bodies. Plea bargains are fact-minimal and don’t care about pathologizing behavior or how truly deserving the defendant is of punishment. Given that the current system is ~90% plea bargains and how the prison system is not dedicated to rehabilitation, we do NOT exercise the original Foucauldian conception of disciplinary power at least in a trial context. We still discipline within prisons, but it is much more retributive and not deemed desirable to regurgitate/remake bad souls into good souls.

#### Modern Successors to Foucault

For all the novices or lay debaters who hates the fact that they’ve read this contention explanation thus far, it gets worse. Foucault died in the 1980s; afterwards theories of power studies have significantly advanced on Foucault’s work. Broadly speaking, as accurate as these categories can be applicable, there are now approximately three phases/types of state power, all of whom existing concurrently in societies towards different people. These include the following:

Societies of sovereignty/necro-politics (historical, Mbembe, Agamben)

Societies of discipline/biopower (Foucault)

Societies of control/psycho-politics (Deleuze, Han)

Thankfully, control societies and psycho-politics is likely of little relevance to the criminal justice system. These are the “new” theories of power, which authors like Mbembe would say are mostly applicable to middle/upper class white folk in the Western world as sovereign power is still applied to all those too unfortunate to be included in the above group (like Mbembe’s critique of Foucault). These theories get confusing as it’s unclear within Foucault scholarship what type of society groups of people live in, especially since all types of societies can exist within the same country at the same time. A state can seek traditional disciplinary power in the military, control society trends in mid-upper class college admissions, while exercising necropolitical power on black and brown populations. I do not know a coherent theory that is inclusive of all these, but I also haven’t read too deeply in broader Foucauldian scholarship.

I have noted all the above theories of power as its crucial to think of what society we live in now in order to know if it is worse or better then a more Foucauldian society in the context of trials/sentencing. Many authors say that the prison industrial complex and plea bargaining is an example of necro politics due to its focus on black and brown folks in racialized ghettos, perpetuating the low-class status of blackness, and that Foucault got it wrong. On a practical level, disciplinary power might sound preferable to necropolitics, making a link turn particularly potent.

#### 1.2.2 Trials Bad (Waiting Times)

Contention 2 is Trials Bad (Waiting Times). Pretrial detention is obviously a bad experience–imprisonment in jail for weeks, if not months, can cause people to lose their jobs from missing work, apartments from nonpayment of rent, and/or access to their children (with them potentially being put in foster care/orphanages). Given that pretrial detention only occurs if you cannot pay bond, longer wait times have a disproportionate harm on minorities who are more likely to be less capable to pay bond (as well-off white folk will simply pay bail and leave). If you cannot pay bail, your options are to plea bargain, stay in jail awaiting trial, or pay a bail bondsman, the people who often charge poor folk exorbitant charges and increase debt bondage for poor communities similar to pay-day loan companies.

#### Plea bargains are orders of magnitude more speedy and quick compared to trials – this applies to both juvenile and adult courts

Redlich et al. 22 [Allison D. Redlich, Distinguished University Professor in the Department of Criminology, Law and Society at George Mason University and the past President of the American Psychology-Law Society, Kirsten Domagalski, graduate researcher and PhD candidate at UC Irvine with an MA in psychological science from UC Irvine, Skye A. Woestehoff, assistant professor at Coastal Carolina University with a Ph.D. in General Psychology from the University of Texas at El Paso, Amy Dezember, Senior Research Associate at the Office of Research and Data at the US Sentencing Commission from a PhD in criminology from George Mason University, and Jodi A. Quas, Professor of Psychological Science and Nursing Science at UC Irvine with a Ph.D. from UC Davis, 2022, “Guilty Plea Hearings in Juvenile and Criminal Court,” American Psychological Association [https://psycnet.apa.org/manuscript/2023-10211-001.pdf]/Kankee](https://psycnet.apa.org/manuscript/2023-10211-001.pdf%5d/Kankee)

\*NOTE: this card is a reformatted version of the same card from in the youth plea bargaining contention

Guilty Plea Hearing Characteristics A simple but informative way to understand plea hearings is to evaluate their descriptive characteristics. First was their length. As anticipated, plea hearings were incredibly quick, consistent with observational studies spanning up to four decades (e.g., Miller et al., 1978; Sanborn, 1992). The hearings lasted about 6 to 8 min in juvenile court and about twice as long, but still only 13 min, in criminal court. Although the plea hearings we observed were longer than misdemeanor arraignment hearings (about 3 min; Smith & Maddan, 2011), is it possible that plea validity can be adequately—much less comprehensively—addressed in a matter of minutes? As a result, even juveniles, who regularly fail to fully understand many aspects of their legal case (e.g., Grisso et al., 2003; Zottoli et al., in press), ceded their rights and were convicted, often of felony crimes, in mere minutes. In contrast, the length of a criminal jury trial is 11 hr and 7 min (or 667 min; Sipes et al., 1988). Thus, the time it takes to convict a juvenile by trial is roughly 95 times longer than the time it takes to convict them by plea, and 51 times longer for an adult. Hearing length could be construed as a proxy for a number of other facets of the hearing, including defendant engagement, plea validity review, or discussion of evidence and/or charges. Indeed, hearing length was positively correlated with defendant participation and review of details of all three of the plea validity components, an important finding given that such a review is a core purpose of the hearing itself. However, a closer examination revealed that this latter pattern held only in the Virginia criminal court, suggesting that, for the juveniles, longer hearings did not result in more detailed discussion of the plea, its meaning, or its implications for the juveniles. Those discussions in criminal court, as well, may have contributed to the plea hearings‘ generally longer length in criminal relative to juvenile court. In juvenile court, it is possible that judges focus on tangential but related elements to the plea, such as parental/guardian understanding and acceptance of the plea conditions (see Fountain & Woolard, 2021) or the juveniles‘ prior criminal history, which may affect their current charges and sentence. As found by Rodriguez (2010), detained youth are more likely to have prior charges than those not detained; at the Virginia juvenile court, we found that plea hearings were longer for defendants in custody than those not in custody, though this pattern did not emerge at the California juvenile or Virginia criminal courts. Other hearing characteristics that differed between courts may also have contributed to variations in length and, more importantly, to defendants‘ likely understanding of their case, the plea, and its consequences. Evidence was reviewed, for instance, in the overwhelming majority of criminal cases but quite rarely in juvenile courts. To our knowledge, a proffer (or presentation) of evidence is not a required part of plea hearings. The American Bar Association‘s (1999) Criminal Justice Standards for plea discussions and agreements does not mention reviews of evidence in its listed responsibilities for judges, prosecutors, and defenders. Yet research has consistently demonstrated that stronger evidence increases the likelihood that individuals, including adolescents, will accept a plea (Peterson-Badali & Abramovitch, 1993; Redlich et al., 2016; Viljoen et al., 2005). And while we do not know whether defense attorneys reviewed evidence with juveniles before the hearings, a lack of review by judges is a striking omission given the value that knowledge of the evidence may play and given that judges in criminal court regularly provide such a review. Likewise, in both the Virginia criminal court and the California juvenile court, most defendants heard the charges read at the start, whereas in the Virginia juvenile court, this occurred in only 6% to 19% of the cases, depending on the severity of offenses to which the juvenile pleaded. Even if defense attorneys explained the charges to Virginia juvenile before the hearing, a re-review by the judge would serve only to enhance juveniles‘ understanding, an especially crucial need given consistent findings that highlight significant gaps in minor defendants‘ knowledge of legal proceedings, including the plea (see Grisso et al., 2003; Redlich et al., 2019; Zottoli & Daftary-Kapur, 2019). Without substantial explanation, it is unlikely that juveniles fully understand the process and the consequences of the plea, a view shared by some courtroom actors (Sanborn, 1992; Woestehoff et al., 2019).

#### 1.2.3 Court Clog

Contention 3 is Court Clog. The core generic aff argument is court clog and is a go-to argument when researching the topic area. It will be the first argument you likely read during aff research, and likely one of the strongest arguments.

Semi-routinely in debate you will discover that some ideas are so manifestly stupid that its nigh near impossible to get accurate cost-estimates or impact cards for the idea, as most intelligent people prioritize analyzing much more plausible, much less stupid ideas. Broadly speaking, plea bargaining abolition is one of these ideas—plea bargaining is so embedded and widespread that to do something different would be disastrous. The scholarly consensus is that debate on whether plea bargaining could be abolished was one in the 1970s-2000s, when both the practice and mass incarceration were becoming widespread. To abolish it now would be a fool’s errand. This is so true that prolific writers on plea bargain abolition like Albert Alschuler have given up and thought abolition to be impossible. Regardless, we have some limited cost estimates listed below.

#### Plea bargain abolition would cost $850 million in 1983. Adjusted for inflation, plea bargain abolition would cost ~$2.75 billion

Alschuler 83 [Albert Alschuler, Julius Kreeger Professor Emeritus of Law and Criminology at Harvard, 1983, "Alternatives to the Plea Bargaining System", US DOJ Office of Justice Programs, https://www.ojp.gov/ncjrs/virtual-library/abstracts/alternatives-plea-bargaining-system]/Kankee

Abstract Coupled with sentencing guidelines, this waiver bargaining could treat together two issues that deserve this unified treatment: sentencing reform and plea negotiations. Another way to end the excessive dependence on the guilty plea would be to spend the money necessary to implement our constitutional ideals without shortcuts. The United States could provide 3-day jury trials to all felony defendants who reach the trial stage by adding no more than $850 million to annual criminal justice expenditures. The actual cost would probably be far less than this figure, however, because many defendants would plead guilty without bargaining and many cases could be tried in less than 3 days. Still another approach might be to simplify American trial procedures in the interest of making trials more available. Contrary to common understanding, the constitution would not preclude a substitution of mixed tribunals of professional and lay judges for criminal juries in State-court proceedings. Less sweeping reforms might also be possible. Four hundred fifty footnotes, many containing references, are included. (Author summary modified)

#### A 10% reduction causes the doubling of the justice system’s size, implying abolition would cause the system to increase by ~15-20 times

Subramanian et al. 20 [Ram Subramanian, director of the Brennan Center’s Justice Program and former editorial director of the Vera Institute of Justice with an undergraduate degree from Wesleyan University, a master's degree in international affairs from Columbia University, and a law degree from the University of Melbourne Law School, Léon Digard, psychotherapist and criminology research with a PhD from the University of Cambridge in Criminology, Melvin Washington II, public policy professional and researcher at the Vera Institute of Justice with a MPP from UMich, and Stephanie Sorage, Analyst at Corporate Insight with a master’s degree in psychology from CUNY, 09-2020, “In the Shadows: A Review of the Research on Plea Bargaining,” Vera Institute of Justice, [https://vera-institute.files.svdcdn.com/production/downloads/publications/in-the-shadows-plea-bargaining.pdf]/Kankee](https://vera-institute.files.svdcdn.com/production/downloads/publications/in-the-shadows-plea-bargaining.pdf%5d/Kankee)

\*Note: About Report and Table of Contents sections omitted

When most people think of the American justice system, they likely picture a courtroom with lawyers, a judge, and a jury waiting to determine the facts of the case and provide a just outcome. But the majority of people “found guilty” in America never stand trial: their fate is determined in a courthouse hallway or prosecutor’s office via a quick conversation between attorneys. Plea bargaining is more a part of the American justice system than the formal trial and, in fact, makes up the vast majority of criminal justice transactions today. Only 2 percent of federal criminal cases—and a similar number of state cases—are brought to trial. More than 90 percent of convictions, at both federal and state levels, are the result of guilty pleas. Plea bargaining is so fundamental to the system that even in 1970, Chief Justice Warren Burger of the U.S. Supreme Court estimated that a 10 percent reduction in guilty pleas would require doubling the amount of judicial capacity in the system. Scholars in recent years have suggested that the criminal legal system could be brought to a halt by a mass refusal to plead guilty. And yet little is known about plea bargaining. Pleas are offered and retracted at the unfettered discretion of prosecutors. Bargains themselves are undocumented and largely unchallenged, save for a few formal questions meant to establish that the plea is “voluntary, intelligent, and knowing.” To understand plea bargaining, then, we must depend on a small but growing body of research. Through interviews, data gathered by courts, and other means, scholars are attempting to understand the factors that influence plea bargaining as well as whether a plea bargain is a “bargain” at all. These studies are vital to understanding a process that is so central to how the criminal legal system currently operates, but they remain woefully inadequate and incomplete. The sheer lack of trials, for example, means that it is difficult to find analogous cases to compare to those that end in pleas. In addition, the dynamic and recursive nature of bargaining is difficult to isolate into discrete questions for study. Finally, the most important voices—the people subject to these bargains—are largely absent from these studies. Instead, data is provided by police, courts, prosecutors, and jails. This one-sided understanding of the bargain explains a good deal about how the legal characteristics of a case, or pressures such as increasing caseloads, drive prosecutorial bargaining, but it offers little insight into the reasons that people trade their right to a trial for a faster and more certain conviction. But why does it matter? The history of the American justice system is a history of mass incarceration, with wildly disparate consequences for Black and white people. We are faced with substantial evidence that people are put in untenable positions after arrest. They are kept in jails away from their families and communities if they cannot afford cash bail or an attorney to argue for them. And although representation is guaranteed, the tremendous caseload borne by public defenders means that “representation” before trial is likely to be perfunctory and impersonal. Pretrial incarceration has been definitively linked to the likelihood of conviction, and most convictions are obtained via plea. And although the Supreme Court has indicated that even knowing you may be put to death if you face trial is not “coercive” pressure to plead guilty, it is difficult to say that an incarcerated person faced with the loss of their income, housing, family, and community is truly free to make a choice. Even after people return to their communities, a conviction—whether it stems from a guilty plea or a jury verdict—carries collateral consequences that will follow them for years, if not the rest of their lives. Today, the American justice system is in crisis, but it is also in a moment of unique opportunity. This review and analysis of the available literature on plea bargaining—released by Vera and the Safety and Justice Challenge—represents decades of work by dozens of scholars. It brings light to the shadowed hallways where the majority of justice is transacted and new attention to the ways the criminal legal system has become an ad hoc administrative process. Introduction The common narrative in popular culture is that criminal justice is meted out in courtrooms around the country. Facts about a particular case inevitably emerge from adversarial proceedings in which prosecutors and defense attorneys go to battle in open court over matters of fact and law, juries decide whether people are guilty or not guilty, and judges determine appropriate punishments.1 People have their days in court, and the public—including victims, if there are any—witness whether justice is done.2 In fact, criminal trials are rare.3 Instead, most criminal cases that result in conviction—97 percent in large urban state courts in 2009, and 90 percent in federal court in 2014—are adjudicated through guilty pleas.4 Of these, researchers estimate that more than 90 percent are a result of plea bargaining—an informal and unregulated process by which prosecutors and defense counsel negotiate charging and sentencing concessions in exchange for guilty pleas and waivers of constitutionally guaranteed trial rights.5 Indeed, by one estimate, a criminal case is disposed of by plea bargaining every two seconds during a typical work day in America.6 Negotiated deals to resolve criminal cases are so ubiquitous that Justice Anthony Kennedy of the U.S. Supreme Court stated in 2012 that “criminal justice today is for the most part a system of pleas, not a system of trials.”7 Plea deals—which are entirely within the discretion of a prosecutor to offer (or accept)—typically include one or more of the following: › the dismissal of one or more charges, and/or agreement to a conviction to a lesser offense (known as “charge bargaining”); › an agreement to a more lenient sentence, which can cover both type of sanction—custodial or community-based—and length (known as “sentence bargaining”); and › an agreement to stipulate to a version of events that omits certain facts that would statutorily expose a person to harsher penalties (known as “fact bargaining”).8 Plea negotiations can be quick and straightforward or long and complicated—or anywhere in between.9 When there are no legal issues in dispute, or in cases in which it is likely that the prosecution will prevail, plea negotiations can be superficial—with people taking given deals without any negotiation or counteroffer.10 This is especially so in cases of misdemeanors, infractions, and other lesser offenses for which there are often standard dispositions routinely offered and accepted with little, if any, actual deliberation. (See “Misdemeanor justice and plea bargains” on page 16.) Often, in more complex cases where available evidence is subject to conflicting interpretations, and/or where sentencing stakes are higher, negotiations can be lengthier—potentially occurring over many weeks and months.11 In a smaller proportion of cases, no actual offer or negotiation occurs, and people plead guilty without any specific promises or assurances from the prosecution—called variously taking an “open plea,” taking a “blind plea,” or “pleading to the sheet.”12 In whatever form it takes, plea bargaining remains a low-visibility, off- the-record, and informal process that usually occurs in conference rooms and courtroom hallways—or through private telephone calls or e-mails— far away from the prying eyes and ears of open court.13 Bargains are usually struck with no witnesses present and made without investigation, testimony, impartial fact-finding, or adherence to the required burden of proof.14 Moreover, little to no documentation exists of the bargaining process that takes place between initial charge and a person’s formal admission of guilt in open court, and final plea deals that close out cases are themselves rarely written down or otherwise recorded.15 As such, plea deals, and the process that produces them, are largely unreviewable and subject to little public scrutiny.16 Thus, despite the high frequency with which plea deals are used, most people—aside from the usual courtroom actors—understand neither the mechanics of plea bargaining nor the reasons so many people decide to plead guilty. Plea bargaining has, however, become the central focus of a growing, but still small, body of empirical research. In recent years, mounting concerns about plea bargaining’s role in encouraging the widespread forfeiture of constitutionally guaranteed trial rights and associated procedural protections—and its critical role in fueling mass incarceration— has stimulated further urgency in understanding how the process works. Indeed, an array of questions regarding its fairness have emerged. Over the last few decades, prosecutorial leverage in plea negotiations has increased exponentially as changes in substantive law have bolstered criminal penalties and given prosecutors a wider range of choices to use when filing charges (such as mandatory penalties, sentencing enhancements, and more serious yet duplicative crimes already well covered by existing law). But increased exposure to harsher penalties has not been matched with increased procedural protections for defendants. Prosecutors’ wide powers in plea bargaining still go largely unchecked, and there are no meaningful oversight mechanisms or procedural safeguards to protect against unfair or coercive practices, raising fears about arbitrariness and inequality. Given this lack of regulation, concern has also grown over the extent to which innocent people are regularly being induced to plead guilty, as well as plea bargaining’s role in perpetuating racial and ethnic disparities in criminal case outcomes—for example, plea bargaining practices that send more Black people to prison or jail than similarly situated white people.17 Plea bargaining’s full impact on the legal system and justice-involved people remains unknown, but empirical research on this little understood yet immensely influential practice has begun to emerge. In order to provide an accessible summary of existing research to policymakers and the public, the Vera Institute of Justice (Vera) examined a body of empirical studies that has developed around plea bargaining. Although this review is not exhaustive, it provides a picture not only of the current state of scholarship on plea bargaining, but also of the gaps in knowledge that must be filled. As this report will discuss, studies appear to fall into seven main focus areas, primarily examining either of two broad questions: (1) which factors most influence the plea bargaining decision-making process?; and (2) what is the impact of plea bargaining on case outcomes? The seven focus areas covered by this report include the following. › Coercive factors. A number of studies examine whether the punishing circumstances of pretrial detention or the threat of onerous sentences—specifically, the death penalty—play an outsized role in inducing and expediting guilty pleas. › Legal case characteristics. Another extensive body of work looks at how legal case characteristics—severity of charge, prior record, evidentiary factors—influence the type of plea offers that are made. Systemic inequities. There is a growing body of research that considers the influence of demographic characteristics in determining plea outcomes. These studies primarily look at the potential existence of conscious or unconscious biases that may create disadvantage and inequality across race, ethnicity, gender, or age. › The criminal law. Another body of work looks at the organization, structure, and content of the criminal code to understand how the criminal law—including the existence and type of structured sentencing schemes—can affect the likelihood and substance of a plea deal. › Caseloads. Some studies have tested the common assumption that the frequent use of plea deals is, at least partly, a function of heavy caseloads among prosecutors and a resultant pressure to hasten the disposal of as many cases as possible. (No research considered the impact of defenders’ caseloads on plea bargaining.) › Trial penalty. A substantial body of the literature explores the so-called “trial penalty” (or “plea discount”)—that is, the difference between a criminal sentence produced by guilty plea versus by trial. Much of this work is narrowly based on the assumption that plea decisions rely on anticipated trial outcomes, such that the higher the penalty (or larger the discount) the higher the likelihood of a guilty plea. › Innocence. Finally, given the potential benefits to people of accepting a plea deal, a small body of research has considered the extent to which innocent people may be coerced into pleading guilty to avoid receiving a “trial penalty” if they fail to prove their cases at trial. Whether people are charged with serious crimes or low-level misdemeanors, whether they are before busy city courts or slower-paced rural ones, they will likely resolve their cases by negotiated pleas. Plea bargaining is the de facto system of justice in America. But despite decades of scholarship, little is ultimately known about how it works or why people plead. This review of contemporary scholarship only offers mixed clues about the criminal legal system’s primary dispositional process. Although there is evidence that most people receive more favorable sentencing outcomes through plea bargaining than they would if they had taken their cases to trial, the exact contours of how such bargains are reached, and the factors—whether individual, legal, institutional, or demographic— that ultimately play a key role in influencing plea outcomes remain both ambiguous and opaque. What exists instead is a mix of complicated, nuanced, and sometimes contradictory research findings. In order to bring plea bargaining out of the shadows and ensure its equitable use, more transparency is needed about the process by which most cases are concluded so that safeguards can be put in place to protect people from its misuse. 8Vera Institute of Justice Law of plea bargaining: An overview

These cost estimates are not of the highest quality; and it’s hard to think of how we would solve problems related to law professional shortages or estimate the cost of more simple things, such as paying for bigger parking lots at court houses (often located in space limited downtown areas) or the annual cost of paying many, many more jurors. There would also be downward pressure on the amount of convictions due to increased prosecutorial screening out of low-level criminals (such as litterbugs or potentially soft drug users). However, in an absolute sense, the cost is not that bad, especially considering that the US discretionary budget for Congress is ~$1.6 trillion and the ~$2.75 billion price tag is pennies compared to whatever tax cuts or DOGE inefficient “efficiency cuts.” For reference, the ~$2.75 billion price tag would be less than the annual cost of NASA, a relatively small government agency compared to the Social Security Administration or the Department of Defense. Obviously, these are all arguments the neg ought to be making when answering court clog, but these are all good things to be aware of if you’re running this contention.

The issue of court clog is inherently linked to whether a bigger system is possible, particularly without spending ridiculous sums of money. Assuming a trial system is exorbitantly expensive, the impacts are the following (a) can’t solve neg impacts because the system is broken, (b) increases wait times that harm people waiting for justice, and (c) expenditures trades off with other, more valuable social goods.

Not being able to solve obviously means there’s less neg offense to deal with. Increased waiting times can be impacted out with the evidence in the “trials bad (waiting time).” These are paired contentions: if trial wait times bad is a true argument, that implies a linear impact of those impacts we already see in the status quo being applied to everyone, which is an intrinsic harm even if eliminating plea bargaining didn’t clog up the courts with a bigger caseload. However, if “neg causes court clog” and “trial wait times bad” are both true arguments, then you have a very potent contention, as the court clog increasing wait times multiplies the harms of those wait times (as the wait times are now substantially longer). For the final impact, to the extent that a program is extremely expensive, it decreases our budget for other goods (such as rehabilitation, poverty reduction, schooling, etc.).

A separate, more small-scale impact is your inability to exercise the “speedy” part of your trial rights guaranteed by the Constitution. However, using this impact is self-defeating given that plea bargainers didn’t even get a trial to begin with, so a subpar, slow trial is a huge upgrade to no trial at all. A good neg response you’d need to contend with is to “not let the perfect be the enemy of the good.”

The only problem besides the link is uniqueness given that to varying degrees, the courts are already clogged with severe backlogs in some court systems (which seems to implicate the strength of the contention). However, there are degrees of uniqueness erased with some overly simplistic responses to arguments, such as a yes/no court clog now paradigm. Given the nature of a criminal justice system in a country of 300+ million people, delays, wait times, and some degree of court clog is inevitable, and as the aff will argue, a lack of wait times might mean the integrity of due process has been damaged due to expedited, “assembly-line justice.” However, the brink paradigm of yes/no court clog hides the fact that most debate impacts are a matter of degree, not kind, such as extreme climate change or extreme economic decline causing bad impacts - neither are binary lever switches indicating yes/no good economy or climate but rather impacts predicted when the status quo reaches extreme degrees of bad stuff occurring.

As aff evidence already presumes when describing the impacts of court clog, some, relatively small degree of court clog already exists, with the degree of which varying depending on whether we focus on immigration, civil, criminal, appeal, tribal, constitutional, etc. courts. Immigration courts may be clogged with a deluge of cases while civil court may need budget cuts from their caseload being too small, but importantly, each individual court’s caseload does not directly impact each other’s caseload, and neither of these courts are part of the “criminal justice system,” so immigration/civil court caseloads are mostly, but not entirely irrelevant to the criminal caseload.

Additionally, law professionals specialize, adding difficulties if a judge specializing in immigration law, corporate bankruptcy, family law, etc. was required to shift their practice and expertise to another field. Of course, judges are less specialized than lawyers given that judges often need to address a variety of cases, but civil judges are imperfect substitutes for criminal cases.

The court system type distinction and law professional’s specialization have two implications:

1. Worse aff impacts — criminal court clog has minimal implications for the integrity of non-criminal courts like patent courts (key to the economy) or appeal/constitutional courts (key to civil rights).
2. Better counterplan responses — a common neg counterplan is to solve the scarce judicial resources problem causing plea bargaining simply by increasing funding to make those resource plentiful. However, given the subdivided court system, someone like an elder law lawyer cannot easily become a defense attorney, let alone a criminal trial justice, meaning there’s both a professional shortage as well as a resource shortage, the former of whom cannot be easily resolved via increased funding (given funding cannot apparate more prosecutors, defense attorneys/public defenders, judges, law clerks, etc. into existence).

#### 1.2.4 Abolition Aff

Contention 4 is the Abolition Aff. This contention is the “reject the system, burn it all down” kritikal affirmative, desiring to move beyond the prison system. Plea bargain driven mass incarceration is likely indefensible, and it’s a bad praxis to defend something that cause such great suffering and racial harms. Some sides on some topics are unworthy of debating, such as the 2010 PF resolution that advocated for building an Islamic cultural center near the 9/11 museum. The topic sparked such large backlash based on the potential harms towards Muslim debaters via debating the topic that the topic was retracted. Since 2010 there has been a stronger culture of kritikal affirmatives, and that option was (and likely still is) nonexistent for PF, hence the public desire to swap the topic. However, in LD (unlike PF), there is an implicit, unrecognized option to choose not to defend the topic, as seen most commonly in identity politics kritikal affirmatives. Abolition is a similar argument usable on both the aff and neg, which can make the topic particularly confusing, but also allows kritikal debates with both aff and neg kritikal literature to advocate for the best option to resolve the harms of the criminal justice system. A full discussion of the potential justifiable reasons for intentionally not defending a topic is beyond the scope of this topic analysis, but I would recommend reading the article linked [here](https://web.archive.org/web/20190204193413/https:/www.premierdebate.com/theory/in-defense-of-inclusion-by-john-scoggin-and-bob-overing/) for a more sophisticated debate on its merits.

#### Definition of the Carceral State

Hong 25 [Esther K. Hong, Associate Professor of Law at ASU, 2025, “The Carceral State(s),” Michigan Journal of Race and Law, https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1414&context=mjrl]/Kankee

INTRODUCTION The carceral state is everywhere. The term has become a “staple[] of . . . contemporary punishment and society literature.”1 It is prevalent in legal scholarship, increasingly appearing in critiques about punishment and other forms of social control in various areas of the law, including criminal, immigration, juvenile, family regulation, and education law.2 It has become a colloquial term among activists, advocates, and journalists,3 and its significance (whether lauded or critiqued) is recognized in commentaries of various political ideologies.4 It is also making its mark in legal casebooks,5 legal filings,6 interviews with politicians, and congressional hearings.7 While the term evokes Foucault’s “carceral archipelago” from 1975,8 its prolific usage is much more recent. One scholar credited Marie Gottschalk with its popularization,9 who began writing about the carceral state circa 2006.10 But even with its pervasive usage over nearly two decades, the defi- nition, conceptualization, and theorization of the carceral state are far from settled. This Article analyzes and contributes to this ongoing work by under- scoring just how varied, decentralized, and fluid ideas about the carceral state are. There are differing histories, core traits, motivations, reach, and impact. There are at least three factors that contribute to this diversity of views. First, in the majority of instances when the term “carceral state” appears in academic and mainstream sources, it is not explicitly defined. This absence is so pronounced that scholars of different disciplines have commented on it. 11 For example, historian Dan Berger observed the oddity in “how little of the published work or conference sessions on the topic [of the carceral state] engaged in this most basic act” of defining it. 12 This preferred practice of not defining the carceral state continues. For example, in perhaps one of the most recent high-profile uses of the term, Justice Sotomayor in her dissent in Utah v. Strieff, 13 used the term “carceral state” without an explicit definition. She opined that the majority’s holding regarding Fourth Amendment searches would lead to distorted interactions between police and individuals that implied that one is “not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged.” 14 Other lower courts that have since quoted Justice Sotomayor also have not defined the term. 15 That so many commentators of the carceral state do not set forth an express definition keeps the concept fluid and open-ended. Writers may assume that readers just understand what the carceral state is, either from its common usage or from the context in which the term appears. But this practice inherently leaves it open to many interpretations. Second, in the limited instances when the carceral state has been expressly defined or conceptualized in legal and social science scholarship, they have differed from one another.16 There are at least four broad categories of conceptualizations that all allude to something that is inherently wrong, dysfunctional, or harmful. For example, the carceral state may signify a certain punitive phenomenon, such as mass incarceration. It may refer to all or specific state practices that punish, surveil, and/or control individuals. It may signify a type of governance, government, or governmentality, or a logic or ideology that permeates throughout society or the entire state. This practice too signals that the carceral state concept does not have a unified, overarching construction. Third, and most significantly, scholars have a wide range of insights on the core and significant characteristics of the carceral state. 17 This diver- gence is apparent in its explicit definitions and conceptualizations. But more tellingly, they are evident in the descriptions that accompany references to the carceral state. As the preferred usage of the term is in its undefined form, the context reveals the commentator’s understanding of the carceral state. These contextual clues in turn show that ideas about its core characteristics span a broad spectrum.18 There are varying descriptions of its composition, relationship with the prison-industrial complex (if any), size, form, and age. Also, while many prominent scholars view the discriminatory actions and effects of the carceral state as its key feature and harm, there remains notable differences in the intent, type, and scope of this discrimination. This diverse understanding of the carceral state matters for both its theoretical development and real-world applications. 19 First, it speaks directly to the theorization of the carceral state. Rather than progressing towards a single overarching theory, there will be many theoretical frameworks or versions since some views cannot be reconciled or merged. This analysis may help solidify the boundaries between the different understandings of the carceral state. Furthermore, while it is not unusual for popular terms and concepts to have diverse meanings and frameworks, 20 the theoretical development of the carceral state also conveys a distinct, broader message. The usage of the term reflects scholars’ growing reluctance to use traditional labels for state institutions, systems, laws, or processes. The term often serves as an epithet, immediately evoking their illegitimacy and dysfunction, such as discrimination, corruption, and oppression. It also underscores how normalized and pervasive certain state-inflicted or state-sponsored harms have become. And yet, that so many commentators have such different conceptions of the carceral state should prompt reflection on why it is so difficult to come to a consensus about what exactly is wrong with our current systems, structures, laws, or governance.

#### 1.2.5 Trials Bad (Victims).

Contention 5 is Trials Bad (Victims). This contention is similar to the pathologized subject contention, but it doesn’t base its justifications on Foucauldian theory. It says that victims being forced to testify in trials in order to get a conviction causes a traumatic and is net negative to their mental health

#### 1.2.6 Jury Duty Bad

Contention 6 is Jury Duty Bad. This contention mostly exists as a preemptive link turn to win arguments about trials being unfair/racist (if poor people don’t get on jury), or that trials are too expensive (if the neg fiats that poor people get on juries and will be compensated more). The former helps out with the “Jim Crow Juries Bad” helps with the contention and the latter helps with the “court clog” contention. The main offense is that juries can worsen the poverty of poor folk by causing them to lose pay; however, this the status quo mostly already “solves” this problem given that the courts already exclude these people from serving due to financial hardship. Many of the racialized harms of trials already exist via plea bargaining, and trials likely comparatively improve the situation (even if they’re not perfect). These arguments implicate neg solvency more so then they are intrinsically winning arguments you ought to always extend in the 2AR.

#### 1.2.7 Jim Crow Juries Bad

Contention 7 is Jim Crow Juries Bad. Black jurors are highly excluded from juror summons rolls (due to quasi-race-neutral economic reasons in terms of you’re less likely to be included if you’re poor, a black folk are a lot more likely to be poor). Similarly, lawyers are much more likely to dismiss black jurors from a potential jury (again with more quasi-race neutral reasons). Both factors contribute to highly white juries being highly influential on black and brown folks’ court outcomes, which offers great potential for implicit racial bias.

Evidence about whether all white juries are inferior to plea bargains via mostly white lawyers is not great. Both cause racialized harms, and the trials have stronger safeguard mechanisms like appeals, evidentiary standards, or a [token](https://www.acslaw.org/expertforum/racial-discrimination-in-jury-selection/) black/brown person. However, the generalized stats about the trial penalty for black and brown folk is comparatively more severe compared to white people, which could be explained via the white juries argument.

#### 1.2.8 Crime

Contention 8 is Crime. Plea bargains increase the severity of convictions, help secure informant deals, and can result in co-defendants testifying against each other (which is the premise of the game theory experiment of the prisoners’ dilemma). All of these *could* potentially be the cause of a reduction in crime. In a roundabout manner, you could make arguments in favor of mass incarceration as a means of preventing crime, especially given the fact that crime rates by almost all metrics are at the lowest point in decades.

#### 1.2.9 Circumvention

Contention 9 is Circumvention. This is a core negative argument as it implicates neg solvency, especially when paired with court clog. Experiments in plea bargaining abolition have often found that either the trial rate skyrockets, or the trial rate doesn’t change due to defendants engaging in open pleas as opposed to negotiated plea bargains. Open pleas involve skipping the process of plea offers and counter offers, with the defendant pleading guilty relatively early without negotiating with the prosecutor over the terms of a plea deal. It’s a hope to be in the prosector’s good graces via minimalizing work for them, and this is entirely legal to do even if plea bargaining was banned, as you cannot have a blanket rule to stop people from pleading guilty to avoid the trial even if you could have a rule against negotiating a bargain.

### 1.3 Negative Topic Analysis

#### 1.3.1 Informants and False Testimony

Contention 1 is Informants and False Testimony. Informants are criminals legally allowed to maintain their criminal persona and actively commit crimes in order to the justice system to acquire information from the informant to catch other, hopefully worse, criminals. In (formerly) popular media, such as the 2004 *Starsky and Hutch* remake, you can see Snoop Dog/Huggy Bear as an example of an informant, both in the sense that he routinely provides information to and aids the investigation of the police, and in the sense that he is untrustworthy and steals all the money at the end of the movie. Informants are a double-edged sword as they can reduce crime by aiding the prosecution of “bigger fish” higher up in a criminal organization (like the mafia or cartel), but they’re given an implicit license to commit crimes and the information they provide is not always accurate and could result in false convictions.

The problem is that informants are untrustworthy, commit crimes, and sometimes intentionally provide false information (to target criminal rivals) BUT drug enforcement and to a lesser degree police/FBI are heavily reliant on informants for their operations, making it hard for law enforcement to address the above problems. The reliance and the phenomena of “loving your rat” can result in bad police behavior and lackluster investigations. Additionally, informants are often a net negative to law enforcement, causing cultures of insecurity, not trusting law enforcement, and decreasing the sense of fairness of the law (given that justice can be bargained for if it’s convenient for the cops). All of these cause a disparate impact on minority communities, often increasing crime levels. The informants themselves are obviously coerced into doing this and often die or suffer horrific experiences in the process of being undercover, which is a secondary impact.

One of the main means for the justice system to acquire informants is via plea bargains—routinely in television like *Breaking Bad*, low-level criminals are caught and obliged to cooperate to catch higher-level criminals in exchange for leniency. There’s few non-coercive means of law enforcement to garner informants as “snitches get stitches,” which is why plea bargaining is often the crucial source of informants.

#### 1.3.2 Mass Incarceration

It's the one business where you really do have a captive audience. Just lock them up, throw away the key, and watch the profits roll in. … We'll have America back the way we want it to be: white, paranoid, and happy to burn anyone that looks different. … The prison industrial complex: a real American success story that they can't outsource. – GTA V

Contention 2 is Mass Incarceration. For those unfamiliar, since the 1970s and the War on Drugs, the same period when SCOTUS said plea bargaining was constitutional, the US prison system has “exploded” in size, becoming the largest in the world. Statistics on the unprecedented increase in the US prison system are both readily available in this contentions evidence and on the internet—this phenomenon has been described as one of the greatest human rights violations in the world and is actively criticized by the UN. Authors such as Michelle Alexander have described this as a new system of mass racial subjugation similar to Jim Crow or slavery due to its disproportionate impact on black and brown folk, contributing to legal, yet informal racial “caste” system by associating black folk with criminality and decreasing their legal rights.

Plea bargaining is crucial in mass incarceration due to its ability to get through caseloads faster. Who knew it was easy to send millions to prison and give up their constitutional rights to the trial process that would potentially prove them innocent if you threaten them with greater punishment if you exercise those rights? If plea bargaining, the mechanism that processes ~90-95% of cases, didn’t exist, the criminal justice system would explode, and by extension the prison industrial complex and mass incarceration. The over criminalization of black and brown communities is contingent on a legal system that permits their prosecution. To some degree this contention “bites the bullet” and concedes the court clog link, as sabotaging and crashing a system that produces injustice is good. This cannot be stressed enough; if the system is so bad the UN says it’s an egregious human rights violation, being concerned about the new system being slow is a non-response. There’s cognitive dissonance between the fact that the US has the largest prison system in history (more so than the Stalinist Soviet Union or Mao’s China), with a devastating impact on black and brown folk, and saying “too bad, so sad” the courts will be clogged if we actually gave everyone justice, so just deal with it and pretend everything is okay.

For reference, this contention *heavily* overlaps with the two racism contentions below.

#### 1.3.3 Advantage Counterplan

NOTE: If you are skimming through the topic analysis, I would highly recommend reading the above section “Note on Counter Plans and Required Neg Advocacy” before running this counterplan.

Contention 3 is the Advantage Counterplan. The all-inclusive advantage counterplan in this brief is highly utilizable for philosophical based frameworks about coercion and rights-protection or smaller non-imprisonment impacts like informants or white collar/crime pedophiles. None of these are reliant on the mass, systemic change of the prison-industrial complex. Do not run this with racism (particularly the critical version) or mass incarceration as the extra-resolutional solvency of the counterplan would also solve your topical reasons why to plea bargaining is bad, meaning a permutation would make the counterplan self-defeating.

For reference, the first two counterplan planks are generally useful in all almost all situations for answering court clog/limited resources arguments, as they solve the system-level harms related to plea bargaining so that everyone can exercise their jury trial rights. The next three planks relate to solving mass incarceration to avoid trial tax/increased incarceration arguments, because if trials have worse punishments and you don’t win that trials reduce the total number of convictions (through higher standards of evidence), then everyone is punished for longer periods, the harms of which need not be explained.

There are only two good responses to the counterplan, law professional shortage (described earlier in the topic analysis), and increased spending bad due to inflation. However, uniqueness overwhelms the link with other status quo events that are increasing inflation, such as the most intense trade war since the 1930s, the recently passed One Big Beautiful Bill Act (which adds several trillion dollars to the national debt), or Trump potentially firing the Federal Reserve chair (thereby threatening the credibility of the US financial system). In the non-debate world, spending huge lumps on criminal justice given the risky inflation situation is a horrible idea, but in terms of the counterplan, inflation and spending-related inflation risks are already sufficiently high that the counterplan cannot make it much worse (making spending bad arguments against the counterplan non-unique).

If people question the legitimacy of the counterplan, think of a well-to-do family’s birthday party who have the financial means to afford another cake, but don’t budget for it, leaving the partygoers to ration the scarce cake resources to maximize the efficiency of cake allocation, leaving ~90% of the partygoers with cardboard and frosting. On a fundamental level, it’s patently obvious you’d assess this a horrible party—there’s easily enough money to buy a sheet cake at Albertsons to avoid this distributional low-cake supply chicanery. Why do we accept the claim that rationing is inevitable because (a) the amount of cake is fixed and we cannot get more, and (b) millions must attend the party without cake? If it’s true the family is truly poor and is lacking in the cake party budget, why not avoid inviting extra people you know you cannot feed gluttonous goodness. Its beyond obvious cake is not the justice system, but one would think we would have higher standards for people receiving the death penalty and life-in-prison than a quinceañera.

#### 1.3.4 Racism (Stock).

Contention 4 is Racism (Stock). This contention is focused on the harms of plea bargaining and mass incarceration on black and brown folk, as well as their associated communities.

#### 1.3.5 Racism (Critical)

Contention 5 is Racism (Critical). This contention is highly premised on the ideas of Foucault and the construction of criminality. If you read the aff version of this contention, you may be confused in terms of how Foucauldian is applicable, especially when the argument there was that disciplinary power is neglected in the criminal justice system now in favor or retributivism and necropolitics. However, the coercive aspects of guilty pleas where you “admit your sins” via the confession allow blackness to be more easily conflated with criminality. An assembly line of mostly black and brown bodies being compelled do admit blameworthiness for something they did not do, while having all the judicial hallmarks of voluntariness and individual agency, helps legitimize and white wash the prison industrial complex as something race neutral, and by extension, eases thinking of the hyperincarceration of black and brown folk as something natural. Below is a card with an explanation of social death that may be valuable to read for context whenever engaging in critical anti-blackness literature.

#### Social death explained

Falzone 19 [Gabby Medina Falzone, researcher at UC Berkley Graduate School of Education, 2019, Beyond the School-to-Prison Pipeline: Social Death and the Relationship Between School and Incarceration,” ISSSI Graduate Fellows Working Paper Series https://escholarship.org/content/qt5942q92r/qt5942q92r\_noSplash\_aef39df9512bd78a458416e801c439ad.pdf?t=q07ecn]/Kankee

Why Social Death Social death is a concept popularized by Patterson (1982), who used it to refer to the way those who were enslaved across cultures and across time are deemed “social nonpersons” (p. 40) either as “someone who did not belong because he is an outsider” or “someone who became an outsider because he did not (or no longer) belonged” (p. 44). Scholars such as Sexton (2010; 2016) use social death to specifically describe anti- Blackness, i.e. the infliction of violences on African Americans by equating them and treating them as less than human. Sexton (2010) argues that “…because blackness serves as the basis of enslavement in the logic of a transnational political and legal culture, it permanently destabilizes the position of any nominally free black population” (p. 36). Other scholars adapted the concept of social death to describe the phenomenon of incarceration. Sowle (1993) uses social death to describe the rise of US penitentiaries in the 1930s as a way to socially isolate criminals who “were germs infecting the body politic” (p. 528). Guenther (2013) discusses social death in terms of solitary confinement, in which incarcerated individuals are forcibly separated from human connection. Price (2015) also argues that “to be sentenced to prison is to be sentenced to social death,” though in addition to the mistreatment in prison he adds the lingering stigma of incarceration after release (p. 5). Rios (2011) briefly mentions social death in his conclusion to refer to the six of his participants who ended up in prison and the “social incapacitation” or “microdoses of social death” that prevented all his participants “from functioning, thriving, and feeling a sense of dignity in their daily interactions with institutional forces” (p. 160). Cacho’s (2012) iteration of social death centers on a priori criminalization. In her version of social death, an individual’s everyday behavior is criminalized, not because the individual is acting like a criminal, but is by their very existence, criminal. She uses her concept of social death to conceptualize the violences of labeling, surveillance, and punishment of gang members, undocumented immigrants, and suspected terrorists to show “how human value is made unintelligible through racialized, sexualized, specialized, and state-sanctioned violences” (Cacho, 2012, p. 4). It is this conceptualization of social death that better describes the experiences of participants in my study. There are two reasons social death is a more suitable metaphor for understanding participants’ experiences compared to the school-to-prison pipeline. First, social death in itself offers a more in-depth understanding of criminalization and dehumanization and the interaction between the two compared to other frameworks. Second, I use social death as a key component of an ecological model to describe the experiences of participants in the larger study that these case studies draw from. Despite its infrequent use, social death is the best lens through which to understand the experiences of the six participants compared to more well-known frameworks. While no framework is as prolific as the school-to-prison pipeline, Rios’ (2011) youth control complex is also commonly used to conceptualize the criminalization of youth.6 His framework presents an alternative to the pipeline’s linear causal trajectory. And unlike the school to prison pipeline metaphor, which is empirically weak and undertheorized (McGrew, 2016), Rios’ (2011) framework is empirically sound, providing strong evidence that hypercriminalization occurs at the hands of the youth control complex. However, I argue that the phenomenon is more complex than criminalization and control and that social death accounts for this complexity. Cacho (2012) argues that criminalization is one aspect of social death, but of equal importance is how certain groups of people are categorized as “illegible for personhood” and unworthy of empathy or compassion (Cacho, 2012, p. 6). This dehumanization positions some youth as appearing human but “really subhuman on the ‘inside’” (Merlo & Benekos, 2017, p. 27 citing Smith, 2016; see also Haslam & Loughnan, 2014). The intertwining of criminalization and dehumanization is not the only advantage to using social death. In terms of metaphor, the metaphor of death rather than of control, more explicitly signifies that forces of oppression actively inflict violences on oppressed populations. The other reason for using social death has to with the larger study that these case studies are drawn from. Data from the larger study were used to develop an ecological understanding of some of the violences that were inflicted on participants. There are four faces of death that emerged from that larger project. As mentioned above, my approach to social death is adapted from Cacho’s (2012) work to conceptualize the violences of criminalization and dehumanization participants experienced as adolescents and young adults. The other three faces of death that I employ are historical, psychological, and biological. I use historical death to capture the violence of erasing and/or rewriting participants’ cultural history in and out of schools. Psychological death refers to the psychological consequences of historical and social death, and biological death refers to physical health consequences of historical, social, and psychological death. Biological death includes actual loss of life, which unfortunately one of the study participants succumbed to. Methods

#### 1.3.6 Rights Theory

Contention 6 is Rights Theory. A key SCOTUS doctrine to be aware of is the “unconstitutional conditions” doctrine; receiving contracts or government benefits cannot be contingent upon you giving up your rights. Ironically, you do not have the right to give up your rights, as that reconstructs your inalienable rights as privileges able to be bought and sold on the market, making you less of a citizen. A good example of unconstitutional conditions applied is indentured servitude and/or coercive contracts after the Civil War and the 13th amendment. Banning slavery would be pointless if you could (re)enter slavery and abrogate your constitutional right to not be a slave if your family was paid enough money to sell you into slavery, which is why SCOTUS eventually banned coercive post-Civil War labor contracts that reproduced slavery under a different name (as it produced unconstitutional conditions).

#### Unconstitutional conditions normally prevent you from treating your rights as privileges, a tradable good exchangeable in a deal. Plea bargaining is the exception

Hessick 21 [Carissa Byrne Hessick, Ransdell Distinguished Professor of Law at the University of North Carolina School of Law, where she also serves as the director of the Prosecutors and Politics Project, 2021, “Punishment Without Trial: Why Plea Bargaining Is a Bad Deal,” Abrams Press, ISBN: 9781419750304]/Kankee

The trial penalty has been around for decades. The federal agency responsible for the administration of the courts used to keep track of it in federal cases. That’s how we know, for example, that even back in the 1970s the average defendant who insisted on a jury trial received a sentence that was three times longer than those of the defendants who pleaded guilty. How can judges justify this? If governments tried to put people in jail because they exercised other rights—like the right to free speech, the right to belong to a church, or the right to vote—judges would quickly step in and stop it. Yet the Supreme Court has decided to allow the government to imprison people longer based on the mere fact that they insisted on their right to a trial. Some people say that the trial penalty doesn’t punish people for exercising their right to a trial; it just grants a benefit (a shorter sentence) to those who are willing to plead guilty. Personally, I don’t see how a judge’s explicit threat to put someone in jail for an extra decade can be recharacterized as a benefit to some other defendant who pleaded guilty. But even if it were, that shouldn’t make a difference as a constitutional matter. The courts don’t usually let government officials force you to waive your constitutional rights even if they give you something in return. If, for example, the federal government told you that you have to give up your right to vote in order to get social security benefits, judges would say that was an “unconstitutional condition” and tell the government it couldn’t do that. But judges haven’t extended their unconstitutional conditions cases to plea bargaining. Instead, they allow government officials to send people to jail for longer just for exercising the right to a jury trial. It doesn’t even matter that officials are doing this in the open—threatening people with longer sentences or more serious criminal charges unless they agree to plead guilty. The Supreme Court and other judges have said this is perfectly okay. How do judges defend their decision to allow the trial penalty and all of the threats and extra punishment associated with plea bargaining? Sometimes they muddy the water by talking about how they shouldn’t second-guess the power of prosecutors to make charging and bargaining decisions. Or they explain that the judge who was giving a longer sentence after a trial did so only because the defendant didn’t “accept responsibility” and therefore might pose a greater risk of committing crimes in the future. But the real answer is that the Supreme Court concluded that plea bargaining was necessary, and then it had to ignore its ordinary constitutional law rules in order to preserve the practice. The Supreme Court admitted as much in a 1978 case, Bordenkircher v. Hayes. The opinion in Bordenkircher was written not too long after the Supreme Court decided that it had to allow plea bargaining because the courts couldn’t accommodate bringing every criminal case to trial. The prosecutor in the Bordenkircher case wanted Paul Lewis Hayes to plead guilty to forgery in return for a sentencing recommendation of five years in prison. The prosecutor told Hayes that if he did not plead guilty, then he would bring new charges against him under the state’s habitual offender statute, which carried a mandatory life sentence for anyone convicted of three felonies. (Hayes had two previous convictions.) Hayes refused the plea bargain and was convicted and sentenced to life in prison. Hayes appealed, relying on Supreme Court cases that said punishing a person for exercising his constitutional rights is unconstitutional. The Supreme Court reaffirmed that it is “patently unconstitutional” for a government official to penalize people for exercising their “legal rights.” But then the Supreme Court said that plea bargaining does not punish people for exercising their right to a jury trial, but it is instead a “give-and-take negotiation” that occurs “between the prosecution and defense, which arguably possess relatively equal bargaining power.” I don’t know how the Supreme Court could say that Paul Hayes and the prosecutor have “equal bargaining power.” All Hayes had was the right to require the prosecutor to prove his case to a jury beyond a reasonable doubt —something that was probably inconvenient but otherwise didn’t really affect the prosecutor. The prosecutor, on the other hand, had Hayes’s freedom for the rest of his life as leverage. Perhaps because the bargaining power between Hayes and the prosecutor was so obviously unequal, the Supreme Court admitted that it had to allow Hayes to be threatened with life in prison because otherwise it would have to declare plea bargaining unconstitutional. And when I say the Supreme Court “admitted” this, I mean that literally. The Court said “by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor’s interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty.” It also said “acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense . . .” In other words, the Court said that, because it had already accepted the constitutionality plea bargaining, it also had to allow government officials to pressure defendants to plead guilty and to impose longer punishments on them if they insist on a trial. \* \* \* \* \* The idea that plea bargaining is just a “negotiation” and not punishment for exercising constitutional rights isn’t just something the Supreme Court says. A number of very smart people have said something similar when they have attempted to defend the institution of plea bargaining. Those attempts to justify plea bargaining describe a plea bargain as a contract between the prosecution and the defendant. As one well-known defense puts it: “The defendant will trade the right to plead not guilty and force a trial for the prosecutor’s right to seek the maximum sentence.” In these contract-based descriptions of plea bargaining, defendants have some leverage: the ability to force a prosecutor to spend the time and effort to take the case to trial. Because prosecutors have lots of cases, the assumption is that they do not have the ability to try more than just a few cases, and so any threat by a defendant to take a case to trial has to be taken seriously. Contract-based descriptions of plea bargaining also assume that the bargains reflect the strength of the evidence against the defendant. Just as we expect people to negotiate prices in other contracts to reflect what they get in return, a criminal defendant should be able to demand a shorter sentence in return for giving up a higher likelihood of acquittal at trial. In contrast, a defendant who is more likely to get convicted should get less of a sentence reduction in his plea bargain. People who defend plea bargains speak about these different plea bargains as “different prices.” Defenders of plea bargains are quick to discount many of plea bargaining’s problems. Any problems with innocent people who plead guilty as part of a plea bargain are recast as problems with trials, not plea bargains; after all, it is the risk that innocent defendants will lose and be convicted at trial that causes them to plead guilty. Similarly, plea bargaining’s defenders dismiss arguments about how the trial penalty and harsh sentences create too much pressure on defendants to plead guilty as criticisms of sentencing laws rather than plea bargaining.

The 13th amendment is a more clear-cut, yes/no slavery example that clearly qualified as producing unconstitutional conditions. However, some contracts apply less totalizing restrictions on your rights by comparison, which in combination with that contract being freely chosen and non-coerced, allows some minor unconstitutional conditions. For instance, non-disclosure agreements’ restrictions on free speech potentially violate the First Amendment if worded badly, which explains courts striking down overly broad and restrictive non-disclosure agreements that whose restrictions on the First Amendment harm free speech rights. Non-disclosure agreements are only a partial restriction on your free speech rights and the contract was (hopefully) non-coercive, meeting it didn’t produce an unconstitutional condition.

Thinking of the conditions for fair contract law is valuable. There’s an idea in neoliberal economics of contracts to be made in the free-market, in which everyone has sufficient information and decision-making capacity for all contracts to be freely consented to with everyone’s voluntary and free choice. However, that doesn’t apply to the real world, resulting in the judicial system determining that some contracts are overly coercive and thereby void or substantially alter those contracts.

Often there is a power imbalance, such as you being exceptionally poor or your interlocuter being extremely rich, meaning that in both circumstances you are not in a good position to bargain. As an enjoyer of Monopoly, the deal-making in the game is a paradigmatic example of “offers you can’t refuse.” You consented to the contract, but that contract was made under the duress of losing the game, which implies coercion, making that consent not freely given. Similarly, in the case of a monopoly, the supplier has exclusive power over that good, undermining the freedom of the market and resulting in potentially coercive deals (as the supplier is a price-maker due to the lack of rival suppliers to challenge his price). Both power imbalances and monopolies are examples of seemingly freely consented to contracts, but the conditions of that contract cause unfair bargaining that makes that contract coercive.

Plea bargaining is both coercive (due to the power imbalance compared to the prosecutor and his monopoly on sentencing), and it’s a totalizing/absolute restriction on your exercise of your 6th-8th amendment rights related to jury trials and due process, which normally would qualify as an unconstitutional condition. However, as described in cards by Robert Schehr, SCOTUS interpretations of rights theory and contract theory had a huge change in the 1930s-1970s, allowing the commodification of your rights if the court felt you consented to it (while simultaneously increasing standards for duress that would implicate your otherwise free consent). This set the precedent for vaguely constitutional contracts that potentially qualify as unconstitutional conditions, such as non-compete agreements, mandatory arbitration, and non-compete contracts. Of the most coercive and most unconstitutional would-be plea bargaining given the immense difficulties of freely negotiating with under threat of a higher penalty at trial, the penalty being state violence via imprisonment and/or the death penalty.

#### 1.3.7 Coercion

Contention 7 is Coercion. As described many times in the topic analysis, threatening to punish you with years in prison or perhaps death if you exercise your constitutional rights harms the freedom of that contract. It is as equally unfree and as much as a non-choice as a mafia boss saying “pay the protection money or I break your legs.” To repeat this point more so would be a waste of everyone’s time.

Note that this contention pairs well with rights theory, Kant, carceral capitalism, and/or the innocence contentions.

#### 1.3.8 Carceral Capitalism

Contention 8 is Carceral Capitalism. This contention is a capitalism centric version of the mass incarceration contention, focusing on the potential commodification of rights and the system-level incentives of mass incarceration for capitalists. Not only is mass incarceration intrinsically useful for those benefiting from the construction and maintenance of prisons for private prison companies, construction companies, rural communities, guard unions, etc., its follow-on effects allow for the construction of carceral citizenship (a more easily exploitable underclass) and a means of a controlling surplus labor. A key benefit of this contention is it’s a great response to abolition and/or antiblackness kritikal affs, saying that the capitalistic desirability of the commodification of peoples and their suffering is the prerequisite to broader prison abolition or race reform efforts.

This contention contains several high quality cards in regards to the commodification of rights in plea bargaining that are useful for rights centric affs. The justice system not only seeks to quantify the unquantifiable with debts owed if someone caused another suffering, but does a second-order commodification by quantifying the questionably quantifiable debts owed in terms of their social utility (i.e. deterrence, rehabilitation, restorative justice, etc.) and the likelihood of the trial conviction being successful. This stupidly abstract process I have likely confused you via the description therein is an example of commodity fetishism, where we socially construct a debt owed, and price in that debt compared to other social goods and the likelihood of conviction so that the sentence can be bargained on the prosecutorial marketplace. Commodification explains why justice feels hollow, as there’s an initial number (an quantity ill-defined in relation to suffering caused) and a secondary adjustment of that number based on similarly ill-defined, unquantifiable social goods and risks of convictions. Both levels of commodification and abstraction make the number feel unreal and unreasonable, driving our desire to punish wrongdoers more in hope of making the number feel realistic, causing a vicious cycle of commodification.

#### 1.3.9 Youth Plea Bargaining

Contention 9 is Youth Plea Bargaining. In terms of anti-plea bargaining advocates, some of the greatest focus on abolition is on juvenile justice systems due to the more easily moldable adolescent brains (allowing easier rehabilitation), desire for leniency (due to lacking full cognitive development assumed for everyone in the age of majority), and their unique potential for coercion in legal situations (due to low knowledge and again, less developed brains). Some juvenile courts have completely banned plea bargaining to great success, more so then generalized plea bargain bans that are a rarity (main examples include 1970s/2013 Alaska, El Paso, and New Orleans). Similarly, more of the legal community agrees that juvenile plea bargaining is a bad practice, and there’s greater flexibility for non-punitive responses in juvenile court compared to adult courts (i.e. theft is a specific crime with certain years of punishment, but that punishment can be modified more easily in juvenile courts).

Additionally, the process of discovery and questioning in juvenile trials unveils info about a juvenile that aids in non-imprisonment government rehabilitation programs. An easy example is a child neglect case; if a child steals food because their parents aren’t taking care of them, bargaining over sentencing numbers and punishment over a few minutes is not conducive to the court learning about the child’s parents need to see Child Protective Services. Often plea bargaining papers over and minimize the uniqueness of an individual, and the “bargain” part of plea bargaining implies less work for the prosecutor, allowing them to focus on the crime potentially committed as opposed to who the child is (harming post-conviction rehabilitation due to low, case-specific info that could allow a tailored response). Other arguments include that an overly punitive response can create youth criminals out of ordinary juveniles who are treated very badly, somewhat similar to the idea that a prison sentence ends up turning out like a job fair to meet other criminals and make connections for future crime (as opposed to being rehabilitated to prevent crime).

#### 1.3.10 Answers to Court Clog

Contention 14 is Answers to Court Clog. Court clog will be an argument to appear in *almost every debate*, so you ought to be prepared to answer it either via a defense of pure plea bargain abolition (per these answers) or a counterplan that both bans plea bargaining AND solves court clog via other means (see the “advantage counterplan” contention above).

A useful analogy to think of when thinking of plea bargaining is latent demand in for-profit healthcare systems in terms of concerns on healthcare rationing. In debates about universal healthcare, opponents argue, somewhat similar to those worrying about court clog, that the system cannot handle everyone who desires healthcare having access to healthcare, meaning we will be forced to ration resources. Full healthcare access is analogous to trials by jury; both are the gold star standard that everyone ought to have access to. Worries about court clog or healthcare rationing under universal healthcare tacitly admit there is latent demand, a pent-up and unmet need that cannot met without additional resources.

If you say that if everyone accessed the good via the induced demand (universal healthcare or plea bargain abolition) there would be delays and rationing, that ADMITS that these people weren’t having their needs be met beforehand, implying we are willing to exclude these people from good public services so other people don’t need to wait. If you’re confused by the analogy, imagine two equations representing the distribution of rights like trials:

1. X = Fast System/”Good” Results (no court clog, aff/status quo)
2. X + Y = Slow System/”Bad” Results (yes court clog, neg/no plea bargaining)

X is a group that does have access in the status quo, and Y is a group that normally does not have access in equation 1 (but would have access in equation 2 that assumes plea bargaining abolition). This equation implies Y *never* had access to their rights and were excluded from the good system so that X could benefit from lower waiting times. Even if equation 1 looks good because court clog doesn’t exist, Y is NOT included, meaning that equation 1 by definition is a two-tiered system of haves and have-nots. The aff being concerned about added wait times is not an argument when the alternative is injustice for the everyone else (Y) who was excluded from the justice process in order to clear the line for those who do receive justice (X).

#### 1.3.11 White Collar Crime and Pedophiles

Contention 11 is White Collar Crime and Pedophiles. Plea bargaining is often exploited via elites with extreme power to combat lawsuits due to their wealth. The favorability of a plea bargain depends on both the probability someone did a crime (and how severe it was), and how difficult prosecution will be. An issue is when one’s wealth can substantially increase the difficulty of prosecution via a private army of lawyers or a politically charged trial. The “lawyer army” phenomenon is somewhat commonly exploited by elites, such a Strategic Lawsuit Against Public Participation (SLAPP) to increase legal fees so exorbitantly that it’s easier for non-elites to cave to the lawsuit then criticize a public figure who threatens to sue you. Similarly, it’s a common strategy for companies to exploit financial inequality to increase legal inequality, such as frivolously suing low-income or small businesses to secure intellectual property.

If a bargain is supposed to minimize work for the prosecutor and the defendant is wealthy enough to stack the deck via stupidly long trials and appeals with their “lawyer army,” then all parties know that the prosecutor is at a disadvantage, especially if a case could harm the office politically. In the late-2000s Jeffery Epstein received a plea bargain, one of such immense caliber that it granted ~100 co-conspirators to child rape immune to prosecution, likely due to potential backlash from political elites or the ultra-wealthy that could threaten the prosecutor’s job security. That means that Epstein, despite being a proven child sex trafficker, was wealthy enough and had powerful enough connections to minimize virtually all legal harms to him until ~2019 for a different, but related sex crime.

Of course this is not fair. In the sense that we note in every Kankee Brief that “money should never be the reason why someone’s debate career is not successful,” I think a similar argument money should be made that “money should never be the reason why a sex trafficker or white collar criminal isn’t put behind bars.” It implies a two-tiered justice system and makes a mockery of fairness under the law when the law’s potency for punishment is threatened by a lawyer army creating too much work for a trial to be worth it for a prosecutor.

#### 1.3.12 Innocents

Contention 12 is Innocents. Plea bargains are a potential means of which innocent people can rationally admit guilt to crimes they did not commit. Innocent/false conviction type impacts are sprinkled throughout neg contentions (don’t think the cards in this contention are the only innocent convictions impacts), and wrongful conviction one of the most common arguments on the topic outside of coercion.

As an aside, technically the legal language when we say “innocent” is supposed to be “not guilty,” as in not guilty for the charges filed. Innocent is a broader, more inclusive term that says we have committed no crimes, including, but not limited to the charges filed. In a court case, you can be “not guilty” of the crime you’ve been charged for, but still not be innocent given that you may have committed a crime that the state has not yet charged. Obviously, innocence is a stronger claim that people use to avoid this linguistic confusion and so that defendant sounds better then they may actually be, which is why this is the language used in most evidence, but technically the terminology is “not guilty.”

Based on statistics from The Innocence Project (and other ex post facto exoneration organizations that do DNA testing of old crimes in order to release the falsely convicted), a substantial percentage of false convictions are the result of false guilty pleas out of threat of greater punishment at trials. Per the relative severity and probability of punishment with plea bargains and trials, some authors have argued it’s a rational decision to lie and plead guilty *even if you’re innocent*. The trial penalty is so large, and even if procedural protections at trial are strong, there’s still a non-negligible risk of a false conviction. See earlier sections in the main topic analysis if you need a better understanding of the trial penalty and potential coercion from the prosecutor that results in innocent convictions.

#### Rational choice proves pleading guilty is rational to avoid the trial penalty

Gilchrist 11 [Gregory M. Gilchrist, Assistant Professor of Law at the University of Toledo College of Law with an A.B. from Stanford and a J.D. from Columbia, 2011, “Plea Bargains, Convictions And Legitimacy,” American Criminal Law Review, https://heinonline.org/HOL/P?h=hein.journals/amcrimlr48&i=145]/Kankee

This problem is best illustrated without accounting for the very real complexi- ties introduced by cognitive bias and lack of information. Such complexities are the basis for Bibas' assertion that plea bargaining does not really happen "in the shadow of trial."5 7 A simplified example-presented very much in the shadow of trial-demonstrates that even a purely rational innocent defendant may elect to plead guilty, and that the effective standard of proof for securing this plea will be mere probable cause. Introducing real-world biases (such as over-discounting future utility) and real-world limitations (such as lack of information or resources) would significantly complicate the example. As a result of such complexities, some defendants would be more likely than the rational defendant to accept a deal; others would be less likely to do so. 58 The point remains, however, that plea bargaining asks defendants to decide whether to plead guilty based on factors largely unrelated to actual guilt.59 Consider a hypothetical in which the quantum of evidence against the defendant is such that the innocent defendant assesses the risk of conviction as twenty percent.60 The defendant faces thirty years in prison if convicted after trial and has an offer of four years if she pleads guilty. Discounting the thirty-year sentence by the anticipated eighty-percent chance that it would not result if the defendant opted for trial (30\*0.2) nets a pre-trial estimate of the value of trial to be a six-year sentence. 61 Even assuming-in another simplification 62-that the defendant val- ues her liberty consistently over time (i.e., without a value-reduction for liberty benefits accruing further in the future), a rational defendant would accept this offer without regard for her guilt or innocence. Anytime the calculus generates a result where a rational defendant will plead guilty, the effective burden of proof to achieve that result is probable cause (assuming the defendant is rational). To be clear, this is not an abstract concern. A four-year offer on charges that could net thirty years after trial may seem unrealistic. It is not. Such a skew is dramatic, but in federal criminal practice it is neither unusual nor new. 63 For example, in a case involving illegal possession of a firearm and possession with intent to distribute a controlled substance, a federal prosecutor might offer a plea to the status offense of being a felon-in-possession of a firearm,64 while threatening to charge carrying a firearm in furtherance of a drug trafficking crime65 if the defendant seeks a trial. 66 The felon-in-possession charge carries a statutory maximum penalty of ten years. A defendant with two prior state felony drug convictions, for which he served little time, will nonetheless be a Career Offender under the Sentencing Guidelines,6 7 Career Offender enhancements would apply to the more serious charge of carrying a firearm in furtherance of a drug trafficking crime, 6 8 but they do not apply to the charge on which a plea is offered. Assuming that the prior convictions each resulted in sentences of less than a year and a month, but more than sixty days, and assuming that the defendant was released from prison within the last two years, but is no longer on probation, the defendant would earn six criminal history points and have a criminal history category of III. The 922(g) conviction by plea would net twenty-one offense levels. 69 That results in a guideline range of forty-six to fifty-seven months. On the other hand, that same defendant, as a Career Offender, if convicted of the more serious 924(c) charge after trial, would face a guideline range of 360 months to life.70 With offers like this, it quickly becomes clear how a person who believes herself to be innocent could nonetheless consider pleading guilty. The problem is compounded when the barriers to purely rational decision- making are acknowledged. "[B]ehavioral law and economics literature has under- mined [the assumption that actors are perfectly rational], exposing consistent irrationalities and imperfect heuristics in human decisionmaking." 7 1 The foregoing illustration assumes a rational and fully informed decision-maker with unlimited resources and, yet, still manages to demonstrate circumstances in which an innocent person might plead guilty. Accounting for the defendant's "consistent irrationalities and imperfect heuristics," the disconnect between actual guilt and a willingness to plead guilty may be even more severe.72

A useful framework for understanding the criminal justice system is [type I and type II errors](https://en.wikipedia.org/wiki/Type_I_and_type_II_errors). Our methodology for prosecuting suspects is either biased towards false positives/type I errors in which innocents are wrongfully convicted or false negatives/false negatives in which wrongdoers are wrongfully acquitted. Given the lower standard of proof in plea bargains, needing only probable cause for an arrest and the “consent” of a suspect, wrongful convictions of innocents are more likely. Similarly, the higher standards of proof and rules of evidence in trial are more likely to result in criminals getting off due to the inability for the prosecutor to prove the suspect committed a crime. Generally speaking, lower standards of proof cause false positives/type I errors and higher standards of proof cause false negatives/false negatives. To the degree of which we lower our standards of proof to convict more criminals, the greater our likelihood of convicting innocents, and vice versa.

When running this contention, it’s paramount to say that the absolute wrongness of a wrongful acquittal is not the same as a wrongful conviction; a wrongful conviction is worse than a wrongful acquittal as the needless punishment of people who did nothing wrong is worse than a criminal not being punished. False positives should be framed as worse than false negatives. Our security as citizens and the social contract is based on the idea that the sovereign power of the state is just and fair, so the punishment of innocents is a greater threat to the legitimacy of the government then the non-punishment of criminals as all non-criminals will fear they too risk a similar fate, blurring the line between guilty criminals and innocent citizens and the presumption of innocence. This explains the [doctrine](https://www.ojp.gov/ncjrs/virtual-library/abstracts/it-better-ten-guilty-persons-go-free-one-innocent-person-be) that “the law holds that it is better that 10 guilty persons escape, than that 1 innocent suffer.” Rights frameworks ought to argue that deterring crime and rehabilitating criminal are secondary, utilitarian goals of the justice system; fundamentally the justice system is premised on justice, and that due process and the acquittal of innocents comes before other incidental goals.

#### 1.3.13 Silence is Compliance

Contention 13 is Silence is Compliance. First amendment speech rights are constitutionally enshrined, and to a certain extent do apply to the criminal justice system. The right to testify, the right to represent yourself, and the right to control what you do and do not say (the right against self-incrimination) under the Constitution indicate the importance of speech in court room settings. Even if acting upon that speech via your own personal testimony and participation in a trial process can be harmful to your case (hence the right against self-incrimination), your active involvement via speaking, arguing, and having an understanding of the process is intrinsically good. It is a forum for the justice system to learn things regarding how effective and fair the process is. Trials additionally have a means for the broader public via the juror panel or the public to have testimony from potential criminals about the harms to minority folk or innocents as a result of the criminal justice system.

In contrast, where ~90-95% of cases are dealt with via guilty plea, there is minimal ability for anyone to speak out or participate in the judicial process, potentially leading to complacency on behalf of defendants and minimal accountability for the justice system when no one speaks out. Minimal defendant participation also implies a one-sided, prosecutorial/judge centric narrative in court documents, and defendants cannot use their narratives to counteract broader societal fears of black criminality and fear-mongering on talk radio/TV.

Additionally, there are first amendment concerns in regards to compelled speech. The justice system subdivides guilty pleas into open pleas, plea bargains, [Alford pleas](https://www.law.cornell.edu/wex/alford_plea), and [nolo contendere pleas](https://www.law.cornell.edu/wex/nolo_contendere). The intricate legalistic details of these for our purposes are of little concern; all that needs to be known is there is a difference between pleading guilty while admitting guilt (as seen in most plea bargains) and pleading guilty to accept punishment while contesting or rejecting the assumption of your guilt. A normal plea bargain has the prosecutor compelling you to admit your guilt as part of your guilty plea. Even if the plea deal is designed for efficiency in which its potentially vague and unclear whether you’re guilty, which implies the court hasn’t met its burden of proof to prove you truly were guilty, the admitting guilt part of the plea deal ignores the efficiency concerns and mandates a guilty plea is part and parcel with an admission of guilt.

If you were allowed Alford pleas and/or nolo contendere pleas, you wouldn’t be lying and there would be minimal concerns about compelled speech, because both of these plea types don’t require you to admit to something into public record you disbelieve to be true. Legally, Alford pleas and nolo contendere pleas are public records that say “yes, we’re skipping the trial to save everyone’s time/money, but I think I am still innocent.” However, as well as that sounds for your and your non-lying self, that statement is simultaneously harmful to the prosecutor, because it is a public recognition that pleas do not equal trials (often referred to as the “shadow of the trial”) and looks bad on his public image. If all plea bargains resulted in Alford pleas and nolo contendere pleas, no one would be lying or compelled to speak something they believe to be untrue, but because prosectors prevent defendants from utilizing Alford pleas and nolo contendere pleas as part of their plea deal, many people who plea guilty are coerced into lying. Fundamentally, a more accurate and honest statement for someone to make when they want to skip the trial is a nolo contendere plea, because its meaning implies “no contest,” not “I say I am actually guilty even though I might not be” like in regular plea bargains.

Note that to the degree you prove that plea bargaining is lying, you win a link to the compelled speech arguments. If plea bargaining is not lying, it qualifies less so as compelled speech, meaning you should focus on general free speech concerns in the silencing cards.

## Affirmative

### Contention 1: Trials Bad (Pathologized Subject)

#### The trial system’s reliance on forensic psychiatry constructs deviancy, reforming justifications for punishment for the “abnormal, disabled” other from utilitarian crime prevention to “objective” psychiatric assessments, excluding the prospect of deviancy and crime derived from normalcy, not disability and “madness.”

Foucault 79 [Michel Foucault, qualifications not needed, 1979, “Discipline and Punish,” Random House, https://monoskop.org/images/4/43/Foucault\_Michel\_Discipline\_and\_Punish\_The\_Birth\_of\_the\_Prison\_1977\_1995.pdf]/Kankee

\*NOTE: OCR errors exist

Is this any more than a mere theoretical assertion, contradicted by penal practice? Such a conclusion would be over-hasty. It is true that, today, to punish is not simply a matter of converting a soul; but Mably's principle has not remained a pious wish. Its effects can be felt throughout modern penality. To begin with, there is a substitution of objects. By this I do not mean that one has suddenly set about punishing other crimes. No doubt the definition of offences, the hierarchy of their seriousness, the margins of indulgence, what was tolerated in fact and what was legally permitted - all this has considerably changed over the last 200 years; many crimes have ceased to be so because they were bound up with a certain exercise of religious authority or a par ticular type of economic activity; blasphemy has lost its status as a crime; smuggling and domestic larceny some of their seriousness. But these displacements are perhaps not the most important fact: the division between the permitted and the forbidden has preserved a certain constancy from one century to another. On the other hand, 'crime', the object with which penal practice is concerned, has profoundly altered: the quality, the nature, in a sense the substance of which the punishable element is made, rather than its formal definition. Undercover of the relative stability of the law, a mass of subtle and rapid changes has occurred. Certainly the 'crimes' and 'offences' on which judgement is passed are juridical objects defined by the code, but judgement is also passed on the passions, instincts, anomalies, infirmities, maladjustments, effects of environment or heredity; acts of aggression are punished, so also, through them, is aggressivity; rape, but at the same time perversions; murders, but also drives and desires. But, it will be objected, judgement is not actually being passed on them; if they are referred to at all it is to explain the actions in question, and to determine to what extent the the subject's will was involved in the crime. This is no answer. For it is these shadows lurking behind the case itself that are judged and punished. They are judged indirectly as 'attenuating circumstances' that introduce into the verdict not only 'circumstantial' evidence, but .something quite different, which is not juridically codifiable: the knowledge of the criminal, one's estimation of him, what is known about the relations between him, his past and his crime, and what might be expected of him in the future. They are also judged by the interplay .of all those notions that have circulated between medicine and jurisprudence since the nineteenth century (the 'mon sters' of Georget's times, Chaumie's 'psychical anomalies', the 'perverts' and 'maladjusted' of our own experts) and which, behind the pretext of explaining an action, are ways of defining an indivi dual. They are punished by means of a punishment that has the function of making the offender 'not only desirous, but also capable, of living within the law and of providing for his own needs'; they are punished by the internal economy of a penalty which, while intended to punish the crime, may be altered (shortened or, in certain cases, extended) according to changes in the prisoner's behaviour; and they are punished by the 'security measures' that accompany the penalty (prohibition of entering certain areas, pro bation, obligatory medical treatment), and which are intended not to punish the offence, but to supervise the individual, to neutralize his dangerous state of mind, to alter his criminal tendencies, and to continue even when this change has been achieved. The criminal's soul is not referred to in the trial merely to explain his crime and as a factor in the juridical apportioning of responsibility; if it is brought before the court, with such pomp and circumstance, such concern to understand and such 'scientific' application, it is because it too, as well as the crime itself, is to be judged and to share in the punishment. Throughout the penal ritual, from the preliminary investigation to the sentence and the final effects of the penalty, a domain has been penetrated by objects that not only duplicate, but also dissociate the juridically defined and coded objects. Psychiatric expertise, but also in a more general way criminal anthropology and the repetitive discourse of criminology, find one of their precise functions here: by solemnly inscribing offences in the field of objects susceptible of scientific knowledge, they provide the mechanisms of legal punishment with a justifiable hold not only on offences, but on individuals; not only on what they do, but also on what they are, will be, may be. The additional factor of the offender's soul, which the legal system has laid hold of, is only apparently explanatory and limitative, and is in fact expansionist. During the 150 or 2.00 years that Europe has been setting up its new penal systems, the judges have gradually, by means of a process that goes back very far indeed, taken to judging something other than crimes, namely, the 'soul' of the criminal. And, by that very fact, they have begun to do something other than pass judgement. Or, to be more precise, within the very judicial modality of judgement, other types of assessment have slipped in, profoundly altering its rules of elaboration. Ever since the Middle Ages slowly and painfully built up the great procedure of investiga tion, to judge was to establish the truth of a crime, it was to deter mine its author and to apply a legal punishment. Knowledge of the offence, knowledge of the offender, knowledge of the law: these three conditions made it possible to ground a judgement in truth. But now a quite different question of truth is inscribed in the course of the penal judgement. The question is no longer simply: 'Has the act been established and is it punishable?' But also: 'What is this act, what is this act of violence or this murder? To what level or to what f ield of reality does it belong? Is it a phantasy, a psychotic reaction, a delusional episode, a perverse action?' It is no longer simply: 'Who committed it?' But: 'How can we assign the causal process that produced it? Where did it originate in the author himself? Instinct, unconscious, environment, heredity?' It is no longer simply: 'What law punishes this offence?' But: 'What would be the most appropriate measures to take? How do we see the future development of the offender? What would be the best way of rehabilitating him?' A whole set of assessing, diagnostic, prognostic, normative judgements concerning the criminal have become lodged in the frame work of penal judgement. Another truth has penetrated the truth that was required by the legal machinery; a truth which, entangled with the first, has turned the assertion of guilt into a strange scientifico-juridical complex. A significant fact is the way in which the question of madness has evolved in penal practice. According to the 1810 code, madness was dealt with only in terms of article 64. Now this article states that there is neither crime nor offence if the offender was of unsound mind at the time of the act. The possibility of ascertaining madness was, therefore, a quite separate matter from the definition of an act as a crime; the gravity of the act was not altered by the fact that its author was insane, nor the punishment reduced as a consequence; the crime itself disappeared. It was im possible, therefore, to declare that someone was both guilty and mad; once the diagnosis of madness had been accepted, it could not be included in the judgement; it interrupted the procedure and loosened the hold of the law on the author of the act. Not only the examination of the criminal suspected of insanity, but the very effects of this examination had to be external and anterior to the sentence. But, very soon, the courts of the nineteenth century began to misunderstand the meaning of article 64. Despite several decisions of the supreme court of appeal confirming that insanity could not result either in a light penalty, or even in an acquittal, but required that the case be dismissed, the ordinary courts continued to bring the question of insanity to bear on their verdicts. They accepted that one could be both guilty and mad; less guilty the madder one was; guilty certainly, but someone to be put away and treated rather than punished; not only a guilty man, but also dangerous, since quite obviously sick, etc. From the point of view of the penal code, the result was a mass of juridical absurdities. But this was the starting point of an evolution that jurisprudence and legislation itself was to precipitate in the course of the next I 50 years: already the reform of 18p., introducing attenuating circumstances, made it possible to modify the sentence according to the supposed degrees of an illness or the forms of a semi-insanity. And the practice of calling on psychiatric expertise, which is widespread in the assize courts and sometimes extended to courts of summary jurisdiction, means that the sentence, even if it is always formulated in terms of legal punish ment, implies, more or less obscurely, judgements of normality, attributions of causality, assessments of possible changes, anticipa tions as to the offender's future. It would be wrong to say that all these operations give substance to a judgement from the outside; they are directly integrated in the process of forming the sentence. Instead of insanity eliminating the crime according to the original meaning of article 64, every crime and even every offence now carries within it, as a legitimate suspicion, but also as a right that may be claimed, the hypothesis of insanity, in any case of anomaly. And the sentence that condemns or acquits is not simply a judgement of guilt, a legal decision that lays down punishment; it bears within it an assessment of normality and a technical prescription for a possible normalization. Today the judge-magistrate or juror-certainly does more than 'judge'. And he is not alone in judging. Throughout the penal procedure and the implementation of the sentence there swarms a whole series of subsidiary authorities. Small-scale legal systems and parallel judges have multiplied around the principal judgement: psychiatric or psychological experts, magistrates concerned with the implementation of sentences, educationalists, members of the prison service, all fragment the legal power to punish; it might be objected that none of them really shares the right to judge; that some, after sentence is passed, have no other right than to implement the punishment laid down by the court and, above all, that others - the experts - intervene before the sentence not to pass judgement, but to assist the judges in their decision. But as soon as the penalties and the security measures defined by the court are not absolutely deter mined, from the moment they may be modified along the way, from the moment one leaves to others than the judges of the offence the task of deciding whether the condemned man 'deserves' to be placed in semi-liberty or conditional liberty, whether they may bring his penal tutelage to an end, one is handing over to them mechanisms of legal punishment to be used at their discretion: subsidiary judges they may be, but they are judges all the' same. The whole machinery that has been developing for years around the implementation of sentences, and their adjustment to individuals, creates a proliferation of the authorities of judicial decision-making and extends its powers of decision well beyond the sentence. The psychiatric experts, for their part, may well refrain from judging. Let us examine the three questions to which, since the 1958 ruling, they have to address themselves: Does the convicted person repre sent a danger to society? Is he susceptible to penal punishment? Is he curable or readjustable? These questions have nothing to do with article 64, nor with the possible insanity of the convicted person at the moment of the act. They do not concern 'responsibility'. They concern nothing but the administration of the penalty, its necessity, its usefulness, its possible effectiveness; they make it possible to show, in an almost transparent vocabulary, whether the mental hos pital would be a more suitable place of confinement than the prison, whother this confinement should be short or long, whether medical treatment or security measures are called for. What, then, is the role of the psychiatrist in penal matters? He is not an expert in responsibility, but an adviser on punishment; it is up to him to say whether the subject is 'dangerous', in what way one should be protected from him, how one should intervene to alter him, whether it would be better to try to force him into submission or to treat him. At the very beginning of its history, psychiatric expertise was called upon to formulate 'true' propositions as to the part that the liberty of the offender had played in the act he had committed; it is now called upon to suggest a prescription for what might be called his 'medico judicial treatment'. To sum up, ever since the new penal system- that defined by the great codes of the eighteenth and nineteenth centuries- has been in operation, a general process has led judges to judge something other than crimes; they have been led in their sentences to do some thing other than judge; and the power of judging has been trans ferred, in part, to other authorities than the judges of the offence. The whole penal operation has taken on extra-juridical elements and personnel. It will be said that there is nothing extraordinary in this, that it is part of the destiny of the law to absorb little by little elements that are alien to it. But what is odd about modern criminal justice· is that, although it has taken on so many extra-juridical elements, it has done so not in order to be able to define them juridically and ,gradually to integrate them into the actual power to punish: on the contrary, it has done so in order to make them func tion within the penal operation as non-juridical elements; in order to stop this operation being simply a legal punishment; in order to exculpate the judge from being purely and simply he who punishes. 'Of course, we pass sentence, but this sentence is not in direct ·relation to the crime. It is quite clear that for us it functions as a way of treating a criminal. We punish, but this is a way of saying that we wish to obtain a cure.' Today, criminal justice functions and justifies itself only by this perpetual reference to something other than itself, by this unceasing reinscription in non-juridical systems. Its fate is to be redefined by knowledge. Beneath the increasing leniency of punishment, then, one may map a displacement of its point of application; and through this displacement, a whole field of recent objects, a whole new system of truth and a mass of roles hitherto unknown in the exercise of criminal justice. A corpus of knowledge, techniques, 'scientific' discourses is formed and becomes entangled with the practice of the power to punish. This book is intended as a correlative history of the modem soul and of a new power to judge; a genealogy of the present scientifico legal complex from which the power to punish derives its bases, justifications and rules, from which it extends its effects and by which it masks its exorbitant singularity. But from what point can such a history of the modern soul on trial be written? If one confined oneself to the evolution of legislation or of penal procedures, one would run the risk of allowing a change in the collective sensibility, an increase in humanization or the development of the human sciences to emerge as a massive, external, inert and primary fact. By studying only the general social forms, as Durkheim did (cf. Bibliography), one runs the risk of positing as the principle of greater leniency in punishment pro cesses of individualization that are rather one of the effects of the new tactics of power, among which are to be included the new penal mechanisms. This study obeys four general rules: 1. Do not concentrate the study of the punitive mechanisms on their 'repressive' effects alone, on their 'punishment' aspects alone, but situate them in a whole series of their possible positive effects, even if these seem marginal at first sight. As a consequence, regard punishment as a complex social function. 2 .. Analyse punitive methods not simply as consequences of legislation or as indicators of social structures, but as techniques possessing their own specificity in the more general field of other ways of exercising power. Regard punishment as a political tactic. 3· Instead of treating the history of penal law and the history of the human sciences as two separate series whose overlapping appears to have had on one or the other, or perhaps on both, a disturbing or useful effect, according to one's point of view, see whether there is not some common matrix or whether they do not both derive from a single process of 'epistemologico-juridical' formation; in short, make the technology of power the very principle both of the humanization of the penal system and of the knowledge of man. 4i Try to discover whether this entry of the soul on to the scene of penal justice, and with it the insertion in legal practice of a whole corpus of 'scientific' knowledge, is not the effect of a transformation of the way in which the body itself is invested by power relations. In short, try to study the metamorphosis of punitive methods on the basis of a political technology of the body in which might be read a common history of power relations and object relations. Thus, by an analysis of penal leniency as a technique of power, one might understand both how man, the soul, the normal or abnormal individual have come to duplicate crime as objects of penal intervention; and in what way a specific mode of subjection was able to give birth to man as an object of knowledge for a dis course with a 'scientific' status. But I am not claiming to be the first to have worked in this direction.

#### Plea bargaining avoids the carceral state’s disciplinarian deviancy construction – decreased punishment severity, more secrecy, hope of leniency, and basing sentences on prosecutorial convenience, not the certain deservingness of punishment found at trials with evidence and discovery. Trials seek to individualize and psychoanalyze offenders to reconstruct their normalcy via punishment; they’re not assembly line justice where confessions are under the threat of greater punishment like in plea bargaining

Foucault 79 [Michel Foucault, qualifications not needed, 1979, “Discipline and Punish,” Random House, [https://monoskop.org/images/4/43/Foucault\_Michel\_Discipline\_and\_Punish\_The\_Birth\_of\_the\_Prison\_1977\_1995.pdf]/Kankee](https://monoskop.org/images/4/43/Foucault_Michel_Discipline_and_Punish_The_Birth_of_the_Prison_1977_1995.pdf%5d/Kankee)

\*NOTE: OCR errors exist

The rule of lateral efects. The penalty must have its most intense effects on those who have not committed the crimel to carry the argument to its limit, if one could be sure that the criminal could not repeatthe crime, it would be enough to make others believe that he had been punished. There is a centrifugal intensification of effects, which leads to the paradox that in the calculation of penalties the least important element is still the criminal (unless he is likely to repeat the offence). Beccariaillustrated this paradox in the punish- ment that he proposed to replace the death sentence- perpetual slavery. Is this not a physically more cruel punishment than deathl Not at all, he says: becausethe pain of slavery, for the condemned man, is divided into as many portions as he has moments left to live; it is an infinitely divisible penalty, an Eleatic penalty, much less severe than capital punishment, which is only one step away from the public execudon. On the other hand, for those who see these slaves, or represent them to themselves, the pains they bear are concentrated into a single idea; all the moments of slavery are contracted into a representation that then becomes more terrifying than the idea of death. It is the economically ideal punishment: it is minimal for him who undergoes it (and who, reduced to slavery, cannot repeat his crime) and it is maximal for him who representsit to himself. 'Among the penalties,and in the way of applying them in proportion to the offences, one must choose the means that will leave the most lasting impression on the minds of the people, and the least cruel on the body of the criminal' (Beccaria,87). The rule of perfect certainty. With the idea of each crime and the advantages to be expected of it must be associated the idea of a particular punishment with the precise inconveniences that result from it; the link from one to the other must be regarded as necessary and unbreakable. This general element of certainty that must give the system of punishment its effectiveness involves a number of precise measures. The laws that define the crime and lay down the penalties must be perfectly clear, 'so that each member of society may distinguish criminal actions from virtuous actions' (Brissot, z4). These laws must be published, so that everyone has accessto them; what is neededis not oral traditionsand customs,but a written legislationwhich can be 'the stablemonument of the social pact', printed texts availableto all: 'Only printing can make the public as a whole and not just a few p!rsonsdepositoriesofthe sacredcodeof the laws' (Beccaria,z6). The monarch must renounce his right of pardon so that the force that is present in the idea of punishment is not attenuated by the hope of intervention: 'If one allows men to see that the crime may be pardoned and that punishment is not a necessary consequence of it, one nourishes in them the hope of going unpunished.. . The laws must be inexorable, those who execute them inflexible.'e Above all, no crime committed must escape the gaze of those whose task it is to dispense justice. Nothing so weakens the machinery of the law than the hope of going un- punished;how could one establishin the minds of the public a strict link between the offence and a penalty if it were aflected by a certain coefficient of improbabilityi Would it not be necessaryto make the penalty the more to be fearedin its violence as it is lessto be feared in its uncertaintyi Rather than imitate the old system in this way and be 'more severe,one must be more vigilanl'.ro Hence the idea that the machinery of justice must be duplicated by an organ of surveillancethat would work side by side with it, and which would make it possible either to prevent crimes, or, if committed, to arrest their authors; police and justice must work together as two comple- mentary actions of the sameprocess- the police assuring 'the action of society on each individual', justice 'the rights of individuals against society' (Duport, Archives parlementaires,XXI, 4y). Thus every crime will come to the light of day and be punished in all certainty. But it is also necessarythat the legal procedures should not remain secret, that the reasons why a defendant is condemned or acquitted should be known to all, and each individual must be able to recognize the reasons for a penalty: 'Let the magistrate speak his opinion aloud, let him be obliged to read in his judgement the text of the law that condemns the defendant. . . Let the procedures that are buried mysteriously in the obscurity of the records office be opened to all citizens who are concerned at the fate of the con- demned' (Mably, 3a8). The rule of common truth. Beneath this ordinary-seeming principle is hidden an important transformation. The old system of legal proofs, the use of torture, the extraction of confessions ,the use of the public execution, the body and spectacle for the reproduction of tmth had long isolated penal practice from the common forms of demonstration: semi-proofs produced semi-truths and semi-guilty persons, words extracted by pain had greater authenticity, presump- tion involved a degree of punishment. The heterogeneiry of this system with the ordinary system of proof really constituted a scandal only when the power to punish needed, for its own economy, a climate of irrefutable certainty. How can one link absolutely in the minds of men the idea of crime and the idea of punishment, if the reality of the punishment does not follow, in all cases, the reality of the offence. To establish the offence, in all evidence, and accord- ing td the means valid for all, becomes a task of first importance. The verification of the crime must obey the general criteria for all truth. In the arguments it employs, in the proofs it provides, legal judgrcment must be homogeneous with judgement in general. There is, therefore, an abandonment of legal proof, a rejection of torture, the need for a complete demonstration of the truth, an effacement of all correlation between degrees of suspicion and degrees of punishment. Like a mathematical truth, the truth of the crime will be accepted only when it is completely proven. It follows that, up to the final demonstration of his crime, the defendant must be regarded as innocentl and that, in order to carry out this demonstra- tion, the judge must use not ritual forms, but common instnrments, that reason possessedby everyone, which is also that of philoso- phers and scientists:'In theory, I regard the magistrateas a philoso- pher who sets out to discover an interesting truth. . . His sagacity will enable him to grasp all the circumstancesand all the relations, bring togethbr or separatewhatever needs to be brought together or separatedin order to arrive at a sane judgement' (Seigneux de Corevon, a9). The investigation, the exerciseof common reason, lays aside the old inquisitorial model and adopts the much more subtle model (doubly validated by science and common sense)of empirical research. The judge will be like a 'pilot steering between the rocks': 'What proofs or what clues will be considered to be sufficient neither I nor anyone else has dared to determine in general; since circumstancesare subject to infinite variations, since proofs and elues must be deduced from these circumstances,the cleares clues and proofs must necessarilyvary in proportion' (Risi, y3). Henceforth, penal practice was to be subiect to a common rule of truth, or rather to a complex rule in which heterogeneous elements of scientific demonstration, the evidenceof the sensesand common sensecome together to form the judge's 'deep'seated conviction'. Although penal justice preservesthe forms that guaranteeits equity, it may now be opened up to all manner of truths, providing they are evident, well founded, acceptableto all. The legal ritual in itself no longer generates a divided truth. It is resituated in the field of reference of common proofs. With the multiplicity of scientific discourses,a difficult, infinite relation was then forged that penal justice is still unable to control. The master of justice is no longer the master of its truth. The rule of optimal specifcation.For penal semiotics to cover the whole field of illegalities that one wishes to eliminate, all offences must be defined; they must be classifiedand collected into species from which none ofthem can escape.A code is therefore necessary and this code must be sufficiently precisefor each type of ofience to be clearly presentin it. The silenceof the law must not harbour the hope of impunity. An exhaustive,explicit code is required, defining crimes and fixing penalties. (On this theme, cf., among others, Linguet, 8.) But the same imperative need for a total coincidence between all possible offences and the effects-signsof punishment forces one to go further. The idea of the samepunishment does not have the sameeffect on everyone: the rich do not fear fines nor the notorious infamy. The injury causedby an offence and its value as example differ according to the status of the offender; a crime committed by a noble is more injurious to society than one com- mitted by a man of the people (Lacretelle, r44). Lastly, since punish- ment must prevent a repetition of the offence, it must take into account the profound nature of the criminal himself, the presumable degree of his wickedness,the intrinsic quality of his will: 'Of two men who have committed the sametheft, how much lessguilty is he who scarcelyhad the necessitiesof life than he who overflowed with excesslOf two perjurers, how much more criminal is he on whom one has striven from his childhood to impress feelings of honour than he who, abandoned to nature, never received the benefit of education' (Marat, 34). One sees the emergence at the same time of the need for a parallel classificationof crimes and punishments, the need for an individualization of sentences, in accordance with the particular characteristics of each criminal. This individualization was to weigh very heavily throughout the history of modern penal law; it is rooted precisely here in terms of the theory of law and accord- ing to the requirements of everyday practice, it is no doubt in radical opposition to the principle of codification; but from the standpoint of the economy of the power to punish, and of the techniques by which one wishes to circulate throughout the social body precisely calibrated signs of punishment, with neither excesses nor loopholes,with neither a useless 'expenditure' of power nor with timidity, it becomesevident that the codification of the offences- punishments system and the modulation of the criminal-punish- ment dyad go side by side, each requiring the other. Individualiza-tion appears as the ultimate aim of a precisely adapted code. But this individualization is very different in its nature from the modulations of punishment to be found in the old jurisprudence, The old system - and on this point it followed Christian peniten- tiary practice- used two seriesof variablesto adjust the punishment, those of 'circumstances'and those of intention'; elements,that is to say, that made it possible to qualify the act itself. The modulation of the penalty belonged to 'casuistry' in the broad sense.(On the non-individualizing character of casuistry, cf. Cariou.) But what w:rs now beginning to emergewas a modulation that referred to the defendant himself, to his nature, to his way of life and his attitude of mind, to his past,to the'quality'and not to the intention of his will. One perceives,but as a place as yet un6lled, the locus in which, in penal practice, psychological knowledge will take over the role of casuistic jurisprudence. Of course, at the end of the eighteenth century, that moment was still far off. The code-individualization link was sought in the scientific models of the period. Natural history no doubt offered the most adeguateschema:the taxonomy of speciesaccording to an uninterrupted gradation. One sought to constitute a Linnaeus of crimes and punishments, so that each particular offenceand eachpunishableindividual might come, with- out the slightest risk of any arbitrary action, within the provisions of a general law. 'A table must be drawn up of all the genera of crimes to be observed in different countries. According to the enumeration of crimes, a division into speciesmust be carried out. The best rule of this division is, it seems to me, to separatethe crimes according to their objects. This division must be such that each speciesis quite distinct from another, and that each particular crime, considered in all its relations may be placed between that which must precedeit and that which must follow it, in the strictest gradation; lastly, this table must be such that it may be compared with another table that will be drawn up for penalties,in such a way that they may correspond exactly to one another' (Lacretelle, 3yr- 3yz). In theory, or rather in dream, the double taxonomy of punishments and crimes will solve the problem: but how is one to apply fixed laws to particular individualsl Far removed from this speculativemodel, forms of anthropologi- cal individualization were being constituted at the same period in what was still a very rough and ready way. Let us take first the notion of the repetition of crime. Not that this was unknown to the old criminal laws.ll But it was tending to become a description of the defendant himself capable of altering the sentencepassed: according to the legislation of rygr, recidivists were liable in almost all casesto a doubling of the penalty; according to the law of Flordal Year X, they had to be branded with the letter R; and the penal code of t8ro inflicted on them either the maximum possibleof the normal penalty, or the penalty immediately above it. Now, through the repetition of the crime, what one was aiming at was not the author of an act defined by law, but the delinquent subject himseld a certain will that manifested his intrinsically criminal character. Gradually, as criminality, rather than crime, becamethe object of penal inter- vention, the opposition between first offender and recidivist tended to become more important. And on the basis of this opposition, reinforcing it on several points, one seesat the same period the formation of the notion of the 'oime passionel' - an involuntary, unpremeditated crime, bound up with extraordinary circumstances, which, while not offering the sameexcuseas madness,nevertheless prevented it from being regarded as an ordinary crime. As early as rygt, Le Peletier remarked that the subtle gradation of penalties that he had presentedto the Constituent Assembly might dissuade from crime'the evil-doer who plansa wicked action in cold blood', and who may be iestrained by thoughts of the penalty; but, on the other hand, it was powerlessagainstcrimes due to 'violent passions that have no regard to consequences';this, however, was unimport- ant, sincesuch crimes revealedin their authors'no reasonedwicked- ness.'lI Beneath the humanization of the penalties,what one finds are all those rules that authorize, or rather demand, 'leniency', as a calcu- lated economy of the power to punish. But they also provoke a shift in the point of application of this power: it is no longer the body, with the ritual play of excessivepains, spectacularbrandings in the ritual of the public executionl it is the mind or rather a play of representationsand signs circulating discreetly but necessarily and evidently in the minds of all. It is no longer the body, but the soul, said Mably. And we see very clearly what he meant by this term: the correlative of a technique of power. Old 'anatomies' of punishment are abandoned. But have we really entered the age of non-corporal punishmentl At the point of departure, then, one may place the political project of rooting out illegalities, generalizing the punitive function and delimiting, in order to control it, the power to punish. From this there emerge two lines of obiectification of crime and of the criminal. On the one hand, the criminal designated as the enemy of all, whom it is in the interest of all to track down, falls outside the pact, disqualifies himself as a citizen and emerges, bearing within him as it were, a wild fragment of nature; he appearsas a villain, a monster, a madman, perhaps, a sick and, before long, 'abnormal' individual. It is as such that, one day, he will belong to a scientific objectification and to the 'treatment' that is correlative to it. On the other hand, the need to measure, from within, the effects of the punitive pov/er prescribestactics of intervention over all criminals, actual or potential: the organization of a field of prevention, the calculation of interests,the circulation of representationsand signs, the constitution of a horizon of certainty and proof, the adjustment of penaltiesto ever more subde variables; all this also leads to an obiectification of criminals and crimes. In either case,one seesthat the power relation that underlies the exerciseof punishment begins to be duplicated by an object relation in which are caught up not ,only the crime as a fact to be established according to common norms, but the criminal as an individual to be known according to specific criteria. One also sees that this obiect relation is not superimposed,from the outside, on the punitive practice, as would be a prohibition laid on the fury of the public execution by the limits of the sensibility, or as would be a rational or 'scienti6c' interrogationas to what this man that one is punishingreally is. The processes of obiectification originate in the very tacticsofpower and of the arrangement of its exercise. However, the two types of objectification that emerge with the project ofpenal reform are very different from one another: both in their chronology and in their effects. The objectification of the criminal asoutsidethe law, asnaturalman, is still only a potentiality, a vanishing trace, in which are entangled the themes of political criticism and the figures of the imagination. One will have to wait a long time beforc homo uiminalis becomesa definite obiect in the field of knowledge. The other, on the contrary, has had much more rapid and decisive effects in so far as it was linked more directly to the reorganizationof the power to punish: codificarion, definition of offences, the fixing of a scale of penalties, rules of procedure, definition of the role of magistrates.And also becauseit made use of the discoursealreadyconstituted by theldiologues.This discourse provided, in effect, by meansofthe theory ofinterests, representa- tions and signs, by the seriesand genesesthat it reconstituted, a sort of general recipe for the exerciseof power over men: the 'mind' as a surface of inscription for power, with semiology as its tool; the submission of bodies through the control of ideas; the analysis of representationsas a principle in a politics of bodies that was much more effective than the ritual anatomy of torture and execution. The thought of the ldtologuer was not only a theory of the individual and society; it developed as a technology of subtle, effective, economic powers, in opposition to the sumptuousexpenditureof the power of the sovereign. Let us hear once more what Servan has to say: the ideas of crime and punishment must be strongly linked and 'follow one another without interruption. . . When you have thus formed the chainof ideasin the headsof your citizens,you will then be able to pride yourselves on guiding them and being their masters.A stupid despotmay constrainhis slaveswith iron chains; but a true politician binds them even more strongly by the chain of their own ideas;it is at the stable point of reasonthat he securesthe end of the chain; this link is all the stronger in that we do not know of what it is made and we believe it to be our own work; despair and time eat away the bonds of iron and steel, but they are power- lessagainst the habirual union of ideas,they can only tighten it still more; and on the soft fibres of the brain is founded the unshakable baseofthe soundestofEmpires'(Servanr sy). It is this semio-techniqueof punishments, this 'ideological power' which, partly at least, will remain in suspenseand will be supersededby a new political anatomy, in which the body, once again, but in a new form, will be the principal character.And this new political anatomy will permit the intersection of the two divergent lines of objectification that are to be seenemerging in the eighteenth century: that which reiects the criminal 'from the other side'- from the side ofa nature againstnature; and that which seeks to control delinquency by a calculatedeconomy of punishments.A glance at the new art of punishing clearly reveals the supersession of the punitive semio-techniqueby a new politics of the body 2. The gentleway in punishment

#### Trial’s offer a medium for the carceral state to justify its assumptions of deviancy with individualizing psychiatry and long-term rehabilitation hopes. Plea bargains’ cult of efficiency papers over the differences of individuals by focusing on expediency and large numbers, preventing the public spectacle of trials to construct their individualized deviancy

Foucault 79 [Michel Foucault, qualifications not needed, 1979, “Discipline and Punish,” Random House, [https://monoskop.org/images/4/43/Foucault\_Michel\_Discipline\_and\_Punish\_The\_Birth\_of\_the\_Prison\_1977\_1995.pdf]/Kankee](https://monoskop.org/images/4/43/Foucault_Michel_Discipline_and_Punish_The_Birth_of_the_Prison_1977_1995.pdf%5d/Kankee)

\*NOTE: OCR errors exist

In short, its task was to constitute a prison-machinert with a cell of visibility in which the inmate will find himself caught as 'in the glass house of the Greek philosopher' (Harou-Romain, 8) and a central point from which a permanent gaze may control prisoners and staff. Around these two requirements, several variations were possible the Benthamite Panopticon in its strict form, the semi- circle, the cross-plan, the star shape. In the midst of all these dis- cussions,the Minister of the Interior in r84r sums up the funda- mental principles: 'The central inspection hall is the pivot of the system. Without a central point of inspection, surveillance ceases to be guaranteed, continuous and general; for it is impossible to have complete trust in the activity, zeal and intelligence of the warder who immediately supervisesthe cells. . . The architect must therefore bring all his attention to bear on this object; it is a question both of discipline and economy. The more accurate and easy the surveillance,the lessneed will there be to seekin the strength of the building guaranteesagainst attempted escapeand communication beween the inmates.But surveillancewill be perfect if from a central hall the director or head-wardersees,without moving and without biing seen,not only the entrancesofall the cellsand even the inside of most of them when the unglazed door is open, but also the warders guarding the prisoners on every floor. . . With the formula of circular or semi-circular prisons, it vzould be possible to seefrom a single centre all the prisoners in their cells.and the warders in the inspectiongalleries'(Ducatel, 9). But the penitentiaryPanopticonwas alsoa systemof individual- izing and permanent documentation. The same year in which variants of the Benthamite schema were recommended for the building of prisons, the system of 'moral accounting' was made compulsory:an individual report of a uniform kind in every prison, on which the governor or head-warder, the chaplain and the instructor had to fill in their observations on each inmate: 'It is in a way the vademecumof prison administration,making it possibleto assesseach case, each circumstance and, consequently, to know what treatment to apply to eachprisoner individually' (Ducp6tiaux, y6-7). Many other, much more complete,systemsof recording were planned or tried out (cf., for example, Gregory, r99ff; Grellet- Wammy, z3-5 and ryg-zq). The overall aim was to make the prison a place for the constitution of a body of knowledge that would regulate the exerciseof penitentiary practice. The prison has not only to know the decisionof the judgesand to apply it in terms ofthe establishedregulations: it has to extract unceasingly from the inmate a body of knowledge that will make it possible to transform the penal measureinto a penitentiary operation; which will make of the penalty required by the offencea modification of the inmate that will be of use to society. The autonomy of the carceralrdgime and the knowledge that it createsmake it possible to increasethe utility of the penalty, which the code had made the very principle of its punitive philosophy: 'The governor must not lose sight of a single inmate, becausein whatever part of the prison the inmate is to be found, whether he is entering or leaving, or whether he is staying there, the governor must also justify the motives for his staying in a particular classificationor for his movement from one to another. He is a veritable accountant. Each inmate is for him, in the sphere of individual education, a capital invested with penitentiary interest' (Lucas, Tl, 449-1o). As a highly efficient technology, penitentiary practiceproducesa return on the capital invested in the penal system and in the building of heavy prisons. Similarly, the ofiender becomes an individual to know. This demand for knowledge was not, in the first instance, inserted into the legislation itself, in order to provide substancefor the sentence and to determine the true degreeof guilt. It is as a convict, as a point of application for punitive mechanisms,that the offender is con- stituted himself as the object of possible knowledge. But this implies that the penitentiary apparatus,with the whole technological programme that accompanies it, brings about a curious substitution: from the hands ofjustice, it certainly receives a convicted person; but what it must apply itself to is not, of course, the offence, nor even exactly the offender, but a rather different object, one defined by variableswhich at the outset at leastwere not taken into account in the sentence,for they were relevant only for a corrective technology. This other character, whom the peniten- tiary apparatus substitutes for the convicted offender, is the delinquent. The delinquent is to be distinguished from the offender by the fact that it is not so much his act as his life that is relevant in char- acterizing him. The penitentiary operation, if it is to be a genuine re-education,must becomethe sum total existenceof the delinquent, making of the prison a sort of artificial and coercive theatre in which his life will be examined from top to bottom. The legal punishment bears upon an act; the punitive technique on a life; it falls to this punitive technique, therefore, to reconstitute all the sordid detail of a life in the form of knowledge, to fill in the gaps of that knowledge and to act upon it by a practiceof compulsion.It is a biographical knowledge and a technique for correcting individual lives. The observation of the delinquent 'should go back not only to the circumstances,but also to the causesof his crime; they must be sought in the story of his life, from the triple point of view of psychology, social position and upbringing, in order to discover the dangerousproclivities of the first, the harmful predispositionsof the second and the bad antecedentsof the third. This biographical investigation is an essentialpart of the preliminary investigation for the classificationof penalities before it becomesa condition for the classification of moralities in the penitentiary system. It must accompany the convict from the court to the prison, where the governor's task is not only to receiveit, but also to complete, super- vise and rectify its various factors during the period of detention' (Lucas, IIr 44o-42). Behind the offender, to whom the investigation of the facts may attribute responsibility for an offence, stands the delinquent whose slow formation is shown in a biographical investigation.The introduction of the 'biographical' is important in the history of penality. Becauseit establishes the 'criminal' as existing before the crime and even outside it. And, for this reason, a psychological causality, duplicating the juridical attribution of responsibility, confuses its effects. At this point one enters the 'criminological' labyrinth from which we have certainly nor yer emerged: any determining cause,because it reduces responsibility, marks the author of the ofience with a criminality all the rnore for- midable and demands penitentiary measures that are all the more strict. As the biography of the criminal duplicates in penal practice the analysisof circumstancesused in gauging the crime, so one sees penal discourse and psychiatric discourse crossing each other's frontiers; and there, at their point of junction, is formed the notion of the 'dangerous' individual, which makes it possible to draw up a network of causality in terms of an entire biography and to present a verdict of punishment-correction.14 The delinquent is also to be distinguished from the offender in that he is not only the author of his acts (the author responsible in terms of certain criteria of free, consciouswill), but is linked to his offence by a whole bundle of complex threads (instincts, drives, tendencies,character). The penitentiary technique bears not on the relation betweenauthor and crime, but on the criminal's affinity with his crime. The delinquent, the strange manifestation of an overall phenomenon of criminality, is to be found in quasi-natural classes, each endowed with its own characteristicsand requiring a specific treatment, what Marquet-Wasselot called in r84r the'ethnography of the prisons'; 'The convicts are . .. another people within the same people; with its own habits, instincts, morals' (Marquet- Wasselot, p). We are still very close here to the 'picturesque' descriptions of the world of the malefactors- an old tradition that goes back a long way and gained new vigour in the early nineteenth century, at a time when the perception of another form of life was being articulated upon that of another class and another human species.A zoology of social sub-speciesand an ethnology of the civilizations of malefactors,with their own rites and language,was beginning to emerge in a parody form. But an attempt was also being made to constitute a new obiectivity in which the criminal belongs to a typology that is both natural and deviant. Delinquency, a pathological gap in the human species, may be analysed as morbid syndromes or as great teratological forms. With Ferrus's classifica- tion, we probably have one of the first conversions of the old 'ethnography' of crime into a systematic typology of delinquens. The analysis is slender, certainly, but it reveals quite clearly the principlc that delinquency must be specified in terms not so much of the law as of the norm. There are three types of convicq there are thosewho areendowed 'with intellectual resourcesabove the average of intelligencethat we haveestablished',but who havebeenperverted either by the 'tendenciesof their organization' and a 'native pre- disposition', or by 'pernicious logic', an 'iniquitous morality', a 'dangerous attitude to social duties'. Those that belong to this cat- egory require isolation day and night, solitary exercise,and, when one is forced to bring them into contact with the others, they should wear'a light mask made of metal netting, of the kind used for stone- cutting or fencing'. The secondcategory is madeup of 'vicious, stupid or passiveconvicts, who have been led into evil by indifference to either shameor honour, through cowardice, that is to say, laziness, and becauseof a lack of resistanceto bad incitements'; the rdgime suitableto them is not so much that of punishmentasofeducation, and if possible of mutual education: isolation at night, work in common during the day, conversationspermitted provided they are conducted aloud, readingin common, followed by mutual questioning, for which rewards may be given. Lastly, there are the 'inept or incapable convicts', who are'rendered incapable,by an incomplete organiza- tion, of any occupation requiring considered effort and consistent will, and who are therefore incapable of competing in work with intelligent workers and who, having neither enough education to know their social duties, nor enough intelligence to understand this fact or to struggle against their personal instincts, are led to evil by their very incapacity. For these, solitude would merely encourage their inertia; they must therefore live in common, but in such a way as to form small groups, constantly stimulated by collective operations, and subjected to rigid surveillance' (Ferrus, r8zff and 278tr). Thus a 'positive' knowledge of the delinquents and their species, very different from the juridical definition of offences and their circumstances, is gradually established; but this knowledge is also distinct from the medical knowledge that makes it possible to introduce the insanity ofthe individual and, consequently,to efface the criminal character of the act. Ferrus states the principle quite clearly: 'Considered as a whole, criminals are nothing less than madmenl it would be unjust to the latter to confuse them with consciously perverted men.' The task of this new knowledge is to define the act's cientifically' qua offence and above all the individual qua delinquent. Criminology is thus made possible. . The correlative of penal justice may well be the offendir, but the correlative of the penitentiary apparatusis someone other; this is the delinquent, a biographical unity, a kernel ofdanger, representing a type of anomaly. And, although it is true that to a detention that deprives of liberty, as defned by law, the prison added the addi- tional element of the penitentiary, this penitentiary element intro- duced in turn a third character who slipped berween the individual condemned by the law and the individual who carries out this law. At the point that marks the disappearance of the branded, dis- membered, burnt, annihilated body of the tortured criminal, there appeared the body of the prisoner, duplicated by the individuality of the 'delinquent', by the little soul of the criminal, which the very apparatus of punishment fabricated as a point of application of the power to punish and as the object of what is still called today penitentiary science.It is said that the prison fabricated delinquents; it is true that it brings back, almost inevitably, before the courts those who have been sent there. But it also fabricates them in the sense that it has introduced into the operation ofthe law and the offence, the judge and the offender, the condemned man and the executioner, the non-corporal reality of the delinquency that links them together and, for a century and a half, has caught them in the sametrap. The penitentiary technique and the delinquent are in a sense twin brothers. It is not true that it was the discovery of the delinquent through a scientific rationality that introduced into our old prisons the refinement of penitentiary techniques. Nor is it true that the internal elaboration of penitentiary methods has finally brought to light the 'objective' existenceof a delinquency that the abstraction and rigidity of the law were unable to perceive. They appeared together, the one extending from the other, as a technological ensemblethat forms and fragments the object to which it appliesits instmments. And it is this delinquency, formed in the foundations of the judicial apparatus,among the'basseseuTtres', the servile tasks, from which justice avertsits gaze,out of the shameit feelsin punish- ing those it condemns, it is this delinquency that now comes to haunt the unuoubled courts and the majesty of the laws; it is this delinquency that must be known, assessed, measured, diagnosed, treated when sentencesare passed. It is now this delinquency, this anomaly, this deviation, this potential danger, this illness, this form of existence,that must be taken into account when the codes are rewritten. Delinquency is the vengeance of the prison on justice. It is a revenge formidable enough to leave the judge speechless. It is at this point that the criminologists raise their voices. But we must not forget that the prison, that concentrated and austerefigure of all the disciplines, is not an endogenous element in the penal system as defined at the turn of the eighteenth and nine- teenth centuries. The theme of a punitive society and of a general semio-techniqueof punishment that has sustainedthe 'ideological' codes - Beccarian or Benthamite \* did not itself give rise to the universal use of the prison. This prison camefrom elsewhere- from the mechanismsproper to a disciplinary power. Now, despite this heterogeneity, the mechanismsand effectsof the prison have spread right through modern criminal justice; delinquency and the delin- quents have becomeparasiteson it through and through. One must seekthe reasonfor this formidable 'efficiency' of the prison. But gne thing may be noted at the outset: the penal justice defined in the eighteenth century by the reformers traced two possible but diver- gent lines of objectification of the criminal: the first was the series of 'monsters', moral or political, who had fallen outside the social pact; the second was that of the juridical subject rehabilitated by punishment.Now the 'delinquent' makesit possibleto join the two Iines and to constitute under the authority of medicine, psychology or criminology, an individual in whom the offender of the law and the object of a scientific technique are superimposed- or almost - one upon the other. That the grip ofthe prison on the penal system should not have led to a violent reaction of rejection is no doubt due to many reasons.One of theseis that, in fabricating delinquency, it gave to criminal justice a unitary field of objects, authenticated by the 'sciences', and thus enabled it to function on a general horizon of 'truth', The prison, that darkest region in the apparatusof justice, is the place where the power to punish, which no longer dares to manifest itself openly, silently organizes a field of obiectivity in which punishment will be able to function openly as treatment and the sentence be inscribed among the discourses of knowledge. It is understandable that justice should have adopted so easily a prison that was not the offspring of its own thoughts. Justice certainly owed the prison this recognition. z. Illegalities and delinquency

#### Trials ensure the discursive power of the penal state is applied to rehabilitate the victim, not merely the perpetrator, creating a spectacle in rape trials to reify dominant patriarchal views of the female psyche to discourage rape prosecution and feminist projects.

Figueiredo 2 [Débora de Carvalho Figueiredo, lecturer at Faculdades Barddal in Southern Brazil, 2002, “Discipline and Punishment in the Discourse of Legal Decisions on Rape Trials,” Springer, https://link.springer.com/chapter/10.1057/9780230522770\_16]/Kankee

Introduction This chapter investigates the pedagogical role played by the discourse of English legal decisions on rape trials. This analysis owes a lot to the work of Michel Foucault, in particular to his book Discipline and Punish (1991) which traces the evolution of criminal justice systems from Medieval torture to Enlightenment’s punishment to modern discipline. Foucault argues that until the late eighteenth century, punishment was frequently the public spectacle of torture: prisoners would be flogged, put on the pillory and even executed in open squares. From then on, however, the entire economy of punish- ment began to change: torture disappeared as a public spectacle, punishment became the most hidden part of the penal process, and the body ceased to be the only target of penal repression. The body began to be exposed to new techniques that aimed to render it ‘docile’, in other words able to be sub- jected, used, transformed and improved. In Foucault’s words, ‘these methods, which made possible the meticulous control of the operations of the body, which assured the constant subjection of its forces and imposed upon them a relation of docility-utility, might be called “disciplines”’ (1991, p. 137; my emphasis). Foucault argues that while the ancient forms of penality, such as torture and death addressed the body of the condemned, modern forms of penality, for example, incarceration, address their soul. It is over the souls (subjectiv- ities) of men and women that the microphysics of judicial power is exercised. The reform of criminal law (from torture to punishment to discipline) introduced a new economy of the power to punish, which was then rendered more regular, effective, constant and detailed, and which began to operate at a lesser cost. The idea was ‘not to punish less, but to punish better; to punish with an attenuated severity perhaps, but in order to punish with more universality and necessity; to insert the power to punish more deeply into the social body’ (Foucault, 1991, p. 82). In short, a move from coercion to consent. 1 As punishment became hidden, it left the realm of everyday perception and entered that of abstract consciousness; Foucault points out that in the modern economy of criminal justice systems it is the certainty and the reach of punishment, rather than its spectacle, which must render punishment effective and discourage crime. To achieve this internal- isation of the power to punish, discipline is vital; individuals must be docile, amenable to subjection, to the subtle grip of disciplinary power. Disciplinary power is realised through three basic instruments: (1) hier- archical observation; (2) normalising judgement; and (3) examination (ibid.). Applying this to the judicial discourse on rape, we can say that all of the three instruments of disciplinary power are present in legal decisions – judges have the hierarchical right to observe the social and sexual behaviour of women and men; they judge human behaviour, categorising some actions as ‘abnormal’ or ‘criminal’ (outside the social pact), and others as ‘acceptable’ or ‘excusable’ (within the social pact); and to arrive at these categories, judges rely on expert evaluations (made by doctors, psychiatrists and probation officers). According to Foucault, examination is the most import- ant technique of discipline. Examination leads to the documentation of people, enabling on the one hand individual descriptions, and on the other hand the compiling of statistics and generalisations. As I will argue in this chapter, the judicial discourse of legal decisions relies both on medical and psychiatric examinations to classify, instruct and discipline rape defendants and rape complainants. The pedagogical function of legal decisions In modern times, it is no longer necessary to discipline exclusively the body. Now that forms of surveillance and control have been individually internal- ised (mainly through discursive practices), the object of discipline and punishment is the soul, conceptualised in terms of the psyche, subjectivity, personality, consciousness and individuality (Smart, 1983). Discourse plays a crucial role in the discipline of subjectivities and consciousnesses. Women, for instance, are discursively trained to police and control their own behav- iour and the behaviour of others, without the need for coercion or external surveillance (Lees, 1997). For those who have difficulty internalising the habits of self-surveillance and self-correction (non-conformists, rule-breakers) there are several panoptic and disciplinary mechanisms to supervise, discip- line and rehabilitate individuals. One of these mechanisms is the rape trial. 2 According to Foucault, different discourses transformed areas such as sexuality and crime into objects of scientific knowledge and targets for insti- tutional practices. Applying his view to rape trials, we can interpret the discursive practices of judges, for instance, as tools in a complex pedagogy of behaviour constructed and realised through legal discourse, a pedagogy which aims to supervise, discipline, educate and control the way men and women behave socially and sexually. From this viewpoint, no legal trial and legal sentence are the judgement and punishment of an isolated individual; the discourse of lawyers, prosecutors and judges also represents the social- cultural evaluation of human behaviour, the setting of examples, an attempt to recompose normality and restore the social pact. In trial proceedings and legal decisions we can see two forms of penality at work: the penality of the law – legal rules, the opposition of ‘legal’ and ‘illegal’ acts and so on etc – and the penality of the norm – the trial represents a space for a broader form of pedagogy, which works by setting examples to be followed, by attempting to homogenise, normalise, bring ‘offenders’ back to the social pact (through rehabilitation) or exclude them from society (through condemnation) (Foucault, 1991). In short, the restorative and educational roles of legal punishment could extend to those who have broken not legal but moral or cultural rules. Take rape complainants, for instance. They have not been charged with a criminal offence, and therefore cannot be the object of direct penal punishment (for example, loss of money or of freedom). However, during the rape trial the victim’s body is exposed in a representational form, the events are reenacted, details are discussed, an atmosphere of the circus (of a spectacle) is created. If we interpret the rape trial as a pedagogy of sexual behaviour, as I am doing in this chapter, we can argue that the discourse of rape trials has ‘side- effects’ which reach far beyond the confines of the courtroom. Seen as a symbolic event, a rape trial establishes for the defendant and the complain- ant, as well as for men and women in general, the forms of behaviour which guarantee social and legal protection, and those which lead to exposure and punishment. Fear of symbolic punishment is enough to prevent many women from reporting a rape (Hall, 1985; Adler, 1987; Edwards, 1996). Their silence indicates that women have internalised the notion that they should learn to avoid male violence and to keep quiet about it (see Bumiller, 1991). 3 To illustrate the argument that the judicial discourse on rape is inserted within a complex pedagogical process, I will discuss in this chapter a very specific type of legal decisions: reported appeal decisions. In what follows, I will briefly describe and delimit the texts I have analysed. A reported appel- late decision on a rape trial (or reported decision) is a type of text where gender relations and power relations overlap. Reported appellate decisions (or RADs for short) are the decisions reported from the higher courts and published in official law reports, which form the basic units of what lawyers call ‘case law’ (Radford, 1987). In order to situate these texts, I will point out exactly where they fit in a sequence of judicial procedures: a crime or felony is initially judged by a first instance court, presided over by a single judge, and sometimes a jury (in the British legal system, these courts are the Magistrates’ Court or the Crown Court). In this first level the defendant may be considere guilty or not guilty; if found guilty, he/she will be sentenced. If the first instance verdict and sentence is unsatisfactory for the defendant, he/she may appeal to a higher court (in England, the Divisional Court of Queen’s Bench, Crown Court or Court of Appeal). The Court of Appeal, which judges appeals on more serious cases (for example, rapes), and where three judges typically sit, will produce a new decision entitled ‘appellate decision’, main- taining or altering, partially or entirely, the previous decision. The most important of these decisions are then published in law reports. For organisational purposes, three sections follow dealing with functions of a custodial sentence of rape; interdiscursivity (the ‘discourses of man’ and legal discourse); and the control of the body (bio-power). All the excerpts used as illustrations were taken from appeals published in the Criminal Appeal Reports (Sweet & Maxwell) and the All England Law Reports (Butterworths) between 1987 and 1998. The excerpts are individually num- bered, each number representing one reported appeal decision. The words or sentences highlighted in italics within each excerpt are the ones I wish to focus on as they better illustrate the pedagogical role of legal decisions (although these italics do not reflect the emphasis of the originals). Functions of a custodial sentence for rape

#### Modern, Foucauldian rape trials are inverse punishments, seeking absolute, panoptical knowledge of a woman’s body and mind to both rationalize a lenient punishment for the rapist and to construct a deterrent spectacle of the woman to prevent further prosecutions of other men due to the fear that other women will suffer the same punishment as her if they seek justice. Even if we don’t win Foucault theories, the neg forcing bad experiences of trials for rape and domestic violence survivors is independent offense

Figueiredo 2 [Débora de Carvalho Figueiredo, lecturer at Faculdades Barddal in Southern Brazil, 2002, “Discipline and Punishment in the Discourse of Legal Decisions on Rape Trials,” Springer, [https://link.springer.com/chapter/10.1057/9780230522770\_16]/Kankee](https://link.springer.com/chapter/10.1057/9780230522770_16%5d/Kankee)

\*TW for violent depictions of rape FYI. We also obviously don’t endorse the misogynistic judicial opinions below

Interdiscursivity: the ‘discourses of man’ and legal discourse In his genealogical analysis of history, Foucault (1991) investigates the interplay between the structuring of the social domain and the multiplicity of discourses emanating from the human sciences (Smart, 1983, p. 66). One of the areas of the social domain which was structured and influenced by the discourses of the social sciences was the criminal justice system. The social sciences, or ‘the sciences of man’, as Foucault calls them, resulted from the disciplines as a whole new corpus of knowledge, techniques and ‘scientific’ discourses which became entangled in the mechanics of legal punishment. The sciences of man provided legal punishment with a hold on the condemned’s soul: an assessment and a description not only of what criminals do, but also of who they are, will be, may be (Foucault, 1991). A trial is no longer concerned merely with establishing the truth of a crime and its proper punishment but, as Smart contends (1983, p. 72): It constitutes a context within which there occurs an assessment of normality and the for- mulation of prescriptions for enforced normalisation. A series of subsidiary authorities have achieved a stake in the penal process; psychiatrists, psychologists, doctors, educationalists and social workers share in the judgement of normality, prescribe normalising treatment and contribute to the process of fragmentation of the legal power to punish. The human sciences of psychiatry, psychology, gynaecology, pedagogy and criminology all have the same roots: the procedures of individualisation, of measurement, diagnosis and treatment of individual bodies, introduced by the disciplinary methods of the 18th and 19th centuries. Discipline and its tools (psychiatric and medical expertise) have penetrated the penal process, from investigation and judgement to punishment (Smart, 1983, p. 72). The mingling of the trial process with sciences such as psychology and psychiatry has apparently purified and cleansed legal proceedings from their hard, cold and impersonal nature. In fact, what it has done is to transfer power from one site to another, or better, to integrate different sites of power, thus making them stronger. Fairclough (1995) claims that when one expert system relies on another to construct its discourse, this reinforces its power structure. By resorting to scientific discourses, judicial discourse also increases its power by endowing itself with extra scientificity and rationality. The excerpt below illustrates the intimate link between psy-discourses and legal discourse: 10 A social inquiry report commented that there was no doubting the appellant’s remorse for his victim’s suffering and the deep shame which he was currently experiencing. It stated he had attempted suicide. Also before the Court was a report from a consultant psychiatrist who noted that the appellant was the youngest of six children in the family, an over- protected child showing early neurotic signs, devastated by his mother’s death when he was 12. Thereafter he showed general signs of delinquency, instability and a tendency to drug taking and alcohol abuse. He led an increasingly criminal lifestyle, chaotic, nomadic, much of it nocturnal, finding greater security in the criminal fraternity than within his family circle. The offence itself appeared to the psychiatrist to be ‘out of character’. His mental profile did not indicate the need either for violence or a habitually aberrant sexual lifestyle. The rape occurred at a time of chaos, insecurity and humiliation with life when, it was said, his judgements, control and perceptions were very severely reduced by drug and alcohol intake. His remorse and regret were genuine. The doctor expressed concern about the ‘self damaging potential which his ruminations may cause’, and recommended professional counselling, together with guidance and support. Although his potential for dangerousness needs to be examined, the psychiatrist thought he could not be regarded as a serious danger within the community. [McIntosh (1994) 15 Cr.App.R.(S.) 162 – stranger rape – 9-year sentence reduced to 7] In the example above, the use of psychiatric expertise helps legal discourse to establish a relation of causality between the defendant’s psychological profile and lifestyle (drug abuse, emotional problems) and his crime. Excerpt 10 is a classic example of the use of social-work discourse and psy- chiatric discourse as a support for a more ‘humane’ legal decision. The social and psychiatric profiles give support to a paternal judicial view of the appel- lant, depicting him as a young man ‘to be pitied’ and helped, and thus reducing his sentence by two years. The diagnostic assessments present in penal judgement extend not just to the defendant, but also to the complainant (she too is evaluated by doctors and psychiatrists to establish the physical evidence of the rape, her ‘trauma’, her profile): 11 That was evidenced by a psychiatric report from Dr Jasper dated January 19, 1993, which was before the learned judge. Dr Jasper examined the victim on four occasions prior to the offender being sentenced . . . She found that the victim was then suffering from a post- traumatic stress disorder which, she said, includes: ‘symptoms of flashback (re-experiencing the event), intrusive thoughts and images relating to the traumatic event, nightmares, acute disturb- ance, depression, anxiety and irritability, all of which Sarah has experienced since the rape’. [Attorney-General’s Reference (no. 3 of 1993) (W) [1994] 98 Cr.App.R. 85 – stranger rape – community service sentence increased to 2 years imprisonment] 12 Fifteen years’ imprisonment for rape of an elderly woman by an intruder in her home reduced to 13 years. The appellant broke into the home of a woman aged 74 in the early hours of the morn- ing. He pressed a knife at her throat, and threatened to kill her. The woman resisted and the appellant attacked with some violence and raped her. The appellant told the victim that he had AIDS. The woman was subsequently admitted to hospital suffering from depression. Sentenced to 15 years’ imprisonment. On March 18, 1992, she was admitted to hospital after taking an overdose of sleeping tablets and anti-depressants. The medical report before the judge and before this Court indicated that she was suffering at that time from depression, although it is right to say that there were causes other than, and in addition to, this appalling experience which contributed to that depression. [Guniem (1994) 15 Cr.App.R.(S.) 90 – stranger rape – 15-years sentence reduced to 13] In the two extracts above, the judges borrowed from psychiatric and med- ical reports to describe the traumatic effects of the rape on the victims and to depict them as ‘genuine’ victims and their assailants as ‘true’ rapists. In the modern style of legal punishing, other ‘discourses of man’ share with the juridical discourse the responsibility of evaluating, categorising, edu- cating and punishing both offender and victim. The legal power to educate, discipline and punish has been fragmented and divided among magistrates, ‘psy’ experts, educators, social workers, prison personnel, and so forth. As Lees points out, ‘power is not a possession, as radical feminists have argued, but is seen as embedded in the discourses of medicine, law, psychology and the social sciences’ (1997, p. 12). The control of the body (bio-power) The final section of this chapter deals with the use of the judicial discourse on rape as a way of better controlling the bodies of women. With the creation of the disciplines, especially the disciplinary mechanism of exam- ination, the body became the object or target of new forms of power exercised with the help of scientific (for example, medical) knowledge. The examination, and the process of documentation that accompanied it, allowed the constitution of the individual as an analysable, describable object. The disciplinary technique of examination was also vital for the surveillance, control and punishment of individuals. The new individual created by the processes of examination and docu- mentation is, as already pointed out, a calculable man (sic). According to Foucault, a mastery of the body and knowledge of its forces constitutes ‘a political technology of the body’. That technology is diffuse and cannot be located in a particular institution or state apparatus. What the institu- tions and apparatuses do is to operate ‘a micro-physics of power’ (1991, p. 26), in other words, they observe, analyse and document the human body (thus functioning as a laboratory to enlarge the knowledge about the body), and supervise and discipline the uses we put our bodies to (thus fulfilling an educational function). The judicial discourse on sexual crimes is one vehicle through which power over the body is exercised. Male and female bodies are diagnosed, treated and imprisoned during or as a result of a rape trial; women are depicted and judged as being constituted by their sex; female virginity and reputation, or unfaithfulness and promiscuity, all marked in the body, are protected or disciplined to safeguard women’s social worth and social norms. In the discourse of rape trials, the body is a main target of legal and microforms of power (the penality of the law and the penality of the norm). To illustrate this view, I will discuss the links between the discourse of rape trials and pornography. Descriptions of female bodies and of rapes as pornography

One example of institutional examination and control of the body is the descriptions of female bodies found in rape trials and legal sentences on rape cases. Reported appellate decisions on cases of rape vary in the way they describe the event and the complainant: some are discreet and almost laconic, while others give detailed and graphic accounts of the rape. If some appellate decisions are laconic about the details of the rape, the same cannot be said about the trial, where every single detail of the event and of the victim’s body is scrutinised and debated. In the opinion of the American legal scholar Catherine MacKinnon (1987), rape trials and porn- ography share a common link: both publicly portray and evaluate the female body. The victim’s testimony during the trial has also been compared with a pornographic vignette: the details of male penetration can give pleas- ure as with other pornographic materials. 5 In rape trials, as in pornographic texts, the events are constructed in fine detail (including for example, where the woman was touched, who removed her knickers, if she had a period or not). During most rape trials the complainant is forced to describe minutely which parts of her body were assaulted, and in which ways; these descriptions, which would embarrass women even in private circumstances, are particularly humiliating when given in public, in front of an audience. The paradox is that the very use of language to describe the sexual parts and functions of a woman’s body is sufficient to render her unrespectable in the courtroom, as will be evidenced in the excerpts below. Giving evidence in court can be interpreted as a way of ‘shaming’ the complainant, of exposing her to public scrutiny and contempt, of disciplining and punishing her (Lees, 1997). And the graphic details of female bodies are not restricted to courtroom discourse. The detailed (and probably distressing) descriptions of the rape given by rape complainants, plus evidence from medical examinations, also find their way into legal decisions, as we can see in the extracts below: 13 He then began an act of intercourse with her. She objected, and took her hands away from his buttocks where she had had to place them. She took her hands away to wipe her mouth, and then she tried to put her hand between his body and hers. He said to her, angrily, that she must put her hands back on his buttocks. She did so, and he put his penis back in her mouth. While it was there he kept thrusting; because of the force of his thrusting she choked and began to, as she described it, ‘urge’ – or, as one would suppose she meant, ‘retch’. He asked her why she was doing that. She replied that he had ‘pushed it too far back’. He continued with what he was doing, albeit not pushing as far back as he had before. Throughout the whole of this episode the knife was at the nape of her neck. He then stopped, withdrew his penis from her mouth and said, ‘Get on the bed’. She lay on the bed. He told her to get on her front and instructed her to kneel, and put her head down and her hands behind her back. She obeyed. With her kneeling in that position he put his penis into her vagina. She could feel the knife in the region of her neck the whole while. He continued the act of sexual intercourse. She did not co-operate and he said to her, ‘You can do better than that. If you help me you will live, if you don’t you will die; I am going to die tonight anyway’. So she did something to appease him. Although he was to continue the intercourse for some little time, that is a sufficient description of the events for the purposes of this case. [Kowalski (1988) 86 Cr.App.R. 338 – marital rape – 4-year sentence reduced to 2] Extract 13 presents detailed descriptions of the rape. In it the judges seem a little embarrassed by their lengthy description (‘Although he was to continue the intercourse for some little time, that is a sufficient description of the events for the purposes of this case’), which does not happen in the following excerpt: 14 On March 7, 1996 he went to see his doctor to discuss a referral to the marriage guidance organisation know as Relate. The complainant came home shortly after he did and saw him come into the house with a carrier bag. When she came into the house, he grabbed her by the throat and he pushed her down on the sofa. He pushed her face into a cushion, so that she was frightened that she was going to suffocate. He held her down with a tea towel across the back of her neck. She asked him not to kill her or to hurt her. He then said that he would not hurt her so long as she kept quiet and did not struggle. He said that he wanted to ‘fuck her’ and that it was going to last a few hours as he ‘made the most of it’. He then took off most of his wife’s clothing. She removed her own necklace and she hid her broken glasses down the back of the sofa for fear that he would strangle or cut her. He then took stockings which he had purchased out of the carrier bag and made his wife put them on. He ripped the remainder of her clothes. He then pene- trated her against her will. He forced her to go into the kitchen with him to fetch some wine from the refrigerator. He placed cushions on the floor, forced her to kneel on all fours and then pene- trated her again. He forced her to perform oral sex, holding the back of her head and threatening to hurt her. He told her that he was thinking of tying her up. He hit her with a tea towel. He then took her upstairs, saying that he was going to ‘defile her little nest’. He then attempted to pene- trate her whilst holding her against the bedroom door. He took her into the bedroom, forced her to put the stockings on with a suspender belt and forced his penis into her mouth. He then penetrated her again. [Michael H (1997) 2 Cr.App.R.(S.) 339 – marital rape – 5 years upheld] Extract 14 is the one which most resembles pornography, evidenced in the mentions of erotic lingerie (stockings and suspender belt), an erotic scene (the cushions on the floor, the wine, the language used by the assailant), the threat of ‘bondage’ (‘he told her he was thinking of tying her up’), and finally the threats and the use of violence (he tried to suffocate her, he hit her with a tea towel, he threatened to hurt her and to tie her up), which conjures up a sado-masochistic scenario (this feature is present in the two excerpts). The distressing experience of giving evidence in court, the frequent prac- tice of character assassination carried out by defence lawyers and even by judges, and the fear of having the most intimate details of one’s life publicly discussed, laughed at or even enjoyed as erotic material, are indications of what awaits women who file a complaint of rape, and probably leads many of them to keep quiet about male sexual violence. Final remarks In this chapter, based on a Foucauldian view of the criminal justice system, I have interpreted the judicial discourse on rape as part of a pedagogy of sexual behaviour. From this perspective, rape trials serve several educational aims: they discipline and punish the individual offender; they set ‘proper’ and ‘improper’ modes of behaviour both for the offender and other potential offenders; they serve as warnings to people in general. The warning function extends the discourse of rape trials and of legal decisions beyond the confines of the courtroom and even of the legal environment; the judicial discourse on rape serves as warning and example both to those directly involved with the trial (offender and victim) and to women and men in general. The educational aim of judicial discourse is furthered by the help of several ‘discourses of men’, such as the discourses of psychiatry and psychology. Foucault claims that the legal power to punish has been fragmented and divided among several disciplines which, through the techniques of obser- vation, judgement and examination, help to categorise people as ‘normal’ or ‘abnormal’, ‘criminal’ or ‘innocent’, amenable to rehabilitation or beyond recuperation. The discourses of medicine, psychiatry and psychology also help to add scientificity to legal discourse, somehow purging it of its harsh and cold punitive character. The idea is that the legal right to punish is not merely about retribution and revenge, but that it also encompasses a humane view of criminals. The disciplinary techniques of observation, judgement and examination present in rape trials also serve to strengthen the hold over the body, and to increase its docility and its usefulness. The bodies and minds of rape victims are scrutinised to determine relations of causality and responsibility, to assess the seriousness of the rape, and to portray the complainant either as a ‘genuine’ or as a ‘non-typical’ victim. In this process, the bodies of women are trapped in minute and embarrassing descriptions that resemble porn- ography, descriptions which also serve as warning to other women of the symbolic exposure a rape complainant goes through.

#### Domestic violence trials prove how trials shift to the forceful psycho-medicalization and deviance-construction women who reject patriarchal conceptions of normalcy, such as totalizing submission to a male spouse.

Robinson 25 [Jordan Robinson, Juris Doctor Candidate at the University of Illinois Chicago School of Law, 2025, “Sin, Sickness, or Self-Defense? How Medicalizing Women’s Acts of Survival Confounds Justification and Excuse, and Undermines Justice,” UIC Law Review, https://repository.law.uic.edu/cgi/viewcontent.cgi?article=2964&context=lawreview]/Kankee

As a result, when women such as Judy Norman resort to violence as a means to defend themselves at a time when their abuser is not actively battering them, they are routinely denied the chance to claim self-defense.29 This is significant because a defendant may only introduce evidence of the victim’s violent character or history of abuse at trial if they are given a jury instruction on self-defense.30 Without a self-defense jury instruction, the defendant is unable to explain crucial context of the crime to the jury and is more likely to receive a harsh sentence.31 At the same time, the criminal legal system unjustifiably medicalizes women’s rational survival actions. Medicalization is the social process by which human conditions or behaviors come to be defined and treated as medical issues requiring diagnosis and treatment by the medical system.32 Around the 1980s, attorneys for survivor-defendants33 who were unable to satisfy the traditional elements of self-defense began to ask courts to admit expert testimony on “Battered Wife Syndrome.”34 Battered Wife Syndrome—today, Battered Spouse Syndrome—refers to a disproven and unscientific theory that women who are subjected to repeated domestic abuse develop a mental illness that prevents them from being able to escape abusive relationships or rationally assess risk.35 If such testimony was admitted, a defendant who otherwise would have been outright denied a self-defense jury instruction could use the expert to attempt to explain why she perceived an imminent threat of danger when an outside observer might conclude that she were perfectly safe—such as when her abusive husband is asleep.36 While courts’ permittance of Battered Spouse Syndrome evidence appears commendable considering the lack of an alternative, it has ultimately proven itself to be little more than an unjustified and ineffective reiteration of the insanity defense. The supposed syndrome that forms its foundational premise has been entirely debunked.37 Subsequent scientific research has proven that victims of domestic abuse do not consistently respond as the theory would predict.38 It baselessly claims that women are suffering from some defect of the mind which caused their violent reaction, when in actuality, these reactions are often rational and necessary acts of survival.39 Abuse victims who engage in rational survival actions after pursuing every reasonable means of escape are not sick with a mental illness.40 Therefore, it is nonsensical that survivor- defendants must claim they suffer from a non-existent mental syndrome in order to have a jury consider their self-defense claim. More importantly, being required to frame their acts of self-defense as the symptom of a “syndrome” undermines defendants’ arguments that they were reasonably acting in self-defense. This article will explore how the survival actions of domestic abuse victims are unjustly medicalized and criminalized by the American legal system.41 Part II will examine why survivors of severe domestic abuse who use force to defend themselves struggle to satisfy the traditional self-defense elements and why courts began allowing Battered Spouse Syndrome evidence. It will explore how the Anglo-American legal system has historically failed to protect women from their abusers, treat domestic abuse as a serious legal issue, and treat women’s defensive actions as legitimate.42 Part III argues that requiring women to clothe their self-defense claims in the dressings of Battered Spouse Syndrome unjustifiably pathologizes their rational survival actions, which confounds the jurisprudential underpinnings of excuse and justification defenses for the jury and results in survivor-defendants’ self-defense claims being discredited. Part IV will argue that courts must refrain from applying medicalized language to criminal defendants and that a specialized self-defense framework is warranted for survivor-defendants. Rather than allowing only “syndrome” evidence, survivor- defendants should be allowed to introduce evidence regarding battering and its effects without the syndrome label. If the survivor- defendant is able to produce a sufficient quantum of evidence indicating that her abuse significantly contributed to the perpetration of her crime, the jury should be allowed to consider the extent to which that abuse mitigates the defendant’s criminal responsibility, including and up to a full legal exculpation from any criminal liability if the jury determines that the defendant was acting in self-defense. II. BACKGROUND

#### Trial medicalization of deviance constructs the pathologized and helpless female subject whose self-defense is contingent on her ability to comport to that battered woman narrative, reifying gender roles, perpetuating domestic violence, and harming feminist agency and beliefs in a rational woman subject.

Robinson 25 [Jordan Robinson, Juris Doctor Candidate at the University of Illinois Chicago School of Law, 2025, “Sin, Sickness, or Self-Defense? How Medicalizing Women’s Acts of Survival Confounds Justification and Excuse, and Undermines Justice,” UIC Law Review, https://repository.law.uic.edu/cgi/viewcontent.cgi?article=2964&context=lawreview]/Kankee

B. The Medicalization of Women’s Survival Actions Sociologists use the term medicalization to describe the social process by which a problem or phenomenon comes to be defined and treated as medical.225 Medicalization constructs certain behaviors, traits, or experiences as pathological or abnormal—that is, deviant—by framing them as a disorder or disease requiring medical treatment and intervention.226 Put simply, deviant behavior is “behavior not within permissible conformity to social norms.”227 When behavior is labeled as deviant, people are discouraged from engaging in that behavior, which operates as a form of social control.228 In order to maximize adherence to social norms and minimize deviant behavior, society utilizes both formal and informal forms of social control.229 Formal controls are “institutionalized forms of social control,” such as the criminal legal system and the medical system.230 Social deviance, however, is relative and contextual: not all deviant behaviors result in the same reaction from society.231 What behavior is labeled as deviant, and how society responds, varies by social context.232 Moreover, different deviant behaviors fall into different designations or categories of deviance.233 Deviant behavior might be categorized as criminal, sinful, pathological, immoral, or merely rude.234 Each category of deviance warrants a different sanction.235 Furthermore, deviant behavior that was once defined as immoral or criminal can come to be constructed as pathological or medical, and vice versa.236 Although it might be expected that the categorization of a certain deviant behavior as either crime or sickness is made on the basis of scientific fact alone, the process by which something is defined as “a sin, a moral problem, a crime, or a sickness” is actually the “product of a political process.”237 Take, for example, the construction of homosexuality in western society. Prior to the 1800s, homosexual behavior was primarily seen as sinful.238 Overtime, it transformed into a criminal act.239 During the 1900s, it was framed as a “sexual patholog[y]” requiring medical treatment.240 Today, with notable exceptions, queerness is increasingly viewed as a socially acceptable and normal way of being that does not require criminal or medical intervention.241 Whether a certain behavior is constructed as sickness or crime matters because “[t]he social responses to crime and illness are different.”242 In the context of a criminal proceeding, the label attached to an act determines which defense is appropriate.243 The Battered Spouse Syndrome theory medicalizes the rational survival actions of domestic abuse survivors by casting them as psychologically disabled and entirely passive except for the final lethal act.244 In reality, however, most survivors “employ ample measures to try to fend off and end the abuse” prior to resorting to lethal violence.245 The use of syndrome evidence unfairly treats survivors as possessing some kind of mental infirmity by failing to leave abusive situations without considering the material and social realities of victim’s lives.246 Medicalizing survivors frames their acts of survival as “abnormal or irrational responses, which ultimately deprives [them of] agency as rational decisionmakers.”247 Moreover, the admittance of expert testimony on Battered Spouse Syndrome engenders “unrealistic stereotypes of people subjected to abuse” in the minds of the jury.248 “[V]ictims are often expected to assume the demeanor of helplessness, to act as if they are without capacity to exercise their rights independently.”249 When a survivor does not “perform their victimization” as expected by the jury after being told by an expert witness that she suffers from a mental illness that disabled her to the point of complete helplessness and impotency, her self-defense claim is frequently viewed with suspicion and discredited.250 Thus, when a survivor-defendant’s behavior and demeanor does not fit the “preconceived victimhood narrative” required by Battered Spouse Syndrome—that is, “weak, helpless, and mentally impaired”—the admittance of syndrome expert testimony can do more to harm than help the defendant’s self-defense claim.251 Women who do not conform to traditional gender roles face the greatest likelihood that such medicalized expert testimony will make a jury less likely to believe their self-defense claim.252 Women who are perceived as tough, confident, independent, abrasive, argumentative, or angry do not fit the purported profile of a victim suffering from Battered Spouse Syndrome, resulting in jurors discrediting their self-defense claims.253 Paradoxically, when there is evidence that a victim has resisted her abuser in the past, her “behavior is perceived as aggressive” rather than defensive.254 Women who are queer or transgender, are poor, engage in sex work, use alcohol or drugs, have a history of being abused, or have a criminal history are less likely be seen as “worthy victims” and be believed.255 Women of color, and in particular Black women, are least likely have their defensive actions interpreted as legitimate.256 Black women occupy a uniquely vulnerable position in society. Compared to white women, they experience domestic violence at a disproportionately higher rate and are more likely to be killed by an intimate partner.257 At the same time, they are “disproportionately more likely to be criminalized by the legal system” in relation to their victimization.258 Black women are more likely to be arrested, more likely to be detained, and more likely to be sentenced to a term of imprisonment than white women.259 The disproportionate condemnation of Black women’s survival actions is “likely a function of the intersection of racist stereotypes and discretion.”260 In order to prevail in a self-defense claim, the defendant must convince the judge and jury that she was not the “initial aggressor.”261 But numerous racist stereotypes that “paint Black [women] as hypersexual, boisterous, aggressive, and unscrupulous” implicitly bias fact finders’ perception of Black women as aggressive.262 In particular, the “Angry Black Woman” trope,263 which depicts Black women as “angry, loud, aggressive, pushy, independent, street smart, mature, hypersexual, threatening, and invulnerable to abuse,”264 makes their claims of victimization appear uncredible, because if a Black woman is angry and aggressive, she “must be a mutual combatant[]” rather than a genuine victim.265 Moreover, studies show that beginning around age five, Black girls are “more likely to be viewed as behaving and seeming older than their stated age” and are perceived as needing less protection and nurturing than white girls.266 Such adultification of young Black girls deprives them of the protections extended to other children in the legal system and contributes to fact finders construing their acts of survival as intentionally criminal rather than as legitimate exercises of self-defense.267 C. Justifications of Punishment Applied to Survivor- Defendants

#### Trial’s Foucauldian striving for positivist proof increases disciplinary control by legitimizing punishments in objective language. The neg’s obsession of evidence and fact-checking inevitably fails due to neutrality of science being transformed into pseudo-science to fulfill the whims of the legal system’s ideological state apparatus

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The core epistemological values of science are rooted in the central, defining concern of inquiry generally: finding things out. A scientific inquirer starts with a question about what might explain this or that natural or social phenomenon; makes an informed guess [hypothesis generating]; and assesses how well his conjecture stands up to what evidence is already available, or can be obtained: i.e., how firmly it is anchored in experimental results and experimental evidence generally; how well it interlocks with the whole explanatory mesh of the body of thus-far well-warranted claims and theories; whether relevant evidence might have been overlooked; and what else could be done to get hold of evidence not presently available.79 At bottom, science is a skeptical pursuit, one that is constituted by the ever-present question, “Why?” Moreover, science is “inimical to the satisfaction of certain [institutional] values,”80 because scientific skepticism “interferes with the imposition of a new set of values which demand an unquestioning acquiescence.”81 This is an important insight as it directly pertains to the competing narratives expressed by scientists who study natural and social phenomena, and the courts and forensic practitioners who also lay claim to empirical evidence (and for a far longer period of time). What I mean is that there has always been an uncomfortable relationship between science and its interaction with society more generally, and law specifically. Haack contends that certain kinds of political regimes seem to be inherently hostile environments for scientific work: theocracies are likely to fear scientific discoveries that may threaten their world-view to deplore scientific methods that offend their moral sensibilities, and to be adamantly opposed to the very idea of investigating certain questions.82 Despite Haack’s reference to theocracy (or perhaps it’s an apt description), forensic practitioners and the courtroom working group83 that encourage them, also engage in a sort of theocratic commitment to their findings, as is indicated by a strict adherence to magical thinking. Their mode of veridiction, the one that they routinely resort to as established by positive law, includes the Frye standard’s “general acceptance” criteria. Since it was adopted by the courts in the 1923, it has had decades to gain prominence as the Archimedean point of departure in our adversarial process since it represents the normatively operating expression of forensic expertise (stare decisis). In short, the norm for judges is to permit questionable, sometimes demonstrably false and misleading, forensic testimony at court since that’s what it has always done, and in doing so, it continues to perpetuate all manner of evidentiary charlatanry. By way of contrast, it is precisely the role and responsibility of science to engage in “organized skepticism,” a kind of methodologically rigorous assessment of “established routine, authority, vested procedures and the realm of the ‘sacred’ generally.”84 It is the role of science to endlessly question the taken-for-granted, the sedimented, those “sacred” beliefs and their attendant procedures that have gained prominence over time. Interesting, sociologist Robert K. Merton’s analysis of the role of science during the spread of Nazi fascism raises important considerations insofar as he recognizes that the scientific method and its institutional gestalt are anathema to the satisficing tendency of the contemporary criminal legal system. Specifically, for Merton, The spread of domination by one segment of the social structure – The State – involves a demand for primary loyalty to it…. The norms of scientific ethos must be sacrificed, insofar as they demand a repudiation of the politically imposed criteria of scientific validity or of scientific worth.85 And perhaps as significant: “The expansion of political control thus introduces conflicting loyalties.”86 What Merton ascribes to fascist regimes is no less of a concern in aspirational democratic ones like the United States of America.87 Systemic demands for social control, as manifested through the administration of law in the United States, generate a dialectical relationship between science and the political, economic, and cultural demands for disciplining working class and poor people. Once again, I defer to Merton’s insight: “The conflict between the totalitarian state and the scientist derives in part, then, from an incompatibility between the ethic of science and the new political code which is imposed upon all, irrespective of occupational creed.”88 Why? Because “the ethos of science involves the functionally necessary demand that theories or generalizations be evaluated in terms of their logical consistency and consonance with facts.”89 In a previous remark I emphasized the dialectical interplay of opposing forces represented by the continued use of unscientific forensic practices, practices that have no error rate indicating the likelihood that their findings may have occurred by chance, with scientific research premised upon skepticism, sharing of methods and data for reliability testing, in scientific peer-reviewed professional journals. It is not solely the courtroom working group that has adopted the hegemonic commitment to satisficing that occurs each time an unscientific forensic practitioner testifies to individualization, by its nature hegemonic discourse assumes popular use across civil society. As such, how would the general public be properly situated to effectively critique and juxtapose to rational criticism conclusions drawn and officially rendered at court by unscientific practitioners? With hegemonic veridiction emerging by virtue of nearly a century’s worth of judicial application, media presentations primarily through television and film,90 and Supreme Court affirmation, the cultural acquiescence that accompanies general acceptance should come as no surprise at all. Largely as a result of the commonsensical appearance of contemporary forensic practices, the lay public is limited in its ability to challenge normative practices. In fact, it is quite possible that the common-sense comfort level experienced by lay people presented with well-known yet unscientific practices (e.g., fingerprints, bite marks, tool marks, shoe prints, ballistics, etc.) may, dialectically, generate consequential hostility toward attempts to introduce science. Merton referred to just this phenomenon when he stated that “Partly as a result of scientific advance, therefore, the population at large has become ripe for new mysticisms clothed in apparently scientific jargon. This promotes the success of propaganda generally.”91 New mysticisms. Magical Thinking. Propaganda. For example, as a critical system steering mechanism, the legal system’s social control function operates as part of a hegemonic system designed to promote and protect dominant cultural interests. As part of that process, systemic efficiency requires the smooth and expedient dispatching of criminal cases. In order to satisfy systemic needs for predictability and efficiency, criminal procedure must generate outcomes, most commonly in the form of convictions, that at a minimum create the appearance of institutional stability. Introduction of expert witness testimony provides systemic assurances that any outcomes leading to conviction and a loss of liberty have been met with empirical (though unscientific) evidence of guilt. Herein lies the charlatanry. Herein lies Merton’s mysticism. Herein lies Malinowski’s magical thinking. So long as most states and the federal government adhered to Frye’s general acceptance standard, which continued to be supported well into the decade of the 1990s, and so long as the general public was in on the shared forensic discourse, a commonsensical interpretation of the application of forensic practices to crime scene evidence became the norm.92 The question that immediately arises is: How is it that when confronted with scientific evidence raising questions about the commonsensical application and interpretation of forensic practices that are continuously found to be faulty fails to dislodge the prevailing belief? This is a question that I will take up in detail in the sections that follow. But consistent with my point above, I wonder aloud whether the persistent disregard of each of the four Daubert criteria by gate keeping judges speaks to magical thinking in the service of state efforts to maintain social control through the administration of justice with primacy given to satisficing. If so, by what mechanisms might this be accomplished? Unscientific Forensic Practices Other scholars far more qualified than I have thoughtfully critiqued the substantive conceptual, procedural, technological, and testimonial aspects of each of the currently applied forensic practices.93 In particular I draw attention to the careful assessment of contemporary expert testimony as applied to match and pattern evidence revealed in the work of Mnookin et al.94 Generally, Mnookin et al. engage in critique of contemporary forensic practices that presumes the same overarching concern that I raise here, but with specific conceptualization of what they refer to as a “research culture.”95 In order to establish the validity and reliability of contemporary match and pattern evidence, Mnookin et al. propose the creation of “a culture in which the question of the relationship between research-based knowledge and laboratory practices is both foregrounded and central.”96 Among the questions identified by Mnookin et al. are: What do we know? How do we know that? How sure are we about that? … We mean a [research] culture in which these questions are answered by reference to data, to published studies, and to publicly accessible materials, rather than reference to experience or craft knowledge, or simply assumed to be true because they have long been assumed to be true.97 According to the Federal Rule of Evidence 702 (b), expert witness testimony may be introduced at trial so long as “the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.”98 But what is the criteria for determining the credibility of the evidence and testimony proffered by those expert witnesses? For example, under Rule 702 should the following forensic testimony be permitted at trial: fingerprint friction ridge analysis, pattern evidence like shoeprints and tire tracks, tool marks and firearms identification, hair microscopy, fiber evidence, document examination, paint and coatings evidence, explosives and fire, odontology, or bloodstain pattern analysis? Each of these forensic practices was assessed by the National Academy of Sciences (NAS) in its 2010 report called Strengthening Forensic Science in the United States: A Path Forward. 99 In each case the most common forensic practices employed by law enforcement had violated all but one of the core criteria articulated by the Court in Daubert. (Courts typically apply the fifth of the Daubert criteria, a holdover from Frye that emphasizes general acceptance.100) Assuming for the moment the accuracy of the NAS report indicating that none of the forensic practices, with the exception of DNA (both nuclear and mitochondrial) and toxicology, meet scientific standards for validity and reliability, should they be used to individualize suspicion leading to arrest and prosecution? Among the key questions presented in the report are whether: (a) any forensic practice is informed by science, (b) the testing methods and conclusions are reliable, (c) the labs are competent, and (d) the examiners are proficient. The following citation to the report is indicative of the serious concerns raised: With the exception of nuclear DNA analysis… no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source.101 The NAS report was followed in 2016 with publication of the President’s Council of Advisors on Science and Technology (PCAST) Report pertaining to Forensic Science in Criminal Courts.102 Two significant gaps between forensic science and the legal system were acknowledged in that report: (1) the need for clarity about the scientific standards for the validity and reliability of forensic methods, and (2) the need to evaluate specific forensic methods to determine whether they have been scientifically established to be valid and reliable. To conduct its assessment, the PCAST Committee reviewed more than 2,000 published scholarly papers. Unlike Rule 702, which equivocates on the question of whether “experience” should be enough to permit expert testimony,103 the PCAST Committee raised concerns over what it terms “black box” research – forensic assessments that focus upon inputs and outputs rather than the methods used to generate them (the definition of consequentialism). Black box forensic practices are typically based upon the experience of the examiner rather than application of scientific method. This kind of testimony, which would accommodate the “general acceptance” rule in Frye and the fifth criteria of Daubert, is scientifically meaningless. In fact, the PCAST Report concludes by saying that: “Neither experience, nor judgment, nor good professional practices (e.g., certification programs, proficiency testing, codes of ethics) can substitute for actual evidence of foundational validity and reliability.” But should that matter? In a 1993 civil lawsuit brought against Merrell Dow Pharmaceuticals, Inc.,104 the United States Supreme Court articulated a standard of expert testimony principally constituted by scientific standards of validity and reliability and articulated as part of the Federal Rules of Evidence 702. As of 2017 the Daubert standard has been adopted by thirty-nine states,105 with three states providing a mixed evidentiary model,106 and eight states adhering to the 1923 Frye standard.107 The intention of the Court in Daubert was to provide a gatekeeping role for judges108 in order to enhance the certainty regarding correlations between suspects and forensic evidence. Writing in concurrence, Justice Scalia makes it clear that the Court will expect judges to take their gatekeeping responsibility seriously

#### Neg humanitarian, individualizing, rights-centric discourse reifies the disciplinary state

Jouet 21 [Mugambi Jouet, researcher at McGill Faculty of Law, 5-27-2021, "Foucault, prison, and human rights: A dialectic of theory and criminal justice reform", Sage Journals, https://journals.sagepub.com/doi/10.1177/13624806211015968]/Kankee

Ancel was an heir to the “social defense” movement born in 19th-century Europe. It focused on crime prevention by drawing on expertise to assess offenders’ dangerousness and incapacitate them as needed (Gerber and McAnany, 1972). But Ancel advocated a “new social defense” because he placed greater emphasis on rehabilitation and envisioned “the defense of human rights, the protection of the human being and therefore the passionate search for a criminal justice policy of a humanistic kind, in the strongest sense of the word [humaniste]” (1981: 7). “New social defense” may thus be a misnomer because Ancel’s theory truly was “penal humanism” (Sizaire, 2017: 263). Ancel’s perspective did not arise ex nihilo. He credited Renaissance and Enlightenment humanism as a source of his new social defense theory (1981: 51–56). European penal systems rooted in religious traditionalism and absolute monarchy gradually came to be replaced by liberal and secular principles. In the 19th and early 20th centuries, this initially gave way to “neo-classical doctrines” with a technical, positivist focus on the application of the law to an offense. Deploring an “excess” of “legalism”, Ancel (1981: 72, 203–204, 312) faulted these doctrines for disregarding “the human person” by treating offenders as “objects” instead of “subjects”. Yet the Enlightenment did not simply foster legalism, but also a shift toward more humane punishments, as demonstrated by the rise of anti-death-penalty movements in Europe and North America (Jouet, forthcoming 2022). Insofar as these shifts marked emerging sensibilities against harshness, as Durkheim (1900) and many argued, Ancel was among the actors hoping to carry this movement into modernity. In Ancel’s eyes, the individual must be at the heart of criminal justice. He differentiated his theory from “dogma” like positivism deterministically imputing crime to biological traits (1981: 77). Emphasizing “free will”, Ancel was even skeptical about classifying “habitual offenders, occasional offenders, and passionate offenders”. “Research on these classifications is probably legitimate and useful scientifically”, he wrote, “but, for the new social defense, the act is above all the expression of an individual personality in a given situation” (1981: 186). Ancel’s reification of individualism reflected wider social shifts. A parallel is palpable between the historic shift toward individualized punishment with humane aspirations and the societal shift that saw the individual gain importance in 19th-century intellectual life. For instance, Søren Kierkegaard blamed Hegel for painting a rigid and systematic vision of history ignoring individual agency. According to Kierkegaard (1846: 121), Hegel even forgot he was a human being. Whether justified or not,6 this accusation mirrored Ancel’s (1981: 184) claim that criminal law in the 19th and early 20th centuries had come “to forget that the offender is a man”. While it may seem like existentialist philosophy and humanistic penal reform belong to distinct universes, in the history of ideas they lend themselves to analogies given their defense of the individual’s worth. Just as the penal system should not be a machinery judging individuals without assessing their circumstances, history should not be perceived as a colossal mechanism rendering individual choice meaningless. Such individualistic claims enable us to analogize Ancel’s concerns to those of existentialists like Søren Kierkegaard or Jean-Paul Sartre, as well as Albert Camus, who distanced himself from existentialism despite sharing aspects of its outlook (Camus, 1946). In fact, Ancel (1981: 287–288) approvingly cited Camus’s essay The Rebel (1951) when calling for “a new conscience” of the “value of human life”. Camus’s influence in Ancel’s epoch is corroborated by Reflections on the Guillotine (1957), an impactful anti-death-penalty essay. In addition to citing Ancel, Anthony Amsterdam, the prominent American abolitionist, emphatically cited Camus’s essay when challenging the death penalty as a “cruel and unusual”, substantively inhumane punishment before the US Supreme Court in 1972 (Amsterdam, 1972). Law & Literature is often understood as a field exploring literary themes in the law and vice versa (Stern, 2014), yet literature also offers a window into the genealogy of ideas that have influenced criminal law and its actors. Figures like Camus and Amsterdam further exemplify how Ancel belonged to a wider reform movement with humanistic aspirations, which stemmed partly from Enlightenment ideals (Jouet, forthcoming 2022). At first glance, the radical critique that Michel Foucault offered in Discipline and Punish’s repudiated this movement by painting Enlightenment humanism as an insidious means of legitimizing penal control. Upon closer scrutiny, however, we will see in subsequent sections below that Foucault converged with this humanistic reform movement in light of the positions he took as an activist, which could diverge from his theories. Still, Ancel’s outlook appeared more hopeful than the pessimism, if not nihilism (Maier-Katkin, 2003), perceptible in Foucault’s writings. But Ancel’s conception of progress was not synonymous with a naive or utopian aspiration to create a crimeless society. His idealism was counterbalanced with a lucidity evoking Camus’s Myth of Sisyphus (1942a), which called for accepting the disappointing realities of an “absurd” world in order to pragmatically face them. Tellingly, Ancel (1981: 287) referred to an “absurd . . . human condition” when citing Camus’s The Rebel. Ancel depicted crime as “a human fact” and “social problem” that a reductive “legal machinery” cannot comprehend. Mere retribution would likewise be blind. The new social defense “does not have the goal of instituting an absolute justice, exactly proportional to the abstract evil perpetrated or intended” (1981: 182, emphasis in original). Ancel deemed that lex talionis reflected a senseless metaphysical morality aiming to equate the sentence precisely with the crime. He further underlined that deviant behavior is inevitable and that the public “should recognize and accept” this (1981: 182, 184, 267). Ancel’s humanism thus went hand in hand with pragmatism. Even though individualistic and humanistic conceptions of justice materialized several centuries earlier (Garland, 1990), Ancel emphasized their development after the Second World War. The first international congress of social defense occurred in San Remo in 1947, soon followed by the creation of the International Society of Social Defence and a UN social defense section. The Council of Europe kept on this track (Ancel, 1981: 15, 32, 258). The movement’s opponents “feared that sociologists, criminologists, and psychiatrists would usurp the role of judges and place their sciences over the rule of law”, as Patricia O’Brien (1998: 196) observed. Ultimately, “Social Defense stood as a marker of the general postwar emphasis on individual treatment and social protection” (1998: 196). Ancel became a leading figure of this movement aspiring to a “socio-humanistic” criminal justice policy protecting “human dignity” (1981: 34). Channeling the polyvalence of Enlightenment thought, he wanted criminal law to embrace “all the sciences of man” (1981: 36). Multidisciplinarity should outstrip narrow legalism: “The criminalist feels today that he cannot be simply a jurist” (1981: 18). His holism comprised a profound internationalism and comparatism. Because dignity is a norm rooted in the intrinsic worth of each human being in the abstract (Bioy, 2010; Cassia, 2016; Kateb, 2011), an aspiration toward “universalism” naturally was at the heart of Ancel’s vision (1981: 36). Ancel’s optimism toward the evolution of Western criminal justice had not anticipated developments like intensifying tensions over systemic racism. Nor had Ancel foreseen modern dimensions of American exceptionalism, including the rise of mass incarceration in the United States since the 1980s (Jouet, 2017). To the contrary, when the last edition of La Défense sociale nouvelle appeared in 1981, Ancel (1981: 125) was convinced that jurists face “human and social problems that, in the current state of [Western] civilization, tend to arise everywhere nearly in the same manner”. Ancel seems to have further underestimated the indifference, ambivalence or hostility toward international standards among numerous American officials and citizens (Ignatieff, 2005; Jouet, 2017). If Ancel did not anticipate these modern developments, he was keenly aware that rehabilitation was already under attack in his lifetime (Dreyfus, 2010). The sustained challenge did not solely come from conservatives who accused his humanistic model of naive leniency toward criminals. The attack equally came from the left and was largely spearheaded by Michel Foucault. From Ancel’s pragmatic optimism to Foucault’s pragmatic pessimism Foucault’s growing focus on criminal punishment in the 1970s with The Punitive Society lectures (1972–1973) and Discipline and Punish (1975) may be interpreted as the culmination of a radical leftist critique of penality that gained ground in the 1960s (Garland, 2002: 65–67). This section describes how Foucauldian theory’s visceral pessimism challenged the influential, optimistic outlook that Ancel had offered in La Défense sociale nouvelle. Discipline and Punish was released in 1975, after the first (1954) and second edition (1966) of Ancel’s book. By the third edition (1981), Ancel was mindful that Foucault and fellow iconoclasts had undercut his theories. Ancel (1981: 260) consequently defended himself against a “critical criminology” equating prisoner rehabilitation with “oppression and subjugation”. Among these stood “labeling theory” and its view that crime is just a social construct: “[T]he offender is only an offender because he is deemed so through a labeling process” (1981: 118). “Radical criminology” likewise gained traction in the United States during the 1960s civil rights and antiwar movements, leading to the idea that “the criminal act is essentially a refusal of the social order established by the ruling classes” (1981: 118–119). Most importantly, Ancel (1981: 260) added that these critics “find themselves in agreement with Mr. Foucault to conclude that, after the subjugation of the body under the ancient system, the supposedly reformed system oversees the subjugation of the soul”. Seeking to rebut Foucault’s influential theory, Ancel (1981: 117) mentions him when stressing “the influence of an ideology derived from Marxism” permeating critiques of criminal justice. To Ancel (1981: 328–329), Foucault’s views reflected: ideological assumptions according to which it is possible to build, instead of the present (capitalist) society, a society where men, free and equal, could behave in a spontaneous manner, which would make disappear at the same time marginalization, deviance, and criminality. Ancel suggested that the critics’ priority then becomes to “stand against ‘the ideology of rehabilitation’” (1981: 328–329). By the late 1970s, Foucault’s followers had actually begun challenging Ancel’s theories on these grounds (Dreyfus, 2010: 185–188, 192). Discipline and Punish had certainly repudiated Ancel’s prominent theory, albeit between the lines, as Foucault did not cite Ancel. In Foucault’s eyes, penality had not evolved toward greater humanity since the Enlightenment. At most the change was cosmetic, a ruse to hide a sophisticated apparatus of repression under which the lower classes were purportedly incarcerated for their own good in the name of illusory rehabilitation. Changing social conditions no longer tolerated flagrant corporal punishment like the agony inflicted on the regicide Damiens in 1757, with which Foucault memorably begins Discipline and Punish. Hence, the ruling classes strategized more insidious means of control with the birth of modern prisons and their depersonalized, routinized, and regimented ways of overseeing the lower classes in an allegedly benevolent, humanistic spirit. The evolution toward individualized punishment, which Ancel celebrated, represented to Foucault a new technology of power. Psychiatrists, psychologists, and other experts would strategically evaluate the character of those thrust into the penal machinery. Foucault was not alone in expressing such concerns. In The Stranger, Camus (1942b) notably painted a law less focused on the crime than the criminal’s character. The defense counsel of Meursault, the antihero who committed murder days after his mother’s funeral, reveals his exasperation: “Come now, is my client on trial for [coldly] burying his mother or for killing a man?” The prosecutor replies that: only someone with the naiveté of his esteemed colleague could fail to appreciate that between these two sets of facts existed a profound, fundamental, and tragic relationship. “Indeed,” he loudly exclaimed, “I accuse this man of burying his mother with crime in his heart!” (1942b: 96) If the humanist Camus depicted criminal law as an intrusive and repressive apparatus, Foucault was far more iconoclastic in Discipline and Punish, casting humanism as nothing more than a means of legitimizing power. The psychological or psychiatric evaluation of prisoners helps us tie Discipline and Punish to Foucault’s wider corpus. As Bernard Harcourt (2020: 113) notes, the prison “produces a truth about the delinquent”, offering a parallel with Foucault’s Louvain lectures (1981c) on how the medieval religious practice of extracting avowals from wrongdoers influenced penality. To Foucault, the development of modern individualism discussed above was not synonymous with growing liberty, but with the state’s domination of the individual (Ferry and Renaut, 1985). Critics found he depicted “a kind of Whig history in reverse—a history, in spite of itself, of The Rise of Unfreedom” (Geertz, 1978). Diverse thinkers have comparably equated the idea of progress since the Enlightenment with a discours de légitimation—a rhetoric aiming to rationalize social injustice. Echoing the incredulity of contemporary French intellectuals toward such metanarratives (Lyotard, 1979; Sartre, 1965), Foucault became the key philosopher of skepticism toward progress in the penal sphere. As such, Discipline and Punish implicitly dismissed Ancel and explicitly dismissed Émile Durkheim, who had authored another leading theory on the gradual humanization of punishment (Durkheim, 1900; Foucault, 1975: 23). Ancel’s aforementioned critique of Foucault was therefore not disinterested. In the third edition of La Défense sociale nouvelle he sought to respond to diverse critics, some of whom accused him of “communism” for being excessively liberal, whereas others equated him with “American capitalism” for being insufficiently radical (1981: 304). After all, Ancel wrote during the Cold War in a climate where many expected thinkers to pick a side. Ancel evoked this context when suggesting that Foucault was on the far-left of the political spectrum and that his philosophy had Marxist roots (1981: 117, 328–329). Foucault’s words after visiting Attica, the infamous American prison, tended to exemplify Ancel’s observation. Foucault had then insisted that “the problem is, then, to find out what role capitalism has its penal system play”, including “in the class struggle”. He added that the distinction between ordinary and political prisoners was illusory (1972c: 28, 31–32). In fact, the detention of Maoist comrades had drawn Foucault toward prisoners’ rights in France and led him to become a founder of the Groupe d’information des prisons, an activist group discussed below, before crafting Discipline and Punish (Miller, 1993).

#### Err aff – existing barriers to victim advocacy means we ought minimize restrictions for victims to access justice, such as a less victim harming alternative to trials

McDonald 25 [Carmen McDonald, attorney and the Executive Director of the Survivor Justice Center and Public Voices Fellow of the OpEdProject, 2-14-2025, "The Burden of Survival and Pursuing Justice", Fulcrum, https://thefulcrum.us/rule-of-law/barriers-to-access-to-justice]/Kankee

My neighbor was brutally attacked outside of his home one Friday night, when another resident, blasting loud music, yelled out his accusations, “You have been going through my things, you have been breaking into my home.” My neighbor gently told this man, “No, I have not gone through your things. Please lower your music.” His reply was a beating, fists that did great damage. His wife was in the driveway, frozen. Horrified. Scared. She called the police and ran to her husband as the man fled. My neighbor’s next memory begins at the County Hospital. His nose and several ribs were broken. He’s home now, bruised, bandaged—and still terrified. He asked why the police hadn’t acted. He had to call the police after the assault. He had to send them photos of his broken bones. The crime is a felony, but the police have no leads. I told my neighbor that this is too familiar in my field of work. When you are a victim, you become everything: The survivor, the patient, the detective, the crime scene investigator, the narrator. The police asked him, why didn’t you have a camera? Why didn’t you let your dog out? Classic victim blaming. Eventually, when he had to identify possible suspects, he was stressed: Could he recognize his attacker? Filing a civil restraining order was impossible because the police had not yet investigated the incident—or identified a suspect. Welcome to my work, I said. Welcome to my world. It is exhausting to be a victim. Having to fight for your own survival is a tale as old as time. I hear it every day, and not just at work. My neighbor’s story is far from unique. A teenager I know was the victim of a fight at school; her parents pushed the school for accommodations after the school did nothing. When I was in college, a friend was assaulted by her doctor. Years later, the burden to testify, to come forward, to try to stop him, was hers. Another friend suffered a beating outside of his place of employment. He had to track down security camera footage just to get the police to pay attention. I know because I have practiced domestic violence law since 2004. Over the decades, the story is the same, always what the victim could or should have done differently. Victim-blaming in the public sphere is brutal. Imagine when it happens at home. By your loved ones. Or by those who claim to love you. The blaming magnifies. “Why didn’t you speak up?” They ask. “Why didn’t you tell anyone? Why did you marry that person?” Why why why. A big part of our work is teaching survivors that the system is not fair. In the pursuit of justice, the system can hurt you more. Even in a crisis, you have to be your own advocate. Plenty of information intended for people who experience domestic violence was applicable to my neighbor’s situation. I shared all the information I had on victim restitution, relocation assistance, security cameras, how to advocate with law enforcement, how to file a restraining order, and more. As helpful as the information might be, it forced him to take the time that he should have used for healing from the physical and emotional damage to become his own advocate. Even my offer rang hollow because all my well-intentioned advice shifted the burden from the authorities to my neighbor, the victim. I am proud to lead an organization that puts survivors first—but even I unintentionally burdened a victim, who should have been supported during a difficult time. We can and must remove barriers to accessing justice. During President Trump’s first administration, the failure to pursue white-collar crimes and cuts in the Victims of Crime Act (VOCA) and related government funding had a massive impact on victims of crime, who now find it much more difficult to get access to legal aid. The Crime Victims Fund (CVF) did not pass the committee last session. We have another opportunity now to secure much-needed funding for victims of crime. Call or email your representatives now and urge them to pass this vital legislation. A similar law was enacted in California in 2024 to address the reduction in federal funding. It came into effect after a group of advocates urged their legislators to find funding to continue critical services—like keeping shelters and other related services for survivors running. Other states can use a similar model in the meantime. Congress must enact this law to continue to protect survivors. On February 7, 2025, the Office on Violence Against Women, withdrew funding opportunities that had previously been available -- sustaining the toxic trend of blaming the victim.

#### The neg humanist and progressive project reinforces the power carceral state

Taylor 25 [Chloë Taylor, Professor of Women’s and Gender Studies at the University of Alberta, 2025, "8 Foucault and Prison Abolition,” Bristol University Press, https://www-jstor-org.ezproxy.library.unlv.edu/stable/jj.12348235.13?seq=1]/Kankee

Prison reform extends the power of the prison Foucault’s argument that prison reform merely extends the power of the prison has also been central to prison abolition activism. Davis (2004) reiterates Foucault’s point when she observes that there is a ‘seemingly unbreakable link between prison reform and prison development’ which ‘has created a situation in which progress in prison reform has tended to render the prison more impermeable to change and has resulted in bigger, and what are considered “better”, prisons’ (Davis and Rodriguez, 2004). Two examples will be discussed here. Nineteenth-century women reformers protested the incarceration of women in the same brutal institutions as men and their activism resulted in the construction of separate prisons for women (Smith, 2010: 266). However, in these new institutions women were often incarcerated for longer than they had been in men’s prisons and the construction of special institutions for women enabled the incarceration of more women than before. Feminist prison reform again led to a growth in women’s incarceration in the late 20th century in Canada. Until the 1990s, the situation of federally sentenced women in Canada was the subject of frequent political critique. There existed only one prison for such women in the country – the infamous Prison for Women in Kingston – which meant that most federally sentenced women were incarcerated far from their communities in an institution deemed ‘unfit for bears, much less women’ (Hayman, 2006: 19). Feminist prison reforms resulted in the building of numerous new prisons for women across the country: prisons whose design was informed by consultations with members of the Elizabeth Fry Society and Indigenous people, including formerly incarcerated Indigenous women. These prisons were built with the genuine intention of empowering women prisoners as well as to situate them closer to their families, and even included a ‘Healing Lodge’ for Indigenous women prisoners. The new prisons were initially characterized by cottagestyle housing, an absence of conspicuous fencing and bars, and female staff who were trained to be closer to therapists and friends than correctional officers. However, in a matter of years, the new prisons reverted to the carceral models, logics and practices of the institution they had replaced. As a result, Canada now has vastly more beds for federally sentenced women than before, which it has been quick to fill (Hannah-Moffat and Shaw, 2000; Hayman, 2006; Montford, 2015). Turning to a second example, legislation aimed at addressing the problem of prison rape in the US resulted in the 2003 Prison Rape Elimination Act (PREA). This Act has provided prisoners with little protection from rape and few legal resources in the aftermath of rape, but has resulted in more intense conditions of confinement (solitary confinement) for those whom guards deem at risk of sexual assault (often LGBTQ inmates) or of committing sexual assault (often racialized prisoners) (Arkles, 2014, 2015). The PREA has also led to extensions of prison sentences for those whom guards deem guilty of sexual misconduct, although this misconduct often involves consensual sexual contact between prisoners or transgressive gender expression (Arkles, 2014, 2015). LGBTQ prisoners are at particular risk of receiving PREA violations for consensual sexual activities. There is no indication that the PREA has reduced incidents of sexual assault, but there is considerable evidence that it has been used by prison staff to increase control of sexual and gender expression in prisons. The PREA has earmarked no money for survivors of sexual violence, yet millions of PREA dollars have flowed into funding ‘personnel, training, technical assistance, data collection, and equipment to prevent and prosecute prisoner rape’ (Arkles, 2015: 105). As Jason Lydon (2016: 64) writes: ‘This well-intentioned reform effort by progressives has been turned into a tool of increased control of sex and sexuality in prison with little evidence that any of the PREA mandates actually reduce incidents of sexual harm.’ Because, as in these examples, prison reform consistently serves to expand and reinforce the power and logics of the carceral state, Gilmore (2015) has argued that the only kinds of reforms that prison abolitionists should strive for are ‘non-reformist reforms’. These are reforms that address the abuses of the prison without allocating any new funds, resources or personnel to prisons and without building any new institutions. Examples of nonreformist reforms are decriminalizing sex work and drug possession; getting better food, a mail service, weekend passes and conjugal visits for prisoners, and compassionate release for ill, elderly and dying prisoners. None of these measures abolishes or even fundamentally challenges the prison, but they either reduce its use or improve the welfare of those who are currently in prisons without extending carceral power or logics. By engaging only in nonreformist reforms, activists strive to help some people avoid prison and to improve the conditions of those who are currently in prisons without reinforcing an institution that, ultimately, they hope to eliminate. Abolishing prisons alone is ineffective

### Contention 2: Trials Bad (Wait Times)

#### Court clog increases pretrial detention which is regressive against poor minorities, causing the mass pretrial lock-up of black and brown folk who cannot afford to leave.

Hessick 21 [Carissa Byrne Hessick, Ransdell Distinguished Professor of Law at the University of North Carolina School of Law, where she also serves as the director of the Prosecutors and Politics Project, 2021, “Punishment Without Trial: Why Plea Bargaining Is a Bad Deal,” Abrams Press, ISBN: 9781419750304]/Kankee

Like José, Jerome had been arrested. Neither José nor Jerome had been found guilty of committing a crime. Yet they were being held in jail along with people who had already been convicted and were serving their sentences. For José, the prosecutor was offering a plea bargain where the court would recognize that the time José had already spent in jail was punishment enough for what he had done. These sorts of sentences are so common that they have a nickname: “time served.” Prosecutors were not offering Jerome a plea to time served; the crime he was accused of was too serious. But if Jerome had been found guilty at trial, the time he spent in jail before the trial would have been subtracted from any prison sentence that he received. This is also a common sentencing practice called “credit for time served.” As these common practices recognize, the government had already begun to punish José and Jerome even though they hadn’t been convicted. It is hard to understand why we allow the government to keep people in jail when they haven’t been convicted of a crime. After all, Jerome’s case teaches us that at least some of the people in jail are innocent. If the state hadn’t dismissed the charges against him, Jerome would have been acquitted at trial. That’s why we have trials: to sort out who is guilty and who is not. And before that trial happens or before a person pleads guilty, we have to assume that they are innocent. Lawyers call this idea the “presumption of innocence.” It is the same idea behind the common expression “innocent until proven guilty.” So why do we allow the state to punish an innocent man like Jerome? Why do we let them keep José in jail before proving that he is guilty? Why do we let them punish the hundreds of thousands of people who sit in jail every year and who haven’t yet been convicted? Well, the people in criminal justice system don’t say that they are punishing people before trial. They say that they are merely detaining these people, not punishing them. But that seems like little more than wordplay: people like José and Jerome are being treated no differently than the people in jail who have been convicted. That’s why, if they are actually convicted, their sentencing judges will say that the time they spent in jail counts as punishment. Of course, the time a person spends sitting in jail doesn’t magically transform into punishment just because she is later convicted. Yet that’s what judges say the law does: they say sitting in jail isn’t punishment before someone is convicted; it isn’t punishment if the charges are dropped or the person is acquitted; but it retroactively becomes punishment if the person pleads guilty or is convicted at trial. Why do we let our government officials use wordplay and legal fictions to punish people before they have been proven guilty? And how could this happen in a country where we say that everyone is innocent until proven guilty? The truth is that we didn’t used to let the government detain so many people before trial. When our constitution was written, the assumption was that someone like José, who was accused of a minor crime, could not have been detained before trial. And for the first century after the Constitution was adopted, someone like Jerome also would have been released. Because Jerome’s crime was more serious, a judge probably would have required him or someone close to him to provide a financial guarantee that Jerome would show up in court for his trial. For example, Jerome might have had to pledge the deed to his house, which would have been forfeited to the court if he had failed to show up for trial. Or if Jerome didn’t own a house, then a wealthier relative would have had to agree to forfeit some property or money if Jerome didn’t show. But unless there was some reason to believe that Jerome would not come back to court, the judge could not have just refused to let Jerome out of jail before his trial. José’s case was so minor that he probably would not even have been arrested. And even if he had been arrested, he would have been released as a matter of course. He certainly would not have had to plea bargain with the prosecution in order to get out of jail. To be clear, there were exceptions to the rule that people had to be released. People who were charged with capital crimes were denied the right to bail. The theory was that a person facing the possibility of the death penalty was more likely to run away; they would run because losing their property or the property of their friends and family is better than the risk of being executed. Historically, a number of crimes—not just murder—were capital crimes. But until the middle of the twentieth century, making someone stay in jail until her trial was still the exception rather than the rule. The right to be released from custody and remain free before trial was considered an important right by the people who wrote our constitution. They were familiar with what happened in England, where people had to fight to make sure that prisoners could be released. That right not to be detained before trial was included in the Magna Carta, and Parliament passed a famous law to stop court officials from setting the financial guarantees so high that people couldn’t meet them. To avoid these problems and abuses in America, Congress passed a law when it first met in 1789 that ensured all defendants were entitled to release pretrial except for those facing the death penalty. Two years later, when the Bill of Rights was adopted, it included the directive that “excessive bail shall not be required.” The right of defendants to be released before trial grew weaker in the mid-twentieth century. In the 1940s the federal criminal justice system adopted a series of procedural rules. Those rules did not frame the question of pretrial release just in terms of whether the defendant was likely to appear at trial. Instead, the rule told judges to consider the crime the defendant was charged with, the strength of the evidence against him, the defendant’s financial situation, and his character in setting the financial guarantee. These new factors didn’t make sense in a system that presumed everyone innocent until proven guilty. At the same time, judges started setting high bail amounts that people couldn’t possibly pay, presumably because the judges didn’t want to release the people at all. Congress intervened in 1966. It passed a law trying to make sure that judges didn’t set bail amounts too high and that judges didn’t use pretrial detention to keep defendants from committing new crimes while awaiting trial. But the 1966 law also validated the criminal procedure rules, telling judges to consider what crimes defendants were accused of committing and to weigh the evidence against them when setting the conditions of release on bail. The 1966 law also gave judges the authority to deny bail altogether in noncapital cases if they decided that the defendants were unlikely to appear for future court dates. Although it endorsed the idea that judges should weigh evidence and could deny bail even in noncapital cases, all told, the 1966 law still favored releasing defendants before trial. That changed in the 1980s. In 1984, Congress passed a new bail law that told judges to consider whether it was safe to release a defendant before trial. If the judge thought that a defendant posed a danger to the community, then the judge was instructed to keep the defendant in jail rather than set any conditions for bail. The law also said that judges should assume defendants accused of many different types of noncapital crimes could not be safely released pending trial. This flipped the presumption of innocence on its head by presuming that a person accused of a crime should be detained and shifting the burden to justify release onto the defendant. This new bail law was part of a larger set of federal laws aimed at cracking down on crime, which had surged in the 1960s and 1970s. Importantly, the Supreme Court signed off on these new bail laws and validated using bail to restore “law and order.” It decided that the Constitution’s rule against excessive bail didn’t prevent the courts from refusing to set any bail whatsoever and just keep defendants in jail before trial. And it also blessed Congress’s decision to make “dangerousness” part of the bail decision. In short, the justices allowed the government to dramatically change the balance of power before trial. Prosecutors could keep defendants in jail for extended periods of time without having to convince juries of anything; all they had to do was convince the judge that the defendants probably committed the crimes or that they were likely to commit more crimes if they were released back into their communities while awaiting trial. The people who wrote the Constitution expected that most people accused of a crime would be set free rather than held in jail pending trial. But two hundred years later Congress and the courts had largely abandoned the view of pretrial detention as an exception rather than the rule. Jail was presumed for a lot of crimes, and judges were explicitly invited to short- circuit the presumption of innocence and weigh evidence themselves. Then—remarkably—things got even worse. In recent decades more and more people have been held in jail before being convicted. This increase in pretrial detention has a few different causes. First, more people are getting brought to jail in the first place. In 1984, the year that Congress passed its second bail reform law, just over 50 percent of all arrests ended in someone being brought to jail. Everyone else was simply given a summons to appear in court and remained free until that date. By 2012, 95 percent of arrests resulted in the suspect being brought to jail. Those numbers are remarkable not only because of the large increase but also because crime rates dropped significantly from 1984 to 2012. Even though there was less crime, police brought more people to jail. Another reason that pretrial detention has increased is because it is now more difficult for people to get out of jail while waiting for trial. In 1990, only one-half of defendants had to provide a financial guarantee to be released from jail. The rest were “released on their own recognizance”—that is, the courts trusted them to come back without having to give a financial guarantee. By 2004, nearly two-thirds of defendants were required to provide a financial guarantee. Bail amounts have also increased. From 1990 to 2004, the average amount of bail in a felony case increased more than 40 percent—from $38,000 to $55,400. Even misdemeanor defendants are sometimes required to pay bail amounts of up to $20,000 to be released before trial. The result of these changes has been devastating. Nearly half a million people sit in jail every day in the United States because they cannot make bail. Many of those cases involve poor people accused of misdemeanor crimes who simply do not have the financial resources to pay even relatively modest financial guarantees. In New York City, one study found that more than 80 percent of defendants charged with low-level crimes were unable to make bail that was set at less than $500. Those people—people who were presumed innocent and accused only of a minor crime—were stuck in jail because they were poor. \* \* \* \* \* It might not seem like a bad idea to keep people who have committed crimes or people who are likely to commit crimes in jail. After all, people should be punished when they commit crimes, and one reason to punish them is to keep the rest of us safe. But even it if is a good idea to keep some people in jail before trial, our system is very unfair in how it decides who stays in jail and who is let out. The decisions are made quickly—sometimes without a defense lawyer and sometimes without a real judge. And we also treat rich people and poor people differently, allowing rich people to buy their release and forcing poor people to stay in jail. It’s hard to say that what happens at bail hearings qualifies as “due process of law,” which the Constitution guarantees before anyone is deprived of their liberty. It’s also hard to say that rich and poor people are getting the “equal protection of the laws,” which the Constitution also guarantees. Because of this, legal advocacy groups have been challenging bail practices across the country. One of those groups—Civil Rights Corps, an organization devoted to challenging systemic injustice in the American legal system—had a big win in Houston, Texas. \* \* \* \* \* In March of 2016, Elizabeth Rossi traveled to Houston. She went to the Harris County Criminal Justice Center, a large building in downtown Houston that houses much of the county’s criminal justice system. She entered the building, went through the metal detector, and asked for directions to the courtroom where bail hearings take place. It wasn’t at all obvious where the courtroom was—she had to walk through people’s offices to get there—but eventually she found it and took a seat in the back of the courtroom. At the front of the courtroom was a hearing officer—not a judge, but a person who had been selected by the judges in the county—a prosecutor, and a representative from pretrial services, the agency responsible for helping the courts with the logistics of detaining and releasing defendants who are awaiting trial. There was also a big television screen in the courtroom. Every couple of hours, the television would be turned on, and Elizabeth could see a couple of sheriff’s deputies and anywhere from twenty to forty- five people. Some of those people were wearing orange jumpsuits; others were still in their street clothes. All of them had been arrested within the past day or so. Elizabeth watched as those people were called, one by one, to stand in a red square that had been painted on the floor. None of the people had a lawyer. They were in the county jail, and rather than take the time and effort to bring these people to the courtroom, county officials decided to conduct their bail hearings from the jail itself via a video link. The idea that officials wanted to avoid time and effort was evident from more than just the fact that these hearings were held on a television rather than in person. The hearings themselves were incredibly perfunctory. “They lasted anywhere from twenty seconds to maybe a minute and a half—three minutes at the outside,” Elizabeth calculated. “The hearing officer would make a finding of probable cause, basically confirm the bail amount that was printed on the court’s bail schedule, and ask the person if they wanted a lawyer to be appointed for their case. And then they would move on to the next person. It was basically a cattle call, one person after the next.” Elizabeth sat in the back of the courtroom for several days watching these bail hearings. She also spent some time in the courtrooms of judges who handle misdemeanor cases—low-level crimes that carry punishments of less than a year in jail. She noticed that the people she saw on television in their bail hearings would end up in the misdemeanor courtrooms a day or two later. “I would see the exact same people coming through the courtrooms,” she remembered. “They were shackled together in orange jumpsuits to enter guilty pleas. And the sentences they received were almost always to time served.” Elizabeth took detailed notes of what she saw in these courtrooms. She saw hearing officers deny personal bonds to people because they were homeless and to people who had committed crimes of poverty, like sleeping at a bus stop or asking for change outside of a gas station. She saw the officers treat the people appearing before them very rudely, telling them to “shut up” and “stop talking” And doubling people’s bail if they thought the person was being disrespectful. Elizabeth took all of these notes back with her to Washington, D.C. She used to be a public defender, but she had left that job to join a new civil rights organization. Civil Rights Corps had been filing civil rights lawsuits against small towns primarily in the South. Those towns were keeping poor people in jail for weeks on low-level offenses just because they couldn’t afford the bail amounts that had been set by the judges. Judges don’t necessarily agree whether it’s constitutional to keep people in jail just because they can’t afford bail. The Supreme Court has said that poor people can’t be sent to jail as punishment simply because they are unable to pay their fines, but the justices haven’t addressed whether people can be detained before trial because they are too poor to pay bail. State courts and lower federal courts are split on the issue. Nonetheless, when Elizabeth’s colleagues brought their early bail lawsuits, they would win because these towns’ practices were incredibly difficult to defend: it just doesn’t seems wrong to keep poor people in jail for weeks at a time for nuisance crimes like jaywalking and public intoxication when people with access to a few hundred dollars can go home. Having racked up some wins in these small towns, Civil Rights Corps was looking for someplace to test their litigation strategy on a larger scale. Elizabeth spent months doing research online and speaking to grassroots organizations. She made the trip to Houston to see whether it might be the right place for their lawsuit. Her investigation convinced them that it was, and so they filed a lawsuit against the sheriff, the county, and the hearing officers. The lawsuit claimed that these officials were violating the civil rights of misdemeanor defendants who were too poor to pay the bail amounts that the hearing officers were setting. The hearing officers in Houston were following something called a bail schedule—a list of suggested dollar amounts for each crime that defendants must pay before a judge will agree to release them. Bail schedules are quite common. The idea behind them is that judges shouldn’t be setting different bail amounts for people accused of the same crime because that wouldn’t seem fair. But bail schedules themselves aren’t particularly fair. For one thing, bail schedules often set bail amounts incredibly high, even for crimes that don’t pose any danger to the public. For example, the 2021 bail schedule in Los Angeles suggests that judges set bail at $25,000 for bribery and $50,000 for campaign finance violations. Bail schedules are also unfair because they set the same amount for everyone rather than different amounts based on a defendant’s ability to pay or the likelihood that they would come to court without paying bail. Elizabeth found that the hearing officers in Houston were blindly following the bail schedule instead of asking defendants about their ability to pay. In fact, during her investigation, Elizabeth interviewed several hearing officers and discovered that they weren’t even allowed to deviate from the bail schedule at these bail hearings. When Elizabeth spoke with me about the lawsuit in Houston, she emphasized both the systemic and the individual impact of the bail practices. She explained that Civil Rights Corps chose to litigate in Harris County (where Houston is located) because it is a huge system. It has a population of more than 4.5 million people, making it the third largest county in the country. Around 45,000 people are arrested every year in the county on misdemeanor charges, many of them too poor to pay bail. Elizabeth also stressed the very human problems faced by their clients: Maranda ODonnell, who had been arrested for driving with a suspended license, was told that she could return home immediately, but only if she paid money bail of $2,500. Loetha McGruder was arrested for drug possession and told she had to pay $5,000 or she would be detained. Robert Ryan Ford was arrested for shoplifting from Walmart and was also told that he had to pay $5,000 in order to be released from jail. All of Elizabeth’s clients were poor. Even those who had jobs had no hope of being able to come up with that sort of money. Yet none of them were ever asked if they could afford to pay these bail amounts. And there were hundreds of other people in the Harris County jails just like them—people who had been arrested for low-level crimes and who could have been released immediately only if they could pay the amount on the bail schedule. Because Elizabeth’s clients couldn’t pay, they ended up back in the courtroom a day or two later, pleading guilty. If they didn’t plead guilty, they’d have to sit in jail for weeks or even months, waiting for their trials to be scheduled. The desire to be free—to go home to their families and their jobs—overwhelmed any desire to invoke their right to a trial. Elizabeth and her colleagues at Civil Rights Corps are not the only people to file a bail lawsuit. Nor were they the only organization drawing attention to pretrial detention in Houston. But their lawsuit had a lasting impact. The federal judge in the lawsuit held a hearing at which Elizabeth and her colleagues presented mountains of evidence about the unconstitutionality of the Houston bail practices. “The hearing was hugely cathartic. Community members packed the courtroom. It was the first time that the money bail system had been tested in open court—the first time that the rationality of it, the effectiveness of it, and the harms that it causes had been aired in any forum even approximating this and with such a significant level of time, investment, and attention,” Elizabeth said. She explained that the data analysis, court testimony, and the bail hearing videos that were presented at the hearing “changed the way people thought about what the system is doing.” It was, as Elizabeth put it, an opportunity to “put money bail on trial.” While she was at the hearing, she kept thinking about all of the people whom she saw standing in a red square during their bail hearings and who then got sent to jail for days or weeks: “It felt like we were putting the judges, the other defendants, and the whole system sort of in that red square in a way— holding them up to scrutiny.” After the hearing, the federal judge granted them something called a preliminary injunction—a ruling that allows a judge to require or prohibit certain actions before a trial takes place. In order to grant a preliminary injunction, a judge has to find that a plaintiff (the person who brought the lawsuit) is likely to win at trial and that there will be irreparable damage or injury if the judge waits until trial to address the conduct underlying the lawsuit. The preliminary injunction required county officials to determine whether every person arrested for a misdemeanor was able to pay bail, and it ordered them to release everyone who could not pay and who would have been released if they had been able to. Harris County officials fought hard against the judge’s decision to grant the preliminary injunction. They appealed and managed to get some of the important parts of the judge’s decision overruled. The case was scheduled to go to trial in December 2018 when something momentous happened. The November 2018 elections gave Democrats a majority of county commissioners, and all of the Republican judges lost their reelection campaigns—a result that some saw as a “reckoning” for what they had done in the bail system. These new officials entered into settlement negotiations with Elizabeth and her colleagues at Civil Rights Corps. Those negotiations resulted in a consent decree—basically a contract that the parties could enforce through the federal courts. That consent decree made sweeping changes to the misdemeanor bail system in Houston. The Houston bail litigation received a lot of national media attention. It also created an important precedent that people can’t be detained pretrial simply because they are too poor to pay their bail. But despite the attention and the precedent, Elizabeth was very cognizant of the limitations of their win. The federal court had criticized specific legal aspects of the Houston system—the rigid bail schedule and the failure to ask defendants about their financial ability to pay bail. “But if you take away the bail schedule, without other reforms and significant culture change, there is a risk that the system will revert to the same levels of pretrial detention,” she noted. For that reason, the consent decree includes strict limitations on the use of money bail, which can no longer be used as a condition of release in most misdemeanor cases, as well as other provisions that are intended to change the way that the courts operate. She emphasized that money bail is not the fundamental problem. “You know, pretrial detention is the problem—just the number of people we have in jail and the fact that they are overwhelmingly Black or Brown.” I asked Elizabeth if she had seen a change in other cities and counties after the Civil Rights Corps win in Houston. I was curious about this because I’d heard defense attorneys here in North Carolina warn judges and prosecutors that local bail practices could draw a civil rights lawsuit from Elizabeth and her colleagues. “Yeah, you do see jurisdictions trying to differentiate themselves from Houston and Harris County. But the fact is that they’re all—or at least most places across the country are—doing exactly the same thing. They are doing it in one way or another, but the result is that way too many people are detained pretrial.” \* \* \* \* \* “You can’t understand the criminal justice system and how we arrived at mass incarceration unless you understand the story of bail,” Shima Baradaran Baughman told me. Shima is a law professor and one of the country’s leading experts on bail and pretrial detention. Shima’s interest in bail grew out of a Fulbright fellowship to Malawi. Knowing that she would have the opportunity to conduct research while in Malawi, Shima spent some time before her Fulbright trying to identify what major criminal justice problems were facing the landlocked African nation. She discovered that Malawi had a serious problem with pretrial detention. One man had been detained for seventeen years before trial without charges, and there were many other people who had been detained for a year or more. During her two years in Malawi, she not only did research on the country’s pretrial detention system, but she also did legal aid work. At one point her work made the newspapers because she was able to get fifty people at once released on bail pending trial. When Shima returned to the United States, she was curious about how the bail system she studied in Malawi compared to the bail systems in the United States. She began by looking at the journals where academic articles about law are published, and she found that the last article written about bail was published in 1990. When she started updating the research in 2011, Shima discovered the staggering increase in pretrial detention that began in the 1990s. In the ten years since she has been writing about bail, many other law professors have begun writing on the topic, and legal advocacy groups like Civil Rights Corps have been filing lawsuits to challenge pretrial detention practices across the country. Shima’s research shows the problems with the harsh punishment in America aren’t just about mandatory minimums and lengthy sentences; those problems begin the moment that someone is arrested. “After arrest, bail is the most important decision that is made. Those two decisions—arrest and bail—are the most important when it comes to mass incarceration and to fixing the racial inequities that we see,” she explained. She cited a series of studies from the past fifty years that showed that Black defendants are more likely to be arrested and detained before trial than White defendants. Studies also show that both Black and Hispanic defendants, as a group, have to pay higher bail amounts to be released than White defendants charged with the same crimes. Shima knows a lot about the data behind pretrial detention because she worked with an economist to analyze data about recidivism—the rates at which people who have committed crimes in the past go on to commit new crimes in the future. They found that judges were detaining large numbers of people in jail who were unlikely to commit new crimes, especially not violent crimes. Shima and the economist concluded that judges could safely release many more people without increasing crime in those communities. Keeping those people in jail was not only harmful to the people detained but also expensive. Taxpayers were paying millions of dollars to keep people locked up—money that could be spent in much better ways because it wasn’t necessary to keep people safe. In recent years, a number of cities and states have adopted “risk assessment instruments,” which are supposed to help judges make more consistent and more accurate decisions about who should be detained pretrial. A risk assessment instrument is basically a questionnaire. Its questions are designed to estimate how likely a person is to commit a crime if released before trial using data about past arrests. While Shima thinks that using data-driven approaches can lead to better decisions, she has concerns about the risk assessment tools that are currently available She analyzed the various instruments that cities and counties are using and concluded that “they are mostly getting it wrong”—that is to say, the instruments weren’t well designed to actually identify those few people who pose a real risk of violence if released. As a result, the risk instruments currently in use are going to continue to keep people in jail who aren’t dangerous. In addition, those risk instruments also unfairly treat Black defendants worse than White defendants. “Because a lot of these instruments include questions like ‘Do you own a home?’ or ‘Do you have a cell phone?’ they end up having racially disproportionate impacts. I mean, most Black people don’t own a home. Whites are ten times more likely to own a home than Blacks. We know that Whites are more likely to own a home than Blacks, so why would you put that in a bail release calculation? Do you have to own a home in order to show up at a court hearing? Of course not. So we need to stop asking questions about socioeconomic status in bail questionnaires, especially since we know that those questions will harm people of color.” Elizabeth Rossi said that these sorts of questions were being used in Houston when Civil Rights Corps brought their bail lawsuit. “The background questions included things like ‘Do you have a car?’ and ‘Do you have a landline.’ And there were also questions about who lived in your household. These questions were all just really questions about poverty. And so the more indicators of poverty you have, the higher your risk score is, and the more likely you have to pay a high bail or be detained.” Elizabeth noted that this old risk assessment instrument was abandoned and replaced with a new instrument from the Arnold Foundation during their litigation. But Elizabeth wasn’t convinced that the new instrument was something to celebrate, saying that even facially neutral risk assessment instruments rely on data from a system that is deeply racist. If the data being used to create a risk assessment instrument comes from a system that disproportionately targets, arrests, and convicts poor people and people of color, then we should expect that data—and any instrument that comes from that data—to be skewed. Whatever the problems associated with risk assessments, those instruments didn’t create the pretrial detention problem in this country. The dramatic increase in people held pretrial and the financial guarantees began many years before cities, counties, and states started using risk assessment instruments. The dramatic increase also can’t be explained by the law-and- order crackdown that took place in the 1980s. Any changes attributable to the new focus on danger would have made its way through the system years before the increase that occurred in the 1990s and 2000s.

#### More pre-trial detention increase exploitation by bail-bond industry

Hessick 21 [Carissa Byrne Hessick, Ransdell Distinguished Professor of Law at the University of North Carolina School of Law, where she also serves as the director of the Prosecutors and Politics Project, 2021, “Punishment Without Trial: Why Plea Bargaining Is a Bad Deal,” Abrams Press, ISBN: 9781419750304]/Kankee

So I asked Shima: What changed? “It took me a few years to figure this out,” she replied. “It wasn’t until I did a deeper dive into money bail practices that I discovered the role that the bail industry played.” The bail bond industry is made up of small companies that help provide the financial guarantee for defendants who are in jail before trial. Because most people who are arrested can’t afford to pay the bail amount set by the judge, bail companies will cover the bail for defendants in return for a fee— usually 10 to 15 percent of the bail amount. If the defendant doesn’t show up for a court appearance, then the bail bondsman might be required to forfeit the bail amount. But the defendant doesn’t get the fee back from the bail bondsman if she shows up for all of her court appearances. Even if the defendant is acquitted at trial or the prosecutor ultimately dismisses the charges, the defendant still owes the bail bondsman the fee. The bail industry is incredibly profitable. It makes an estimated $2 billion per year. And although the businesses that actually post bail for defendants tend to be small, the insurance companies that underwrite those small companies are quite big. They have a significant economic interest in having more cases where money bail is required and in having those bail amounts be higher. Sometimes they have even been successful in convincing courts and other public officials not to actually collect the money that is forfeited when a defendant doesn’t show up for a court date. “The bail industry is a multibillion-dollar industry. And the bail insurance industry is their lobbying arm,” Shima explained. “In the 1990s the bail insurance industry designed a multijurisdictional campaign to convince people in state and local governments to make decisions that would be helpful for the bail industry. They gave money to people running for state legislature, for sheriff, for judge, and for local prosecutor. They did this because they wanted to change the default from having defendants released on their own recognizance to paying money bail instead. “And they were so successful,” she continued. “If you look from 1990 on, we’ve dramatically increased reliance on money bail. Now, in the United States, money bail is the most common way for a defendant to be released, while it used to be release on recognizance.” I pushed back a bit on the story that Shima was telling. I haven’t found a lot of bail bond–related money in my own research on campaign contributions in local prosecutor elections. I’m generally somewhat skeptical of claims that the problems with the criminal justice system can be traced to the profit motive. For example, a number of people insist that the problems of mass incarceration are attributable to private prisons. But in reality, private prisons house less than 10 percent of the country’s prisoners. And the incarceration rates in states that have private prisons don’t appear to be growing any faster than states without them. But Shima pushed back as well. “It actually is the profit motive,” she insisted. She pointed to all of the major legal groups, including the American Bar Association, that have come out strongly against the concept of money bail. The groups have come out against money bail because it literally treats people differently depending on how much money they have—something that everyone knows is unfair. But the bail bond industry has repeatedly blocked attempts at bail reform, spending millions of dollars in campaign contributions and to lobby state lawmakers. To give me a sense of how powerful the bail bond industry is, Shima spoke about her own experience with state bail reform. A few years ago, she was invited to a meeting of local officials and stakeholders who were looking to reform the bail system. Sitting around the table with public officials and experts like Shima was a representative of the bail lobby. Shima was very surprised to see the lobbyist, who had been invited as a “stakeholder.” “I’m thinking to myself, ‘What? In what world does this guy get to sit in here?’ ” But he did. And the reforms that came out of that group, Shima pointed out, didn’t include any reforms that were going to meaningfully decrease the number of people being detained in jail. Pretrial detention has become so common in this country that attempts to change it have met with serious resistance. The lawsuits that the Civil Rights Corps and other organizations file are hotly contested by local officials. And when those officials actually try to make changes themselves, they sometimes find that other local officials block their attempts at reform.

#### Defendants either plea bargain for early release with time served, or being penalized for poverty via pretrial detention and the bond industry, which post-neg, is the only option

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\* \* \* \* \* Pretrial detention has become so common in this country that attempts to change it have met with serious resistance. The lawsuits that the Civil Rights Corps and other organizations file are hotly contested by local officials. And when those officials actually try to make changes themselves, they sometimes find that other local officials block their attempts at reform. That’s what happened in Boston. Efrain Rivera was arrested for shoplifting at the Gap in a Boston mall. Mr. Rivera, who struggles with drug addiction, was no stranger to the criminal justice system at the time of his arrest. He had been arrested many times before. Some of those arrests had resulted in convictions, and others were still pending when officers arrested him for shoplifting. Often, someone who has pending criminal charges will not be released if they get arrested on new charges. But Boston had a new prosecutor, Rachael Rollins, who was elected as Boston’s district attorney in 2018. Rollins ran on a platform of criminal justice reform. One area she thought needed reform was bail. “Bail is one of the biggest things that exposes the penalty of poverty—the penalization of poverty,” Rollins said when we spoke on a Wednesday afternoon. “Imagine you are poor and I am not poor and we are charged with the exact same crime—say it is operating with a suspended license, and maybe bail is $250. If you don’t have that money, you are going to stay in jail. But if I do have that money, then I’m getting out.” It’s a powerful example of injustice, and Rollins knows it: “For non- lawyers it is so crystal clear that that has nothing to do with whether you’re a good person, or I’m a good person, or you committed the crime, or I didn’t commit the crime. It has everything to do with the fact I have money and you don’t.” Rollins doesn’t just talk about the problems with bail; she has also made changes within her office to help minimize the number of people held in jail pretrial. One change that she made involved the training for her prosecutors. As part of their training, she now requires all prosecutors to visit the Nashua Street jail, where Boston sends most people it detains pretrial. Rollins made the jail visit mandatory because, as she put it, the prosecutors “have the ability to set bail and send people away, and so they should have to set foot in the place where those people are going to go.” The changes that Rollins made meant that the prosecutors in her office treat Mr. Rivera differently. The prosecutor in that case told the judge that she didn’t think Mr. Rivera needed to be kept in jail until his trial. His crime was minor, there was no reason to think that he wouldn’t appear at his court dates, and he was getting treatment for his substance abuse problem. Sending Mr. Rivera to jail would interfere with that treatment, and so the prosecutor argued that releasing him pretrial was the best course of action.

#### A lengthier involvement with the criminal justice system is more damaging than the punishment that defendants prefer pleading guilty over the punishment of process of a trial – star this card

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Sometimes, Feeley reported, the bargaining occurred across cases: a prosecutor would tell a defense attorney that he could not dismiss charges in a case because that defense attorney had already had his “quota” of dismissals that day. Or a defense attorney would argue in favor of a dismissal by noting that he hadn’t asked the prosecutor for anything yet that day. As for the due process model, Feeley didn’t just say what everyone already knows—that it doesn’t accurately describe the criminal justice system. Instead, he turned the due process model on its head, presenting it as a problematic approach to criminal justice. Most people praise the due process model as an ideal (if impossible to achieve) system. But Feeley tells us that defendants may actually try to avoid some of the process that they are due. As he explained, any contact with the criminal justice system was unpleasant and costly for defendants. Invoking the process that they were entitled to would often prolong the defendants’ interactions with the criminal justice system, and so defendants readily give up their ability to test the prosecution’s evidence or even secure a lawyer because those rights meant more time and effort for the defendant. This was nothing short of a bombshell when Feeley’s book was published. The process that he tells us defendants were trying to avoid exists, in large part, to protect those defendants. It is part of the “due process of law” guaranteed by the U.S. Constitution. But more important, Feeley demonstrated that the system could “punish” people merely by bringing them into the system. Even those defendants who were acquitted or whose cases were dismissed had to endure an arrest and court appearances. Such experiences impose costs on and demean everyone who is subjected to them. For defendants, one of the major costs of the criminal process is having to show up at court. Feeley found that cases dragged on for unbelievably long amounts of time: “Cases in which there was no trial, no witnesses, no formal motions, no pretrial involvement from the bench, and no presentence investigation still required as many as eight or ten different appearances spread over six months.” These appearances not only discouraged people from insisting on their right to a trial; they also discouraged defendants from having protracted negotiations to get a better plea bargain from prosecutors. As a result, defendants with complex cases would plead guilty at arraignment rather than trying to wait and convince the prosecutor to give them a better deal. As Scott Hechinger said when we spoke in Brooklyn, the costs of coming to court are literal and figurative. It literally costs defendants $5.50 round trip on public transportation to travel to the courthouse for every appearance. That might not seem like a large amount of money to a middle-class defendant. But for those who are not financially secure, that is an added expense they can ill afford. For some of his clients, Scott said that this $5.50 is “the difference between eating and putting food on the table” or going without. The figurative costs—which academics call “opportunity costs”—are all of the other things that a defendant can’t do when they have to appear in court. They can’t go to work, take care of their children, go to a doctor’s appointment, or do any of the other dozens of things that we all need to do every day just to keep our lives on track. “Just having to come to court in and of itself—let alone the six or seven times that they would have to come if they ever wanted to possibly get to the point where they’d get a trial—is a horrible, punishing process,” Scott stated. Appearing in court is not the only source of “costs” for defendants. The right to have a lawyer represent them also imposes either literal or figurative costs. Any defendant who wants to hire her own lawyer will have to pay the costs of that lawyer’s fee out of her own pocket. And lawyers are not cheap. Of course, defendants who can’t afford lawyers can ask judges to appoint lawyers for them. But, as I explained in chapter 5, some places still manage to charge defendants money for their “free” lawyers. Even in those places that don’t charge defendants money for their appointed lawyers, defendants still have to expend significant time and effort to prove that they are entitled to free lawyers. The defendants have to fill out forms that ask invasive financial questions, and they have to be prepared to answer further questions by judges or other court personnel who might be skeptical of their claim that they can’t afford to pay for a lawyer. The process of getting a court-appointed lawyer can also be humiliating. When I clerked for a judge after I graduated from law school, one defendant asked for a court-appointed lawyer, but the prosecution objected. My judge held a hearing at which the prosecutor argued that the defendant should sell his car to pay for an attorney. When the defendant pointed out that the proceeds from selling his car would not be enough to pay a lawyer for his whole case, the government attorney responded that the defendant should sell his car, use that money to pay for a lawyer, and then come back to the court and ask for a court-appointed lawyer after the money ran out. There was little doubt in my mind that making the defendant switch lawyers partway through his case would be inefficient: the first lawyer wouldn’t be able to accomplish much, and then the new, court-appointed lawyer would have to get up to speed. So making the defendant sell his car wouldn’t really save the taxpayers much money, but it would leave the defendant without his car even after the case was over. Feeley also documented that the people who worked in the system saw contact with the system itself as a form of punishment. He saw prosecutors tell defendants to plead guilty at arraignment—including a defendant a with complex case that could have benefited from further investigation and negotiations—on the theory that they should “be smart and get it over with today.” The inconvenience associated with being arrested was also perceived as punishment. Feeley observed: “Officials are often willing to drop minor charges, feeling that the arrestees have learned their lesson by spending a night in jail.” That sort of attitude makes sense if pretrial incarceration is a punishment; after all, many misdemeanors are very minor offenses that don’t deserve more than a night in jail. But as chapter 4 explains, our criminal justice system constantly maintains the fiction that pretrial incarceration is not punishment. By tearing down that fiction—that nothing we do to defendants before they are convicted is punishment—Feeley exposes perhaps the greatest injustice of our modern system: it indiscriminately punishes the guilty and the innocent. The costs of the pretrial system are borne by everyone who is swept up in it: guilty defendants, innocent defendants, and even their family members. \* \* \* \* \* Looking at the people seated around us in the Brooklyn courtroom, I could see what Feeley (and Scott) meant. The people waiting in the courtroom were being subjected to a form of punishment; they resembled children in detention at school as they sat on the benches, not permitted to talk or even to read. The way in which the judge spoke to them—not rudely but somewhat condescendingly—also reminded me of a principal or a teacher telling a student what he had done wrong. Most of the people whom Scott and I saw in that courtroom had been released, sometimes on bail. They were home with their friends and families while their cases wound their way through the system. Because they had been charged with misdemeanors, even if they lost at trial, they were not facing particularly severe punishments. As Scott explained, even though misdemeanors could result in a sentence of up to a year in jail, the prosecutors in Brooklyn rarely sought jail sentences, and judges rarely imposed them. Nonetheless, the vast majority of these people will plead guilty rather than insist on a trial. Scott said that approximately 40 percent of misdemeanor defendants plead guilty as soon as they are able to see a judge. And for those cases that don’t plead guilty at their first judicial appearance, they steadily trickle out of the system before a trial takes place. Some of the defendants have their charges dismissed. Others eventually decide to plead guilty; some decide to plead because the prosecutors are willing to reduce the charges against them, others because they get sick of having to come back to court so many times. Some of the defendants will enter an alternative treatment program. At the end of the day, Scott estimated that, at most, 1 percent of misdemeanor cases in Brooklyn go to trial. That cases were leaking out of the system became clear as Scott took me from courtroom to courtroom in the Brooklyn courthouse. The first courtroom —the one that resembled the public restroom—was where misdemeanor defendants made their initial appearance before a judge. It was the largest and most crowded courtroom that I’d ever seen. The subsequent courtrooms we visited—the ones where people would make additional appearances before judges, where suppression hearings were held, and where defendants facing felony charges appeared—had fewer defendants in them. The courtrooms were also smaller, more formal, and less dingy, but still far from welcoming. One of the last courtrooms we visited was part of a specialized court— specifically a court that dealt with defendants whose crimes were related to substance abuse. When we entered the courtroom, a man who had been arrested for drunk driving was being admitted into the program. The man was tall and broad-chested. He seemed like the sort of person who would take up two or three seats on the subway, not only because of his size but also because he’d feel entitled to the extra space. But in the courtroom, the man did not exude an air of self-confidence or entitlement. His broad shoulders drooped as he listened to the judge tell him, very sternly, the consequences of failing out of the program. The Brooklyn substance abuse treatment program is structured as an alternative to incarceration. It requires defendants to plead guilty in order to enter the program and avoid jail. For defendants facing felony charges, that means they plead guilty to two crimes, a felony and a misdemeanor. After they plead guilty, their sentences are withheld—that is to say, the sentences aren’t imposed until after they complete the treatment program. If a defendant successfully completes the program, then the judge will vacate the felony plea, removing the guilty plea on that charge from the defendant’s criminal record. Since felonies often carry mandatory minimum sentences, getting the felony pleas vacated and those charges dismissed is really beneficial for defendants. Once a felony plea has been vacated, the only charge left is the misdemeanor, and then the judge will impose a sentence on the misdemeanor —not incarceration but some other small punishment. The man whom we saw pleading guilty in the drunk-driving case was facing felony charges because this wasn’t his first DUI. If he successfully completes the program, then he will be sentenced just for a misdemeanor—a sentence of only a $500 fine. But if he doesn’t complete the treatment program successfully, he won’t get the felony vacated. He’ll be sentenced for that felony, and he will end up in jail. As the judge explained all of this to the defendant, it sounded really daunting. The judge emphasized that the treatment would be demanding and that if the defendant did not do everything required of him, then the prosecutor would be free to seek the maximum sentence on the felony. In other words, the judge told the defendant that if he failed to complete the treatment program, he would almost certainly end up spending no small amount of time in jail. The judge also explained the requirements of the treatment program. One of the requirements was that the defendant had to pay for the costs of treatment. But as the man told his defense lawyer, the treatment itself was going to interfere with his work hours. And if he couldn’t get enough hours at work, then he wouldn’t have the money that he needed to pay for the costs of the program. The lawyer explained the problem to the judge. The judge understood that the defendant was in a catch-22. But it was quickly made clear to the defendant that the problem was his, not the court’s. It was up to the defendant to figure out how to attend treatment and still work enough hours so that he could pay for that treatment and all of the other expenses in his life. After we left the courtroom, I asked Scott what would happen if the defendant couldn’t attend all of the treatment sessions or if he couldn’t pay for them. It’s complicated. Scott stressed that the judge in the treatment court wouldn’t kick the defendant out of the program right away; they generally give people a number of chances if they miss an appointment, don’t make their payments, or have a urine sample test positive for marijuana. But there would be smaller punishments along the way for these lapses: an outpatient treatment regime might get converted into an in-patient regime, forcing the defendant to live in an institution while undergoing substance abuse treatment. Or the time in the treatment program could be extended from twelve months to eighteen months. Judges in the treatment programs could also give a lapsed defendant a short jail punishment of a week or two at Rikers Island. Obviously, ending up in an institution or in jail would prevent the defendant from working and being able to pay for his treatment. And if the defendant’s treatment got extended because he was missing payments, he would probably just end up missing even more payments. The drunk-driving defendant was warning his lawyer and the judge about these problems, but it didn’t matter. He was pleading guilty anyway, even though he could see that there was a significant chance that he might fail the program and end up in jail. Substance abuse treatment courts have been touted as a good alternative to incarcerating people who break the law. The basic idea behind these courts is that some people commit crimes because they are abusing drugs or alcohol, and their criminal activity is more likely to continue so long as they continue to abuse these substances. If the system can get them to stop abusing alcohol or drugs, so the argument goes, then they will also stop committing crimes. So the objective in substance abuse courts is to treat the substance abuse problem and use the threat of criminal punishment to get defendants to comply with the terms of the treatment program. But drug courts are only a good alternative to jail if they actually work. “I’ve had clients who have succeeded. But I’ve had more clients who have not succeeded and ended up in jail,” Scott told me. And sometimes, he added, the clients who enter these treatment programs and who fail end up worse off than if they had just pleaded guilty in the first place. Scott recounted the story of one client who could serve as a poster child for ending up worse off. Scott’s client was charged with burglary in the third degree for stealing some things from a bodega. The client wasn’t eligible for bail, so he was sitting in jail. After he’d been in jail for nine months, Scott convinced the judge to let the client enter an alternative-to-incarceration plea. The plea required the client to do eighteen to twenty-four months of treatment, the first year of which would be in an inpatient program. The year of inpatient treatment was very successful and, against the odds, the client appeared to have actually kicked his substance addiction. But when he was released from the inpatient program, no one helped him set up his outpatient appointments, and he didn’t have any insurance to cover those treatments. So the client relapsed, and he ended up getting rearrested for assaulting another man and taking his phone. Because the client was already in the treatment program, he wasn’t eligible to be released from jail pending trial when he was arrested for the new charges. So he ended up pleading guilty in the new case, just so that he could be released from jail, even though he disputed taking the phone and assaulting the other man. The new charges resulted in the drug court judge sending him back to the inpatient treatment program, but at that point the client wasn’t interested in receiving treatment. “He was just kind of gone at that point,” Scott said. The client ended up failing out of the treatment program, and he was facing sentencing on the bodega burglary charges when I interviewed Scott. “He faces a mandatory minimum of one and a half to three years, which means he’ll be eligible for parole after one and a half years. But I don’t think he’ll be released on parole,” Scott said. His client actually ended up worse off by entering the treatment program than if he’d just pleaded guilty to the charges in the first instance. In addition to spending more than a year living in an institution for his inpatient substance abuse treatment, he’s going to have to serve the same sentence that he would have gotten if he’d never entered the program in the first place. “This started out as an eighteen- to twenty-four-month program, but this whole ordeal has been going on for four years,” Scott said. At this point the client wants to put the ordeal behind him and he is frustrated with the prosecutor, with the judge, and with Scott because these petty charges have kept him in the system for years. “He keeps saying ‘y’all’ like I’m a part of this, and that hurts: ‘Y’all have had me for four years for stealing a few things from a bodega to support my drug habit. When is enough, enough?’ ” Scott paused for a second and then added, “Apparently, the answer is ‘Not yet.’ ” \* \* \* \* \* Like many public defenders, Scott Hechinger developed a passion for criminal justice in law school. He went to NYU, where he met Bryan Stevenson, a modern hero in the fight for criminal justice reform. In addition to teaching law at NYU, Stevenson runs the Equal Justice Initiative, a human rights organization that has been very successful in exonerating wrongfully convicted defendants and winning Supreme Court victories. Stevenson’s memoir, Just Mercy: A Story of Justice and Redemption, was a New York Times #1 bestseller and has been made into a major motion picture starring Jamie Foxx and Michael B. Jordan. As a student, Scott did some legal research for Stevenson on juveniles serving sentences of life in prison without the possibility of parole. That research was part of a broader litigation strategy that culminated in Stevenson arguing before the Supreme Court. Scott camped out the night before the oral argument, sleeping on the sidewalk in front of the Supreme Court, so that he could get one of the small number of public seats in the audience. Stevenson ended up winning the case, resulting in a landmark ruling that the Eighth Amendment forbids mandatory life-without-parole sentences for juveniles. Stevenson was a mentor for Scott. When Scott told Stevenson that we wanted to pursue a public interest career and that he wanted to use his law degree to help tell compelling stories, Stevenson told him that the path was obvious: he should become a public defender. Scott took Stevenson’s advice and spent one of his law school summers in New Orleans interning with the public defender’s office. It was a new office, established in the wake Hurricane Katrina. New Orleans had never had public defenders before, and Scott was in their second class of summer interns. Public defenders are in a difficult situation. They are supposed to zealously protect the rights of their clients, but they also have to get their funding from public sources. Many chief public defenders are appointed by judges or by other elected officials in their jurisdictions, so they can get dragged into political fights as well. Sometimes zealous advocacy can ruffle feathers and get the defenders in trouble. For example, the top public defenders in Montgomery County, Pennsylvania, were fired recently after they filed a brief with the state supreme court criticizing how judges in their county set cash bail. The judges appear to have complained to the county commissioners, who fired the defenders. The new public defenders in New Orleans also upset the judges, who were not used to defense attorneys sticking up for their clients and questioning how the courts dispensed justice. “I remember seeing supervising attorneys getting dragged out of courtrooms in handcuffs for making simple legal arguments,” Scott said as we sat down for lunch after my tour of the courthouse. As an intern, it was Scott’s job to help the public defense lawyers who would appear in court on behalf of indigent defendants. “My main job was helping in arraignments, which would be held en masse,” he said. “A hundred people or so would be marched into the loading dock of the Orleans Parish Prison, in front of an oversized TV. As an intern, I would run and try to interview as many people as I could to find out as much about them as I could. Then I would run the three blocks from the prison to the courthouse, where there was one public defender sitting next to the judge, looking at a television screen full of Black faces in orange jumpsuits. Then bail was set, basically just depending on the charge.” According to Scott, the New Orleans public defenders would lose all the time. Nonetheless, he was inspired by his experience. It impressed on him that even if the defendant was going to lose, it made a big difference have someone speak to them face-to-face and treat them like human beings. The defendants felt listened to instead of just feeling forgotten by the system. And so Scott decided to become a public defender. After a short fellowship and a clerkship with a judge, Scott joined Brooklyn Defender Services in 2012. Since joining the organization, Scott has developed a national reputation as a critic of the criminal justice system. He is the founder and director of Zealous, an organization devoted to training and helping public defenders across the country to advocate outside the courtroom for an end to mass incarceration. We met at an academic conference organized by NYU, but his reputation extends beyond legal academics. Teen Vogue did a profile of him. And he has a large following on Twitter. When I ask Scott about his rise to prominence, he tells me a story about sitting in the Brooklyn courthouse one day, covering arraignments. He watched a middle-aged woman being arraigned for failing to pay a surcharge. The woman had pleaded guilty to stealing beef jerky from a bodega two months before. Because she’d been convicted, she had to pay a $250 surcharge. But she hadn’t paid the surcharge, and so she got arrested again. The penalty for failure to pay a surcharge, Scott explained, was fifteen days in jail, which could be reduced to ten days for good behavior. “The whole thing took about two minutes,” Scott said. And while the facts of the case and the implication were buried in technical language, Scott understood those technicalities and knew what was happening. “What I saw was a person who had pleaded guilty for stealing food because she was hungry—something that shouldn’t be criminalized in the first place—and then she added to her criminal record. She tried to pay her fine but failed. She spent the night in jail, got brought to court, and then got sent back to jail for ten days for simply not having any money—which is what got her in trouble in the first place. And when she gets out, she’s going to be even more damaged.” During his time as a public defender, Scott has tried hard not to lose the inspiration from his early experiences or to allow himself to become desensitized to what he sees: “I try not to become blasé about everyday injustice. It’s so easy to because you see the same patterns and the same things happen every day.” But he knows that many people who work in the system do become desensitized. And as he looked around the courtroom at the woman’s arraignment, he saw the other lawyers not even paying attention to the case because it was so routine. So he wrote about the case on Twitter. He wanted to remind his fellow public defenders about how awful these cases are and hoped that it could serve as a kind of call to action for the small group of colleagues who followed his Twitter account. “I wanted to tell them not to lose sight of this stuff—that we have an obligation to bear witness, both because we see it happening, but also because we understand it in a way that other people don’t.” Scott’s tweet about the woman’s case was retweeted ten or fifteen times, which he said with a self-deprecating laugh “was about ten or fifteen more than I’d ever gotten before . . . except maybe from my wife, who would sometimes retweet my stuff to make me feel better.” The positive feedback, though modest, encouraged Scott to tweet more. He started bringing his laptop with him to arraignments. And while he’s waiting between cases, he’ll sometimes tweet about the cases that he observes. “I want people to see what I saw and understand it the way that I understood it,” he said. Scott’s tweets have gone viral, giving him a platform not only to speak about the everyday injustices that he witnesses but also to lift up the voices of others in the system. One inmate in Texas reached out to Scott during the coronavirus pandemic. The seventy-one-year-old man, who was charged with a drug crime, suffered from non-Hodgkin’s lymphoma. He had been in solitary confinement for six months, and jail officials weren’t supplying him with any medical care. Scott’s tweet about the man was retweeted more than 6,000 times. One day later, the local prosecutor issued a statement saying that the man was being released. In helping people learn about and understand what happens in these courtrooms, Scott hopes not only to bring about change in specific cases but also to help other public defenders tell the stories of people who are caught up in the criminal justice system. And as those stories are told more widely, and as more people see the everyday injustice that Scott and his colleagues do, he hopes that more people will see the criminal justice system as the wrong way to deal with problems like poverty and addiction. \* \* \* \* \* David Jaros, a public defender turned law professor, tells a frightening story about how the pretrial process can lead defendants to give up their right to a trial. The story is about his former client, James.\* James had left his apartment one day when he the police were in his building. When officers confronted him in the hallway of his building, they ordered James to show them his identification to prove that he lived in the building. Because his wallet was still in his apartment rather than with him, he couldn’t show them his ID. So police arrested James for trespassing even though he was in his own building. David was appointed to represent James on the trespassing charge. Because he had been arrested, James first met with David while he was still locked up in the back of the courthouse. At that point James had spent almost twenty-four hours in jail. His meeting with David took place right before James was scheduled to appear in front of a judge for the first time. During the meeting, David had to learn about James’s case, tell him what his options were, and counsel him about what decisions to make. David explained to James that there were only two possibilities about what could happen at his first hearing: he could either plead guilty or have the judge decide whether bail was required for his release. David assured James that, in cases like this, the judge would almost certainly release him without bail, but the judge was not going to be willing to dismiss the charges at that first hearing. If James wanted to fight the trespassing charge, he would be released, but he would have to return to court for another appearance and bring proof with him that he lived in the building. If James didn’t want to fight the charges and return to court again, David explained that James would have to plead guilty. Pleading guilty to trespassing would be considered only a “violation” rather than a misdemeanor, which meant that James wouldn’t have to serve any more time in jail. He wouldn’t even have a criminal record. He would have to pay $100 in court costs, and there was a chance he would have to do some community service too. But if he pleaded guilty, not only would he be released immediately, but he would not have to return to court. James told David that he wasn’t willing to take off another day of work for a second court appearance: he had already missed work because of his arrest, and he was worried that more absences might result in him getting fired. David told James that in order to avoid returning to court, he would have to plead guilty then and there. James said he wanted to plead guilty right away. David said, “As his lawyer, I could explain the ramifications, but it’s ultimately his decision about whether or not he’s better off taking that plea or missing work.” David is right that defendants need to make their own decisions about their cases, but I was horrified by James’s story. James pleaded guilty to trespassing in his own building. He was completely innocent of that charge, and it would take only one more trip to court to clear his name. I couldn’t understand how James could make that decision. But David helped put the situation in perspective. “Can you imagine spending almost twenty-four hours in jail and then having to take another day to return to court just to prove that you in fact had a right to be in your building?” he asked me. David did, of course, have clients who would go home, get proof that they lived in the building or that they were legitimately visiting someone in the building, and then bring that proof with them to the next court date to get the charges dismissed. “But someone who doesn’t want to lose his job, or someone who makes more in a day than the court costs, might rationally say, ‘I don’t want to spend a day sitting in court and waiting around for my lawyer to show up and the prosecutor to get there and then have my case called. I’d rather just have this case resolved and never have to come back here.’ ” I would like to think that I would have made a different decision—that I would stand on principle and insist on proving that the police who arrested me were wrong. But, as David explained, getting the charges dismissed wouldn’t feel like a victory. “At the end of the day, all you get is that the case is no longer there—it’s been dismissed—but you don’t get back that time or that experience.” James’s story is not unique. He had been arrested during a regular sweep of buildings in the Bronx. Officers would swarm the hallways, and, to avoid being arrested, people had to demonstrate that they were there to see someone or that they otherwise had a right to be in the building. David has many stories about clients being arrested during these sweeps. A lot of those clients had perfectly legitimate reasons to be in those buildings. One client was arrested when he was at a building to visit his aunt. Another was at a building to see some friends from school—friends who lived only two doors away from his own building. David explained that officers would take the people over to the door of the person they said they were visiting. They would knock on the door, and if no one answered, they’d arrest the person. David’s clients would try to tell the officers that their family members or friends actually lived in those apartments; they just must not be home at the moment. But officers would just say, “Fine, that’s your defense,” and arrest them anyway. Then the police would take David’s clients to booking and make them sit in a jail for a day before David would meet them for the first time and they would get to see a judge. As a lawyer, I couldn’t understand how these people were being arrested for trespassing. “Trespassing” means entering or remaining on someone else’s property without permission. Visiting family and friends certainly isn’t trespassing. And it is legally impossible to trespass in your own home. More important, police can’t arrest you unless they have probable cause to believe that you’ve committed a crime. Not having your wallet in your pocket isn’t evidence that you’ve committed a crime, nor is the fact that the friend you went to visit ends up not being at home. James and David’s other clients were arrested under a program called Operation Clean Halls in New York City. The idea behind Operation Clean Halls was simple: to make New York apartment buildings safer and more pleasant for their residents. The operation targeted people who were hanging around those buildings, hassling residents, and selling drugs. Of course, proving that someone is selling drugs isn’t always easy, and people aren’t likely to harass someone else where the police can see them. So, in order to keep people out of these apartment buildings, the NYPD used the trespassing laws rather than having to prove that these people were engaging in any other illegal activities. Operation Clean Halls began in 1991. At one point, more than 8,000 buildings were participating in the Clean Halls program; that meant that the owners had invited the NYPD in to make these arrests. More than 3,000 of the Clean Halls buildings were in the Bronx, which resulted in thousands of arrests. During David’s time as a public defender in the Bronx, Clean Halls cases were, as he put it, “extraordinarily common.” “It would be a rare day if you had an arraignment shift and didn’t have people who had been arrested for trespass in a Clean Halls building.” The problem, of course, was that police weren’t particularly careful when it came to deciding who had a legitimate reason to be in a building and who didn’t. They would clear the hallways, sometimes arresting anyone that they found without an ID. And even if you did have an ID, you had to prove to officers that you had a legitimate reason to be in the building, even though the Constitution requires the opposite: It requires police to have evidence of illegal activity before arresting someone rather than requiring people to provide proof of their innocence in order to avoid arrest. A 2013 study by New York City’s Civilian Complaint Review Board found that 40 percent of fully investigated complaints by people who had been caught up in of Operation Clean Halls were “substantiated.” That’s a bureaucratic way of saying that the officers acted improperly if not illegally. As the report noted, this rate was twice as high as the rate for complaints against officers outside of Clean Halls buildings. The report strongly suggests that police were routinely violating people’s rights in the Clean Halls sweeps. Unsurprisingly, people of color were disproportionately swept up in Operation Clean Halls. Of people who complained to the Civilian Complaint Review Board, nearly 90 percent were either Black or Hispanic. In 2012, three organizations—the ACLU, the Bronx Defenders, and a group called LatinoJustice—filed a lawsuit against the New York City Police Department, saying that Operation Clean Halls was illegal. The groups won a preliminary injunction against the program and ultimately entered into a settlement with the NYPD. Under the terms of the settlement, the police could not conduct sweeps of Clean Halls buildings in which they forced everyone present to provide identification. Instead, police could only approach people when they already had some evidence that the person was trespassing in the building or committing some other crime. In other words, these groups had to sue the NYPD in order to force officers to follow ordinary constitutional rules. The settlement also required police to keep records about every person they stop or frisk near a Clean Halls buildings—something that will allow more scrutiny of police behavior in the future. But before the lawsuit forced the program to change, tens of thousands of people were swept up into the criminal justice system. Between 2007 and 2012, the NYPD made at least 16,000 trespassing arrests every year under Operation Clean Halls. Many of the cases were dismissed by judges or weren’t prosecuted by district attorneys. But more than 60 percent of Clean Halls arrests ended either in a guilty plea or another unfavorable disposition for the person arrested. We don’t know how many of the thousands of people arrested in Operation Clean Halls were innocent or how many of those innocent people pleaded guilty. But David’s stories make clear that the burden of the court process itself caused at least some innocent defendants to plead guilty. At the end of our conversation about James and his other clients, I asked David: Why couldn’t he have gotten James’s charges dismissed without making James come back to court and miss another day of work? Why couldn’t James just send David a copy of his ID and then have David show up at the next court date without James to provide that evidence to the judge and the prosecutor in order to get the case dismissed? David explained that James was legally required to appear at the next court date. The default rule in criminal cases is that defendants have to show up for all court dates—even the ones when nothing is going to happen and the lawyers are just going to set another date for the next status update. In an incredibly small number of cases, David had been able to convince the judge to allow the defendant to “waive” his appearance at the next court date when the case was clearly just going to be dismissed. But it was “stunningly rare” how often judges were actually willing to do that. David sighed as he noted, “There was absolutely no recognition by the actors in the system about the level of inconvenience for all of the people caught up in the system.” \* \* \* \* \* It is very important to understand the plea bargaining dynamic in misdemeanor cases because most criminal cases are misdemeanor cases. But studying misdemeanor cases can be difficult because state and local governments do not keep particularly good records of misdemeanors. Until recently, we didn’t even have a good estimate of how many misdemeanor cases are filed in the country. Law professor Alexandra Natapoff undertook the difficult task of combining data from across the country and found that there are approximately 13 million misdemeanor cases filed every year. Those cases can range from serious criminal behavior like domestic violence to trivial misconduct like littering. Because misdemeanors make up 80 percent of all criminal cases in the country, most of the people who are arrested and charged with a crime will be accused of committing a misdemeanor. And because misdemeanor offenses can be so trivial, any of us might find ourselves charged with one. So it should deeply concern all of us that those people who are swept up in the misdemeanor criminal justice system see the system itself as a form of punishment. To be clear, the process can also look like punishment in felony cases. People accused of felonies who are lucky enough to be released pending trial also have to return to court time after time. But that inconvenience doesn’t drive plea bargaining in felony cases—at least not serious felony cases—the same way that it does in misdemeanor cases. In serious felony cases, defendants can’t risk going to trial because the stakes are too high. In misdemeanor cases, defendants don’t push for trials because the stakes are so low. Unlike felony defendants, who face much more severe sentences if they are convicted at trial than if they plead guilty, the difference between a guilty plea and a conviction after trial for a misdemeanor defendant is likely to be much, much smaller. But while the difference in sentencing gives prosecutors a lot of leverage in felony cases, the similarity in sentences make the punishment of the process more obvious and more important for misdemeanor defendants. Imagine a misdemeanor defendant who is facing a $250 fine if she is convicted at trial. She could avoid the fine if she is acquitted at trial, but it will take anywhere between three and seven court visits before she will actually get that trial. It will probably set her back more than $250 in transportation costs and lost wages for her to attend all of the court appearances—and she might even lose her job for missing so much work— so she is probably better off just pleading guilty right away. If she can make the fine just a little bit lower by pleading guilty at arraignment, then it would be even more irrational for her to insist on a trial. David Jaros emphasized that the risk of losing their job isn’t the only gamble that misdemeanor defendants take when their cases drag on for extended periods of time awaiting trial. There is also the risk that a defendant could miss a court date or get arrested again for something else. If a defendant misses a court date, then the judge will issue a warrant for her arrest. And if you are arrested when you already have charges pending on another case, you usually won’t be released on the new case. As we know, defendants who are incarcerated before trial feel enormous pressure to plead guilty in order to be released. “So,” David concluded, “all of these things snowball into creating a system that functions more around resolving pleas rather than going to trial.” That the stakes in misdemeanor cases are lower does not mean that a misdemeanor conviction has no effect on a person. Even if a defendant isn’t going to go to jail when she is convicted of a misdemeanor, there are still collateral consequences associated with that conviction. For example, a misdemeanor conviction can affect a person’s eligibility to get a student loan or live in public housing. A misdemeanor conviction can keep people from getting a job at the many businesses that require a criminal background check. It can even result in a person who is not a U.S. citizen being deported. But those consequences seem smaller when compared to the costs of the prolonged contact with the system while waiting for trial. The very act of being brought into the criminal justice system—even if you are never convicted—can also have severe consequences. Defendants have to miss school or work to attend court dates, and so the defendants may perform poorly in class or lose their jobs if they keep returning to court while waiting for a trial. And an arrest record—even if the arrest never turns into a conviction—is often used by landlords, employers, and immigration officials when they make important decisions about people’s lives. It doesn’t matter to these people outside of the criminal justice system that the defendant wasn’t convicted. As law professor Eisha Jain has explained, these people use arrest records because those records are relatively easy and inexpensive to find, and because they think arrests are good proxies for the potential for violence, unreliability, or instability. Because the difference is so small between the consequences of a trial and the consequences of a plea bargain, misdemeanor plea bargains might seem unimportant, especially when you compare their outcomes to the outcomes in felony cases. But it would be a mistake to ignore the problems that misdemeanor plea bargaining causes. And it would be an even bigger mistake to ignore misdemeanors when thinking about how to reform our system.

#### Public defender incomes are on the brink – budget cuts, pay per case, and low wages means trials are unaffordable, killing the profession and link turning the neg

**Canon 22** [Dan Canon, civil rights lawyer and a law professor at the University of Louisville in Kentucky, 2022, “Pleading Out : How Plea Bargaining Creates a Permanent Criminal Class,” Basic Books, ISBN-139781541674684]/Kankee

Well, sort of. TODAY, EVERYONE ARRESTED FOR A FELONY OFFENSE IS ENTITLED to a defense lawyer. Juvenile defendants and anyone facing jail after a misdemeanor offense are also entitled to representation. That’s a lot of people. So many, in fact, that there aren’t nearly enough lawyers to help them all. The lawyers who do represent criminal defendants must rely on plea bargaining, or they’d never be able to manage their own caseloads. Put simply, defense lawyers need plea bargaining to stay afloat. The US Supreme Court likes to tell states what to do (e.g., “give everyone a lawyer”) but not necessarily how to do it. Naturally, this tends to create inconsistencies and confusion. For one thing, when the Supreme Court decided Gideon, it didn’t say who was considered “poor enough” to get a court-appointed lawyer. That call is usually made by the presiding judge and is based on a quick snapshot of the defendant’s resources. Sometimes defendants get a court-appointed lawyer simply because they say they are  unemployed; sometimes they don’t get one because they own something as extravagant as a used Volkswagen. I’ve had indigent status denied to a client on the basis of their having just over $200 in their commissary account. In case the reader is unaware, $200 is not enough to pay an attorney to undertake representation for anything more serious than a ticket for jaywalking. But the biggest logjam created by the Supreme Court is that it did not tell states how they were to go about making lawyers appear out of thin air for thousands upon thousands of low-income defendants created by the post- Prohibition legislative frenzy. It is not often the case that dozens of lawyers are sitting in the audience waiting to see if the judge calls on them. When Powell was decided in the 1930s, overcriminalization and overpolicing were just finding their land legs, and there weren’t many lawyers doing indigent defense, let alone entire agencies devoted to it. When the Gideon opinion was issued in the 1960s, there was barely a drug war, SWAT teams weren’t kicking down fifty thousand doors per year, and prisons still had  some beds available. The Supreme Court may have been naive about how wide the floodgates would be opened by Powell and Gideon. One might reasonably wonder if today’s more conservative court would make the same decision or if they’d just say “best of luck” to criminal defendants who can’t afford lawyers. The federal government, despite being a major player in racking up all these criminal charges in the first place, has been virtually no help in digging up defense lawyers over the last century. The states or, in a few places, individual counties implement their own systems and pay the freight. Sometimes the systems implemented are good. Often they are not so good. One way that states and larger cities have complied with Gideon is by creating separate public defender agencies. But these agencies exist to serve  the criminal class. As such, to say that these agencies have been marked as low priority by politicians would be a dramatic understatement. One Supreme Court justice wrote shortly after the Gideon decision that “the successful implementation of [public defense] would require state and local governments to appropriate considerable funds, something they have not been willing to do.”12 That was true then, and it is true now. In the loveless marriage between the state and federal governments, public defense is the ugly stepchild. In our system, which values high numbers of convictions above all else,  underfunded public defender offices are burdened with an insane number of cases. There is no widely accepted standard for how many cases an attorney may take on, but it is widely accepted that there is some limit, one beyond which a lawyer simply cannot provide decent representation. Guidelines established by one national group in 1973 suggested that caseloads should  not exceed 150 felonies or 400 misdemeanors per year, and state bar associations have issued similarly modest guidelines.13 I can almost hear public defenders cackling in exasperated disbelief, because it is not uncommon for them to carry more than twice that number. For example, a 2009 report found that Minnesota public defenders carried loads of between seven hundred and eight hundred cases for each lawyer, on average. Public defenders in Utah reported having no more than ten hours to work on any one case.14 One high-ranking public defender calculated that Missouri caseloads required attorneys to dispose of one case every 6.6 hours.15 And a public defender in Knoxville, Tennessee, gave this frank testimony about his office’s one hundred cases per attorney, per week: “There’s [no time]… to do any on-scene investigations. There’s [no time]… to do any contacting of [police] officers.… There’s… [no] time to interview any witnesses. You just go into court [, and] you fly by the seat of your pants to see what you can accomplish.…”16 As one observer notes, the once-lofty idea of a constitutional right to counsel has been reduced to “a guarantee of little more than a companion at arraignment.”17 When times get tough, **indigent defense** is the first thing to face budget cuts in just about every state. That means attorneys get laid off, and the already unbearable caseload for the existing workforce worsens. The financial crisis of 2008 made sacrificial lambs of public defender agencies all over the country: Minnesota cut more than twenty attorney positions, Georgia cut more than forty, and one Florida county alone cut fifty staff and attorney positions total.18 Once those funds are gone from the budget, it’s hard to convince legislators to give the money back, let alone give those agencies what they really need to be fully functional. To add insult to injury, many public defenders are paid so miserably that they have to work second jobs in addition to the hundreds of clients they look after. It is not unheard of for a beleaguered public advocate to finish a twelve-hour day of the most emotionally taxing work imaginable and go right to driving an Uber for another six hours. One Kentucky public defender told  his local newspaper that “I never thought I would be 30 years old driving pizzas out after graduating from law school.… But you have got to make ends meet.” A Missouri public defender grimly admitted that on his salary, “if you want to raise a family, buy a house and a car, that’s not going to happen.”19 The dearth of resources given to public defenders has given rise to a whole subgenre of case law, one in which the public defense agencies have sued their own states for additional resources, to get out of the cases they are in, or both. Some of the judges who preside over these cases seem to get it. One opinion out of Louisiana raged at lawmakers: Indigent defense in New Orleans is unbelievable, unconstitutional, totally lacking the basic professional standards of legal representation and a mockery of what a criminal justice system should be in a western civilized nation. Equally shocking is the Louisiana legislature, which has known since 1972, constitutional violations and insufficient funding have plagued indigent defense, not only in New Orleans, but also in other Louisiana parishes. The  Louisiana legislature has allowed this legal hell to exist, fester and finally boil over.20 But just because a judge gets it doesn’t mean a legislator will bother to write a check for more resources, especially not for America’s most politically unpopular group: criminals. Of course, prosecutors’ offices often don’t have the resources they need, either. Government work is still government work, after all. But you won’t find a district attorney in America with less firepower than their public- defending counterparts. In Harris County, Texas, which long held the title of “death penalty capital of the world,” the budget for prosecutors is more than  twice the amount allotted for public defense. Harris County prosecutors get thirty full-time investigators; appointed lawyers get none. In New Orleans, public defenders are outnumbered three to one by prosecutors. This is not just a problem in the South. One county in New Jersey has double the number of attorney positions for prosecutors as for public defenders and more than seven times the number of investigators. Nor are you likely to find a prosecutor who is paid less than a public defender, if you adjust for seniority. Then again, seniority is not a big factor; most public defense agencies have enormously high turnover rates. I’ll delicately suggest that a broke, overworked prosecutor is different from a broke, overworked public defender, for a lot of reasons. Chief among these reasons is the simple fact that a prosecutor has more control over their caseload. If they don’t want to prosecute more cases, they can dismiss them or simply decline to prosecute (although this of course could get a deputy  prosecutor in hot water with a chief who is obsessed with high conviction tallies). In most jurisdictions a prosecutor’s workload is spread over more people, so it’s unusual for them to be carrying as many cases as a public defender. Another key difference is that it’s not usually a big deal if the prosecutor doesn’t know the facts of a case, but if a public defender can’t tell their client’s side of the story, that’s a problem. To paraphrase an old criminal lawyer’s adage, a prosecutor doesn’t have to worry about whether or not their client will go home at night. For a system that’s supposed to be skewed toward the criminal defendant (remember the “beyond a reasonable doubt” standard we used to have?), ours doesn’t read that way. The disparity in resources between prosecutors  and public defenders demonstrates what we’ve seen in previous chapters: criminals, or even people accused of crimes, are treated as second-class citizens. So naturally, their lawyers are treated as second-class lawyers, and the agencies that employ them are treated as second-class agencies. Public defenders are expected to be experts in criminal law, take on totally unmanageable caseloads, and then suffer the stigma common among incarcerated people, the general public, and even private attorneys (who should know better) of not being “real lawyers.” The truth of the matter is that “real lawyers” who practice criminal defense at private law firms often aren’t doing much better. The problem of the private bar is essentially one of capitalism: more cases means more pay. Fewer cases means less pay. So we want more cases. But if the cases don’t resolve quickly, then private lawyers, just like public defenders, can get overloaded. The competition for cases is stiff, especially in the world of what we call “blue-collar” crime: the thefts, rapes, and murders of the world. As incomes continue to drop and attorney fees continue to increase, it gets tougher to make a living doing ordinary criminal work. About 95 percent of all criminal defendants are now represented by public defenders or other appointed counsel.21 That leaves only a small wedge of pie for those who have private counsel and an even smaller wedge for “blue-collar” criminals who can pay. Pressure to sign up as many cases as possible and to resolve those cases as soon as possible is inevitable. The example of Steven Vargas’s lawyer at the beginning of this chapter is an extreme one, to be sure. But a lawyer taking on more cases than they can realistically handle because they have bills to pay? That’s hardly out of the ordinary. Plea bargaining makes it possible. In some areas, mostly rural ones, defense of the poor is handled much the same as it was in the pre–Powell/Gideon days. Cases are farmed out to a pool of private lawyers, who are appointed by judges from a list (or just from off the top of the judge’s head). This arrangement creates fertile ground for ethical violations. Private attorneys get paid slightly more per hour than a public defender might, but the cases often quickly reach the cap that a state  will pay, leaving the attorney with a busy private practice to maintain and a handful of cases that no longer generate income. Unsurprisingly, not a lot of lawyers are lined up to do this kind of work. I’ve done a fair bit of indigent representation on contract with the ever-cash- strapped state public defender’s office in Kentucky. Those contracts currently pay $75 per hour, which may sound pretty good. And it is! But when you stack it against a lawyer’s regular rates, which tend to range anywhere from  $200 to $500 hourly (in the Midwest and the South—the rates can be much higher on either coast), it’s hard to keep top talent engaged in these cases: experienced lawyers have to look at this kind of representation as a genuine public service. Add the fact that four or five cases at a time max out at $5,000 for all of the cases combined, and you start to see the real problem with farming the cases out to private counsel. Those lawyers who factor state contracts into their business models almost invariably end up biting off more than they can chew. One Indiana lawsuit involved a lawyer in a rural county who was assigned 176 unique felony cases and 32 unique misdemeanor cases in one year alone. State guidelines say a private lawyer can ethically handle only 75 felonies in a year on contract, but that didn’t stop the judge from continuing to appoint this lawyer, who also had a full roster of paying clients. Of course, nearly all of his cases ended up with guilty pleas; only two went to trial. But the Indiana courts rubber-stamped this arrangement all the same, finding no violation of anyone’s rights.22 Ethical guidelines are just that: guidelines. Courts don’t have to make anyone adhere to them and often won’t, if doing so would interfere with business as usual, even if that business amounts to large-scale legal malpractice. Lawyers who take on those gargantuan caseloads must pressure clients to take plea deals, whether it’s the right thing for the client or not. There’s no time for anything else. THERE IS ANOTHER MAJOR INCENTIVE FOR A LAWYER TO GET  their client to take a plea deal: criminal defense is hard. Over the years, in addition to an explosion in criminal cases accompanied by a slow drain of money from the criminal defense industry overall, the professional expectations placed on defense lawyers have become daunting. Courts have radically altered their Fourth Amendment jurisprudence since Gideon, which means knowing when to file what motions to challenge what kind of evidence can be a thorny affair. The American Bar Association and other professional organizations  have continued to publish more-detailed guidelines every few years, upping the ante for what is considered “competent” representation. And courts have demonstrated impatience with overburdened defense attorneys, even calling them out by name in published opinions when they don’t really deserve it. All this is perhaps a good thing in the abstract. But in practice, it means a lot more work for earnest defense lawyers who actually want to get it right. The interviews I did for this section of the book were among the more difficult because getting workaholic lawyers to sit still long enough can be like trying to nail grape jelly to a beehive. When I did finally talk to them, most of them have the capricious speech patterns of someone who has had to relentlessly hop from case to case for years. I’m telling on myself here, too. Having experienced it firsthand, I am almost certain that a few years of running a high-volume practice does something terrible to your brain. Although I’m not sure when it became the norm for lawyers to work themselves to death (maybe it’s always been that way), it is certainly the norm now. It’s practically a badge of honor to take on more than you can possibly handle.  Good criminal defense lawyers don’t confine themselves to the courthouse, either. Like cops, defense lawyers are expected to take on numerous roles that they are not built for. They become social workers, addiction medicine specialists, therapists, and more to their clients, filling voids that legislatures can’t be bothered with. It’s no wonder the substance- abuse rate among attorneys is astronomically high. Under those circumstances, if a lawyer has the ever-present ability to take something off their plate, they’ll probably do it. Anyone would. A system of normalized plea bargaining gives them that ability. The alternative is trial. And trials themselves, especially now that very few of them ever happen, are a briar patch. To be effective at something that might happen once or twice a year, a would-be trial lawyer has to have  thousands of cases, evidentiary rules, procedural rules, and local tricks of the trade committed to memory. Trial lawyers also have to be good public speakers, think quickly on their feet, be charming, and be appropriately aggressive with difficult witnesses. Not only that, but they have to be able to work twelve-hour days on one case, ignoring their families and putting their other cases on hold for days, weeks, or even months at a time. The opportunities for screwing up a trial are infinite, and trying a case—while exhilarating—can be a tremendous pain. You’d have to be a sociopath to  want to take every case to trial at the expense of your client, your pocketbook, your kids, and your own sanity. In contrast, a plea bargain takes only a few minutes, and there are no rules to memorize. The courts make pleading as quick and painless as possible. “Rocket-docket” or “meet-and-plead” systems, which are explicitly designed to speed cases through, happen every week in courthouses all over the country. Defendants show up, prosecutors give shoot-from-the-hip offers, and dozens of cases are resolved instantaneously. Karen Faulkner, a former public defender now in private practice, describes a rocket-docket–type system as “a mechanism to speed up the process of moving a felony to sentencing” in which “the defense is required to show all their cards to the state without the prosecutor having to tender or review discovery, speak to witnesses outside of a police officer, or review the strength of their case (as required under the ethical rules for prosecutors).… If the offer is unfair and is rejected,” the prosecution “has a policy to not make a better offer” later on. “The process is very one-sided, making the negotiations blind.”23 Vince Aprile, the lawyer who represented the defendant in Bordenkircher v. Hayes (discussed in the Introduction), sums up speed pleading: “Prosecutors essentially say ‘If you don’t take this deal, you’re never gonna get a better deal when we go forward.’”24 Defense attorneys play along because it’s the only way they can keep all their cases in motion. Another thing: trials, unlike guilty pleas, are subject to appeal. That’s good news for the defendant, but for their lawyer it means that the extensive record created by a trial might be pored over by another defense attorney, another prosecutor, the court of appeals itself, the media, and anyone else who might be interested in looking at it. On the other hand, when a defendant forgoes a trial to cop a plea, that means neither the public nor the higher courts will ever see any police misconduct, any abuse of authority by prosecutors, any failings by the defense attorney, the draconian sentences we hand out every day, or the abject foolishness of the criminal statute itself.  For defense lawyers, encouraging a client to take a plea deal is a no- brainer. Imagine you think a client is guilty, and you have the choice of (1) pleading early, (2) slogging through a year of work and pleading guilty, or (3) slogging through a year of work, disappearing into the hell of trial for a week, watching the jury returning with a guilty verdict, and then having your work put under a microscope at the court of appeals. Assuming you get paid no matter what, which one would you choose?

### Contention 3: Court Clog

#### Alaskan plea bargain ban increased costs and time delays

Burke 13 [Jill Burke, former writer and columnist for Alaska Dispatch News, 8-13-2013, "Will Alaska's plea bargain plan serve justice, or cause it to grind to a halt?", Anchorage Daily News, https://www.adn.com/alaska-news/article/will-alaskas-plea-bargain-plan-serve-justice-or-cause-it-grind-halt/2013/08/14/]/Kankee

More expensive? Disallowing sentence bargains means that it will be up to judges to determine consequences for defendants in what is known as an "open sentencing," a kind of mini trial in which evidence and witnesses are presented as part of the fact-finding process by the judge before a sentencing decision is made. Deputy Public Defender Douglas Moody anticipates the new policy will be more expensive. Not only will it require more court time, but also more time from lawyers as well as probation officers who write reports on a defendant's history that are used at sentencing. Moody also suspects the state may see more cases go to trial, since the reason defendants plead is to have some certainty about their fate. Why take a plea deal if there's not much to gain from it? But, Moody said, there is a potential upside. "If it results in better charging decisions and better screening of cases it may be more cost effective in the long run," he said. Sixty percent of the Department of Law's $97 million budget is spent on criminal matters, Geraghty told the Alaska Legislature last spring. In 2012 it handled nearly 40,000 matters, including more than 20,000 misdemeanors and 8,000 felonies. It took $105 million to run Alaska's Court System that same year, and $287 million for the Department of Corrections. 'Conveyor-belt justice'

#### Err aff – ~90% judges, who have more expertise on judicial dockets then the neg, approve plea bargaining

Miller et al. 25 [Monica K. Miller, Director, Interdisciplinary Social Psychology Ph.D. Program, Foundation Professor, Criminal Justice Department and Interdisciplinary Social Psychology Ph.D. Program at UNR with a J.D. and Ph.D., Nathan W. Prager, Doctoral Candidate in the Interdisciplinary Social Psychology Ph.D Program at UNR with an M.A., Teyah S. Giannetta, Doctoral Student in the Interdisciplinary Social Psychology Ph.D Program at UNR with a M.S., and Janice L. Burke, Doctoral Candidate in the Interdisciplinary Social Psychology Ph.D Program at UNR, 2025 “Do Plea Bargains Advance Justice? A Content Analysis of Judges’ Perceptions of Plea Bargaining,” UIC Law Review, https://repository.law.uic.edu/cgi/viewcontent.cgi?article=2971&context=lawreview]/Kankee

V. RESULTS A total of 574 judges participated in the survey. Out of those judges, 512 judges responded that they did perceive plea bargains to advance justice, but 59 judges responded that they did not believe plea bargains advance justice. The remaining three judges did not respond to the closed-ended question, but they did leave comments. A. Hypothesis One

#### Court backlogs independently deter economic investment and effectively stymies growth in innovation- empirics prove

**Scialabba et al. 19** [Lori Scialabba, specialist executive at Deloitte Consulting LLP and served 33 years in the US federal government, retiring as the acting director of USCIS, Bruce Chew, federal research leader for the Deloitte Center for Government Insights and a managing director with Monitor Deloitte, China Widener, principal at Deloitte Consulting LLP and serves on Deloitte’s US Board of Directors and is also a leader and adviser to multiple organization-wide DEI communities, Isaac Jenkins, writer at Deloitte, 5-6-2019, “Government backlog reduction”, Deloitte, https://www.deloitte.com/us/en/insights/industry/government-public-sector-services/government-backlog-reduction.html]/Kankee

The true costs of backlogs Agencies often struggle to get the funding needed to fix their backlogs. After all, a backlog is an annoyance, but is it really worth the effort to solve it? The problem with this thinking is it ignores the opportunity costs of a backlog, which can be significant for individuals, communities, and businesses. For example, the US security clearance backlog, which peaked at over 700,000 cases in 2018,[9](https://www.deloitte.com/us/en/insights/industry/government-public-sector-services/government-backlog-reduction.html#endnote-9) is a backlog with high opportunity costs. Each clearance case represents an individual who needs access to classified information to do the job right—but instead is unable to do so, or worse, is simply waiting for clearance to be employed. According to a 2018 survey of cleared personnel, jobs that required clearance had an average salary of about US$93,000.[10](https://www.deloitte.com/us/en/insights/industry/government-public-sector-services/government-backlog-reduction.html#endnote-10) The downstream effects of the backlog—in employment terms alone—are felt in lost labor market efficiency, forgone income, and reduced tax revenues (not to mention the mission impact of a shortage of qualified and cleared personnel). Many states face backlogs in everything from human services to examining criminal evidence. With some states facing a serious epidemic of opioid and related drug abuse, a drug-evidence testing backlog can mean delayed justice, which means police could release known drug dealers while they wait on evidence. That means more dealers and traffickers on the street, and more damage to communities.[11](https://www.deloitte.com/us/en/insights/industry/government-public-sector-services/government-backlog-reduction.html#endnote-11) The effects on communities can exacerbate backlogs in other state systems—from children in foster care to state and local court systems to elder care. And government backlogs can reduce the attractiveness of investment and innovation in **entire** economies. Backlogs in court systems, for example, can deter economic investment by **increasing risk**, especially for foreign investors, and by enabling anti-competitive behavior, such as bogging down competitors in endless lawsuits or violating agreements with impunity. Backlogs in developing economies in Asia, for example, are soaring, with downstream effects for justice, growth, and long-term development.[12](https://www.deloitte.com/us/en/insights/industry/government-public-sector-services/government-backlog-reduction.html#endnote-12) They can harm developed economies too: By one estimate, Italy’s justice backlog reduces GDP growth by 1 percent annually.[13](https://www.deloitte.com/us/en/insights/industry/government-public-sector-services/government-backlog-reduction.html#endnote-13) Backlogs can also hinder innovation. Studies by the Center for the Protection of Intellectual Property have found that each year of patent delay can reduce a startup’s employment by 21 percent and sales growth by 28 percent over the five years after approval.[14](https://www.deloitte.com/us/en/insights/industry/government-public-sector-services/government-backlog-reduction.html#endnote-14) Patent backlogs can decrease the payoff for R&D, reducing technology **progress**:[15](https://www.deloitte.com/us/en/insights/industry/government-public-sector-services/government-backlog-reduction.html#endnote-15) For example, backlogs in three top patent offices led to more than US$**10 billion in reduced global growth** each year.[16](https://www.deloitte.com/us/en/insights/industry/government-public-sector-services/government-backlog-reduction.html#endnote-16) Backlogs can also reduce citizen satisfaction, and in turn, confidence in government. Trust in government today is at historic lows, with only 18 percent of Americans surveyed saying they trust government to do the right thing all or most of the time.[17](https://www.deloitte.com/us/en/insights/industry/government-public-sector-services/government-backlog-reduction.html#endnote-17) For many citizens, case-processing systems are where they encounter government, whether at the registry for motor vehicles, in applying for benefits, or getting permits for their homes or businesses. Long wait times and poor customer experience can further erode confidence in government—no one’s desired outcome. How not to clear a backlog

#### Court congestion kills the preservation of democracy

**Jawando and Wright 15** [Michelle L. Jawando, Vice President at the Center for American Progress, Sean Wright, writer for the Center for American Progress, 4-13-2015, “Why Courts Matter”, Center for American Progress, https://www.americanprogress.org/article/why-courts-matter-2-2/]/Kankee

Introduction No matter the issue—whether it’s marriage equality, voting rights, health care, or immigration—the U.S. federal courts play a **vital** role in the lives of all Americans. There are two types of courts: state and federal. The federal courts are those established to decide disagreements that concern the Constitution, congressional legislation, and certain state-based disputes. Although most Americans are familiar with the lifetime appointment of justices on the U.S. Supreme Court, many are surprised to learn that more than 900 judges have lifetime appointments to serve on lower federal courts, where they hear many more cases than their counterparts on the Supreme Court. Each year, the Supreme Court reviews around 100 of the most significant cases out of the nearly 30 million cases resolved by state and federal courts. These courts hear the majority of cases and, most of the time, they have the **final** say. That is why, along with the Supreme Court’s justices, the judges who sit on the nation’s federal district and circuit courts are so important. At any given time, there are vacancies on U.S. federal courts that need to be filled. If they are not filled, federal caseloads get **backlogged**, and as a result, Americans’ access to justice is limited. As of March 9, 2015, there were 50 current vacancies on U.S. federal courts. These seats have been vacant for a total of 22,222 days, resulting in a backlog of 29,892 cases. The Administrative Office of the United States Courts has designated 23 of these pending vacancies as judicial emergencies, meaning that filling them is a critical task. As the Center for American Progress has noted, “in practical terms,” these are the judicial districts “where judges are overworked and where justice is being **significantly delayed** for the American public.” The Constitution dictates that the president appoints federal judges while the Senate advises and consents on these appointments. The result is a delicate balance between the desires of the White House, deference to home-state senators, and the power of the party that controls the Senate. Recently, politics has played a big role in the pace at which judicial nominees are confirmed. In an attempt to slow President Barack Obama’s effect on the federal courts, Senate Republicans have obstructed the president’s judicial nominees at unprecedented levels by attempting to prevent or delay a vote through filibustering a record number of nominees and making them await confirmation for long periods of time. The reason many Senate Republicans have played politics with President Obama’s judicial nominees is because they know the dramatic impact the judiciary can have on policies, including marriage equality and reproductive choice. The fewer judges that President Obama appoints to fill federal judicial vacancies, the greater leverage the next president will have in deciding the make-up of these courts. Yet in the face of unprecedented obstruction, President Obama has made great strides to fill vacancies and to ensure that federal judges meaningfully reflect the dynamic diversity of the nation. A diverse federal bench improves the quality of justice and instills confidence that judges understand the real-world implications of their decisions. Americans have different backgrounds, as well as an assorted set of professional, educational, and life experiences. It is important that the federal courts reflect the diversity of the public they serve. As Supreme Court Justice Sonia Sotomayor once wrote, “The dynamism of any diverse community depends not only on the diversity itself but on promoting a sense of belonging among those who formerly would have been considered and felt themselves outsiders.” Furthermore, scholars have found that judges often change their minds during the deliberative process. In one study, researchers concluded that having a woman on the panel affected “elements of both deliberation and bargaining—alternative perspectives, persuasive argument, and horse trading.” Not only do the federal courts play a **vital role in preserving democracy**, but who sits on the courts has an effect too. This issue brief examines the ways in which our federal courts influence important policy issues and illustrates how judges’ decisions are often aligned with the legal philosophy of the presidents who appoint them. This fact drives home one of the reasons why courts matter: The decisions of federal judges have repercussions on people’s lives. Through its review of how the federal courts affect three specific policy issues—gun violence, money in politics, and voting rights—this issue brief shines a light on how important the federal courts are for the progressive community.

#### Court clog shuts off efficient resolution of climate litigation- that crushes effective enforcement of environmental policies to lessen climate change

Carlarne 21[Cinnamon Piñon Carlarne, 19th President and Dean of Albany Law School, leading international expert in environmental and climate change law policy, 2021, “The Essential Role of Climate Litigation and the Courts in Averting Climate Crisis”, Ohio State Legal Studies Research PaperNo. 592, SSRN, https://ssrn.com/abstract=3761850]/Kankee

The failures of state actors are undeniable. The United States is simply one very obvious and very important case in point. With very few exceptions, heads of state and national legislatures demonstrate little interest in leading efforts to address climate change. The leadership **void is immense**. The task of filling it falls to the judiciary. The history of judicial leadership on matters of critical social importance on which the political branches have stumbled is long and layered in social and liberal democracies worldwide. From the US Supreme Court’s decisions to desegregate schools and advance individual freedoms and privacy rights, to India’s Supreme Court’s string of decisions advancing protections for privacy, gender, and sexuality-related rights,3 to the expansive suite of decisions of the European Court of Human Rights on topics ranging from domestic slavery to environmental justice,4 to the ongoing role of courts in recognizing a right to a healthy environment5 and emerging rights for nature,6 the judiciary plays an **essential** role in *advancing* the rule of law on climate change. More specifically, climate litigation7 draws on a long history of environmental litigation. From the earliest days, litigants turned to the courts to ensure the **implementation***,* **enforcement***,* and **evolution** of environmental law. Courts have served as the **guardians** and, at times, the architects of the rule of law in the environmental context in jurisdictions as varied as the United States, South Africa, and India.8 The role that the courts have and continue to play in shaping environmental law reflects a long history of adversarial legalism9 and an abiding faith in the ability of the courts to be unbiased arbiters of legal disputes as well as visionaries of change. Climate litigation is thus neither an aberration nor a new phenomenon. The expanding body of climate litigation responds to profound state failures to protect their citizenry from the **dire** threats that climate change poses. Moreover, it tracks a history of citizens turning to the courts to identify and enforce fundamental rights when the political branches **fail** to do so, and reaffirms the long-standing role and responsibility of the judiciary in maintaining the integrity of the rule of law and ensuring the wellbeing of the nation and its people, particularly in moments when the state fails to respond to urgent social, scientific, and political challenges.10 Building on a long history of effective environmental litigation, climate litigation is playing and **incontrovertibly** important role in shaping the rule of the law around climate change. The Emergence and Evolution of Climate Litigation

#### Judicial backlog link turns justice delays

**Settles 24** [Tanya Settles, professor at the University of Texas San Antonio and CEO of Paradigm Public Affairs, 09-20-2024, “Justice Delayed: The Growing Impact of Judicial Backlogs”, American Society for Public Administration, https://patimes.org/justice-delayed-the-growing-impact-of-judicial-backlogs/]/Kankee

Retirement accounts for many of the judicial vacancies across the nation, but other factors, including increased politicization of judicial appointments and returns to private practice also contribute to judicial shortages. Furthermore, younger judges are being appointed who are more likely to resign before meeting the Rule of 80, the federal law that requires judges age plus years of service on the bench equal 80 before eligible for Senior Status caseload reductions or retirement. Combined with the expectation of public scrutiny and hostility directed toward judges, oppressive caseloads, politicization and persistent under-resourcing, it is no surprise judges are leaving the bench and the judiciary is experiencing the same challenges with recruitment and retention the other sectors of public service.  Impact of Judicial Backlog  For state and county governments a **judicial backlog** is more than a mere inconvenience. In criminal cases, it means people accused crimes may spend more time in pretrial detention. Victims and witnesses may experience emotional trauma from lengthy delays that impede physical and emotional healing. On the civil side of the law, delays in resolving business disputes can have economic repercussions that hinder economic activities and growth. For circumstances where judicial intervention may be required, delays can be emotionally devastating to individuals who await civil resolution of cases involving child custody and divorce. Backlogs in state and local courts cause both up- and downstream impacts that exacerbate challenges with government resource allocation, budget and fiscal stability. Finally, and perhaps more importantly, workplace disruption caused by backlog and other circumstances may cause judges to be prone to poor application of the law. Like everyone else, when faced with backlogs and increasing workload, judges and magistrates may rush to decisions without full considerations of the merits of each case and impartial application of law. In other words, because they are human, they can make mistakes that have deleterious consequences for the millions of people and businesses who seek their help.   Solutions  This is not a problem that money alone can solve. While better funding may help, it doesn’t resolve caseloads that for some jurisdictions have increased by upwards of 30 percent in recent years, nor does it adequately address the combined impacts of fewer qualified candidates who seek a high stress judgeship with a relentless workload. To solve these problems, particularly at the local and state level, a new range of solutions are needed. Some are legislative, others are administrative, and together they may be practical:

#### Court clog causes more pretrial detention

**Zarkower 21** [Sam Zarkower, second-year law student at Cornell Law School, graduated from Dartmouth College with a Bachelor of Arts in Government and Classical Studies with a Minor in Public Policy, 11-10-2021, “Expanding the Courts to Reduce Case Backlogs”, Cornell Journal of Law and Public Policy, https://publications.lawschool.cornell.edu/jlpp/2021/11/10/expanding-the-courts-to-reduce-case-backlogs/]/Kankee

Case backlogs significantly impact the judicial system. By delaying the proceedings, case backlogs increase the cost of litigation. When a case is backlogged, parties—especially those that cannot afford to wait or pay for protracted litigation—are incentivized to accept less than optimal settlements. **Backlogs** also force criminal defendants, who cannot afford bail, to spend a greater amount of time in jail before a determination of their guilt can occur. Moreover, backlogs can stymie justice by delaying trials until after witnesses or even parties have passed away.  Courts across the United States have experienced backlogs for quite some time. Between 2000 and 2014, thousands of civil cases were backlogged in U.S. District Courts each year, and this trend has only continued into the 2020s. For example, as of 2020, the number of backlogged cases in the U.S. District Court for the District of New Jersey sat at a staggering 39,000, up over 230% since 2016. In the administrative law courts of the Department of Health and Human Services, hundreds of thousands of Medicare appeals were backlogged during the 2010s. Similarly, the nation’s immigration court has faced severe backlogs for more than a decade. Concerningly, the immigration court’s backlog has grown at an exceptionally rapid pace. Back in 2012, only 318,832 immigration cases were backlogged. By 2019, the backlog had ballooned to over one million cases. Unfortunately, this problem is not limited to federal courts. In 2019, county and municipal courts faced an average backlog of 828 cases. That same year, state courts experienced an even greater backlog with an average of 1,030 cases backlogged per court.  The effects of COVID–19 have only exacerbated the nation’s backlogs. By suspending jury trials and in-person proceedings in response to the pandemic, local, state and federal courts have expanded their backlogs. In regards to the former, the pandemic has caused state and local court backlogs to increase on average by about thirty three percent. In Texas, the pandemic has created statewide backlogs that are projected to take three to five years to clear. Similarly, Georgia’s pandemic backlog is projected to last for at least three years. Meanwhile, in Florida, the backlog count has grown to over one million cases since the beginning of the pandemic. In New York City, the backlog of criminal cases has grown by approximately one third since the start of the pandemic. Following the outbreak of COVID-19, the U.S. District Courts for the Eastern District of California and the District of Arizona declared judicial emergencies in order to respond to their worsening backlogs.  In order to reduce the backlogs, legislatures should expand the nation’s courts. By establishing new judgeships at local, state and federal levels, more cases can be resolved each year. Although the expansions would require sizeable financial appropriations, the potential benefits would not be insignificant. Based on data from 2020, each new United States District Judge would be able to terminate an average of 527 cases each year.  After weighing the costs and benefits of expanding the courts, several governing bodies have already begun to recruit extra judges to reduce their backlogs. As of July 2021, one Texas county unanimously decided to appropriate funds in order to hire three visiting judges. In Massachusetts, the state government rehired 15 retired judges to address their case backlog. In an effort to respond to their state’s backlog, the Wyoming state legislature is debating a bill that would establish additional judgeships. While Congress has authorized the recruitment of 415 more immigration judges to address the immigration court’s backlog, they have yet to expand the nation’s district courts. Hopefully, that will soon change.

#### Longer cases mean more humiliation, lost wages, and denial of access to education, jobs, housing, and credit. These are all independent of whether someone is convicted

Ahmed 22 [Zohra Ahmed, Assistant Professor at the University of Georgia School of Law, 2022, “Bargaining for Abolition,” Fordham Law Review, https://fordhamlawreview.org/wp-content/uploads/2022/04/Ahmed\_April.22.pdf]/Kankee

To extend the assembly line metaphor, if police place the person arrested on a conveyor belt, then prosecutors crank the pulley, keeping the process in motion to eventually ensure that a judge imposes some kind of penal discipline down the line.24 Legal adjudication moves the conveyor belt forward—that is, in order for the defendant to progress from one stage to the next, a judge needs to issue a legal ruling. The process only moves forward by compelling the accused’s appearance, either by the threat of or by actual physical coercion in the form of pretrial detention. Prosecutors perform the lion’s share of the adjudicative labor, making them the system’s most powerful actors.25 Their charging decisions orchestrate the path of the case. Prosecutors determine whether a case will go to trial or be resolved with a plea.26 One labor-saving maneuver that prosecutors consistently deploy is to charge the defendant with the highest possible offense to secure a plea and avoid a labor-intensive trial.27 But they do not work simply to extract convictions. Professor Issa Kohler-Hausmann shows that assistant district attorneys in New York City use their charging power to bring the urban underclass under court supervision.28 The district attorneys’ offices in New York City tend to assign quality-of-life cases to their new recruits, where they learn their craft by practicing on the lives of Black and Latinx New Yorkers. 29 The cases are often indistinguishable from one another; their pleadings mirror the boilerplate language in the police paperwork, which is itself reflective of the stubborn persistence of police quotas.30 Kohler-Hausmann shows that district attorneys’ offices pursue cases despite the fact that few will result in convictions. 31 Some cases will even be dismissed by design or by neglect.32 But the cost of processing the case is displaced onto defendants who each have to return to court multiple times. For defendants, it means repeated court dates, lost wages, and lost time that court actors systematically devalue.33 For each court date, to enter these courtroom’s physical spaces, nonlawyers must endure a set of humiliating rituals. Every morning, even before the session begins, a long line of people with court dates hugs the corner of the building—in rain, snow, or shine.34 The patient attendees wait, only to be greeted by court officers guarding the cold metal detectors. After they take off their outer garments and empty their pockets, those with court dates can expect a brisk pat down. Then, the interminable wait begins, before the court officer finally announces their cases. And, as prosecutors progress through their thick piles of case files, defendants endure repeated trips to court until their case is finally closed. Meanwhile, as the case is pending, the defendant’s life hangs in the balance: even the seemingly benign mark of an open criminal case is apparent to employers, landlords, creditors, and school admissions officers who are given cause to deny a hopeful application.35 When it finally comes down to resolving the case, prosecutors determine the ultimate disposition for quality-of-life offenses, based not on the strength of the case but rather on the accused’s misfortune of being previously arrested for something else.36 Although prosecutors are the most powerful violence workers in criminal court, they tend to minimize the amount of power they exercise over people’s lives, “placing that responsibility onto other systems out of or beyond their control.”37 The defense attorney has an ambiguous relationship to this violence work. At their most powerful, defense attorneys can slow down the conveyor belt and create off-ramps to mitigate the work of their adversaries. However, defense attorneys cannot expect to disrupt the entire operation through their legal practice. At worst, the defense attorney legitimizes carceral control by providing the illusion of due process. 38 Prosecutors, as they apply the criminal law, narrow the court’s attention to the singular individual act. Their prerogative to blame obfuscates the conditions outside of the individual’s control that makes criminalization almost inevitable.39 Prosecutors blindfold themselves to the structural conditions that shape who the police place on the assembly lines. But their adherence to the myth of personal responsibility conflicts with the evidence. Sociologists ascribe urban interpersonal violence, like homicide, to conditions of extreme segregation.40 But criminal law focuses primarily on the person who pulls the trigger. Even when prosecutors consider mitigation, they still operate within the bounds of retributive justice, applying the defendant’s social history as a discount against the accused’s blameworthiness.41 Their work minimizes state failure and emphasizes personal responsibility. Indeed, prosecutors are the cult of personal responsibility’s most faithful practitioners. This methodological individualism entrenches group-level differences. In Chicago’s Cook County, sociologist Nicole Gonzalez Van Cleve captures the tenor of the conversation between courtroom insiders as they negotiate case resolutions.42 Van Cleve shows how the discourse of crime and its attendant discourse of personal responsibility serves as the civil way to launder discussions of racial hierarchies in racially neutral ways.43 Defendants’ ascribed personal characteristics feature prominently. 44 Van Cleve traces the logical and linguistic slippages in courtroom actors’ negotiations: the defendant’s poverty becomes ascribed to their laziness.45 A past trauma solicits fear rather than empathy.46 The lawyers broker deals by trading on pseudosociological tropes: broken families, absent fathers, and dependent mothers.47 White courtroom insiders awkwardly appropriate African-American vernacular to speak about Black defendants.48 These ways of speaking parallel the pervasive racial discrimination that taints every aspect of the court system. 49 In this way, criminal legal processes play a critical role in constructing racial hierarchy. Prosecutors and judges reserve their more punitive criminal court sanctions for Black defendants, all other things being equal, particularly in drugs and weapons prosecutions and in the juvenile justice system. 50 The latter has the effect of “creating a cumulative record of disadvantage over the life course.”51 Other state-produced vulnerabilities become liabilities in court. Criminal courts are public institutions that almost exclusively regulate the poor and the working class.52 This is not a coincidence: policy makers in the 1970s anticipated prison constructions based on the number of men who were unemployed.53 Yet, despite the overrepresentation of poor people in criminal court, being poor systematically disadvantages defendants and undermines their cases in court.54 Court fines and fees, incarceration, and lost wages further immiserate defendants.55 Criminal courts’ processes and the punishment that they dispense also frequently weaponize expressions of neurodivergence, transforming neurocognitive differences into disabilities.56 Criminal courts’ violence is thus not just physical but also structural.57 To borrow scholar Ruth Wilson Gilmore’s formulation, the criminal punishment system’s practitioners “exploit and renew fatal power-difference couplings.”58 Gilmore elaborates: “There is no difference without power, and neither power nor difference has an essential moral value. Rather, the application of violence—the cause of premature deaths—produces political power in a vicious cycle.” 59 Gilmore draws attention to the legal and extralegal processes, such as racism, ableism, and classism that produce group-level hierarchies.60 Criminal procedure participates in these processes, exploiting and reconstructing differences that stratify individuals with life-altering consequences.61 The criminal punishment system shortens people’s lives and inflicts psychological and emotional pain.62 Criminal law’s physical and structural violence weakens social bonds. But that disintegration is also a cause: it is precisely the lack of social solidarity that makes this multidimensional violence possible. When prosecutors make charging decisions, they stigmatize defendants as blameworthy and castigate them as unruly, harmful, or dangerous. They inherently assign value to persons and behaviors, identifying who deserves our collective wrath and who merits our solidarity. Their adjudication instructs not only those directly entangled in criminal courts but also the public at large. Criminal law’s practitioners engage in physical, structural, and social violence: they force people into cages or, at least, they threaten to; they exacerbate and reconfigure group-level differences that put those who are criminalized at a distance from the levers of social, economic, and political power; and they undermine social solidarity by erecting fault lines between guilty and innocent.63 Taking a step back and opening the aperture, criminal courts’ workers communicate lessons about who and what society ought to value. These moral lessons are not always explicit or consistent, and they exist only in human action. In turn, to erect a different theory of value would thus require criminal court actors to perform their work differently, or to stop altogether. II. L ABOR AS MATERIAL INPUT

### Contention 4: Abolition Aff

#### Preventing construction of criminality from and the denial of the will to knowledge of delinquency is the prerequisite to ending carceral citizenship and mass incarceration. Traditional antiblackness scholarship overprioritizes vestiges of sovereign power when disciplinary control driven by capitalism and biopolitics perpetuates the carceral state

Taylor 25 [Chloë Taylor, Professor of Women’s and Gender Studies at the University of Alberta, 2025, "8 Foucault and Prison Abolition,” Bristol University Press, https://www-jstor-org.ezproxy.library.unlv.edu/stable/jj.12348235.13?seq=1]/Kankee

Introduction: Foucault’s genealogy of the prison In Discipline and Punish (1977), Foucault does not so much argue that incarceration produces recidivism as point out that this fact has been known since the birth of the prison (Foucault, 1977: 252–253, 265, 270–272, 276– 284). We have long known that punishment does not deter and prisons do not rehabilitate. On the contrary, prisons produce criminals and thus more crime. Incarceration leads to situations of isolation from society and feelings of anti-sociality in those incarcerated, and simultaneously socializes offenders into a criminal milieu. Moreover, prisons deprive families and communities of parents and wage earners, leading to more crimes arising from poverty and familial and community dysfunction. Contemporary critical prison studies scholars such as Michelle Alexander (2011) have demonstrated that the manners in which offenders continue to be punished, restricted and regulated post-incarceration in countries such as the US leaves many former prisoners with few options other than to return to prison. Foucault offers more theoretical variations on these critiques of the prison, observing that the introduction of the discourses and activities of the psychological sciences into the criminal trial and the prison provided an opportunity not simply to punish a prisoner’s body, but also to categorize, observe and refashion their soul. Prisoners are constructed as objects of knowledge for criminology, psychiatry and psychology, which predict their likelihood to reoffend and suggest further disciplinary measures based on this prediction, such as extended or reduced periods of incarceration and various forms of probation and post-incarceration surveillance. For Foucault, the production of ‘objective’ knowledge about criminals objectifies these human beings, producing the very objects and realities that are then known and acted upon. For all these reasons, prisons are not merely ineffective at preventing crime but also counterproductive, to the extent that it would be better for crime prevention to have no criminal justice system at all than to perpetuate the system we have (Davis, 2003: 105). As legal scholar Nicola Lacey puts it, the uselessness of prisons as a means of crime control is a ‘frequently rediscovered insight’ (Lacey, 2011: 18). The subtitle of Discipline and Punish is ‘birth of the prison’, but to what prison does Foucault refer? On the one hand, clearly he is providing a genealogy of the prison in the sense of physical institutions of confinement. At the same time, Discipline and Punish provides a genealogy of the modern soul – the disciplined soul, which, he argues, is another kind of prison, or another way in which bodies are kept docile. Foucault (1977) thus shows that the prison both monitors and produces souls, but it does not produce the penitent souls that were anticipated by the original advocates of penitentiaries; rather, it produces delinquent souls that almost inevitably lead these bodies back to prison. So, as Foucault makes clear, the prison fails spectacularly at rehabilitating prisoners and thus prison is ‘dangerous when it is not useless’ (Foucault, 1977: 232). Although the failure of prisons to rehabilitate is important to note, Foucault insists that we must move beyond such naïve reiterations of familiar criminological facts and ask what prisons are doing well, such that biopolitical states do not dream of doing without them. For him, it cannot be the case that the failure of the prison to deter crime or to rehabilitate prisoners simply has not yet registered with the powers that be, or that we merely need to demonstrate these facts again. Such demonstrations have been ineffective for 200 years for a reason: the prison must in fact be effectively serving purposes that make it indispensable to the biopolitical state. In order to explain what the prison is doing well, it is necessary to understand the ways in which sovereign power was failing in the punitive realm, such that a disciplinary response to crime – embodied by the birth of the prison – was appealing in the first place. Foucault (1977) argues that under sovereign power, crimes were viewed as offences against the sovereign rather than against their immediate crime victims. Punishment was conceived as the reassertion of the sovereign’s power rather than the repaying of a debt to one’s victim or to society. The people were not seen as the ones on whose behalf punishment took place, but as compulsory spectators of the bloody rites through which the sovereign reasserted his power. The population was not meant to feel vindicated or protected by the punishment of lawbreakers, but rather awed by the display of the sovereign’s might. The result of this approach to punishment was that people often felt sympathy for the condemned and outrage at the excesses of the sovereign’s violence. In contrast, disciplinary power is more likely to be supported by the population because it is packaged as the paying of a debt to and protection of society, and we are more likely to support an effort made on our own behalf than one aimed at terrorizing or subduing us. Thus, while the punitive spectacles of sovereign power frequently backfired by giving rise to revolt, popular manifestations of resistance have been relatively rare since the rise of the prison. Beyond this, sovereign power was ineffective because it punished relatively few bodies. Disciplinary power, in contrast, targets all bodies and, more importantly, all souls. Significantly, we are less likely to resist a form of power that has already constituted who we are. The effectiveness of discipline lies in the fact that we are unlikely to recognize our self-formations and intuitions as the products of power. We thus accept contingent norms that are the product of disciplinary normalization as both universal and common sense. For example, although what is considered a crime as well as how criminals are perceived is contingent and socially constructed, we have internalized a pathologizing and fearful understanding of criminals, most of whom are not violent or dangerous, but the victims of poverty and racial profiling, whose acts may not have been criminal in another time and place. However, the idea that crime entails violence and wrongdoing, and thus that criminals should be feared and mistrusted, is normative today, and we do not usually resist what we have internalized as a norm. In short, even if disciplinary power – exemplified by the prison – fails to deter crime or to protect society, it remains desirable to the biopolitical state because it produces a population that is extraordinarily submissive to the criminal punishment system. Foucault (1977) also notes that because the punishments were so extreme in the law codes under sovereign power, judges were not willing to enforce the laws consistently. Thus, justice could also be irregular because the judges themselves were not willing to be consistent, and therefore the punishments and laws of sovereign power were not enforced. All this made the exercise of sovereign power highly sporadic: sometimes it was applied according to the letter of the law and then people might revolt in sympathy for those being mutilated or killed for petty crimes such as larceny, while in other cases the law was not enforced because it was too severe and thus there was no certainty of punishment. In contrast, with disciplinary power, punishments are lighter and therefore judges are consistently willing to enforce them. Foucault writes that penal and legislative reform aimed ‘to make of the punishment or repression of illegalities a regular function … Not to punish less but to punish better; to punish with an attenuated severity perhaps, but in order to punish with more universality and necessity’ (Foucault, 1977: 82). Although popular resistance occurs far less often under disciplinary power than under sovereign power, when people do revolt, resist and riot in the streets against the exercise of the state’s power to punish today, it is largely in cases where capital punishment (a remnant of sovereign power) still exists or is exercised by the police and in instances where punishment is applied inconsistently and thus unjustly. So, in the US, there are protests when people are about to be legally executed, when police execute unarmed Black people and when high-profile court decisions are blatantly racist. Thus, resurgences of sovereign power, seen in irregular, severe and biased punishments, still give rise to rebellion in a way that routine prison sentences typically do not. Foucault observes in Discipline and Punish that penal reformers in the late 18th and early 19th centuries suggested a variety of approaches to punishment other than prison. For instance, one proposal was that punishments should match crimes: a thief would lose his hand; a poisoner would be scalded with boiling liquid; and a murderer would be executed. The only criminals who would be punished by being put into prison would be those who had deprived someone else of their liberty, such as kidnappers. Yet these ideas for penal reform never had traction, whereas the prison soon came to seem ‘self-evident’ and even ‘natural’. Although the problems with the prison were quickly recognized, the ‘self-evident’ aspect of prisons remained. As Foucault (1977: 232) writes: ‘It is the detestable solution, which one seems unable to do without.’ But why can we not imagine doing without the prison? Why does it seem self-evident when we know that it is but a 200- year-old invention? First and foremost, Foucault (1977) thinks that the prison seems selfevident to us today because it is an extension of the pervasive structure of society. We live in a disciplinary, carceral society and the prison is simply a more extreme disciplinary and carceral space than those of our regular lives. The prison thus seems natural to us because it is a mere intensification of what we have been habituated to in all the other institutions in which we are formed and trained (Foucault, 1977: 233). Thus, in the final chapter of Discipline and Punish, Foucault asks why we accept being punished, and being punished for such minor offences. In response, he suggests that we do so because we are habituated to disciplinary power as it extends from gentle to draconian forms, from parental discipline through schools, hospitals, workplaces, the army and on to prisons. Beyond this, prisons seem self-evident because, compared to other punishments, they are perceived as egalitarian and democratic. Moreover, prisons are understood as economic and moral; prison terms are a means of ‘paying one’s debt to society’, and the debt is calculated in terms of time served. This economic approach to punishment seems fair and consonant within a capitalist worldview. Finally, prisons were at least originally conceived as therapeutic and thus penal reformers could assure themselves that their punishments reflected a civilized and humane society in which we do not hurt wrongdoers, but merely deprive them of their liberty in order to help them to help themselves. However readily we may contest each of these perceptions of the prison, carceral institutions have proved palatable because they conform not only to capitalist values, but also to our self-perception in Western democracies as egalitarian, civilized and humane. Foucault (1977) discusses another reason why prisons have come to seem inevitable. This is that prisons are sites of knowledge production. As Foucault argues in works such as The Order of Things and The History of Sexuality, modernity is characterized by the invention of human sciences and the desire to know ourselves. The French title of Foucault’s The History of Sexuality is La volonté de savoir: The Will to Know. Modernity is unique in this desire to know the knower, especially in its ‘problematic’ forms. Foucault’s ‘will to know’ is a play on Nietzsche’s ‘will to power’, and the will to know about ‘problematic’ human kinds is caught up in a will to power insofar as we want to know about these human kinds to control or transform them. In the case of criminality, a great deal of knowledge is now considered necessary not only about crimes but also, more importantly, about criminals, as is most evident in the 19th-century invention of criminology. According to Foucault (1977), criminological knowledge is considered necessary today both to judge and to punish lawbreakers. The prison is in some ways the ideal place for deriving knowledge about criminals, both as individuals and as types. Carceral institutions are panoptic, providing the perfect opportunity for total observation of the human kinds housed there. However. the idea that prisons, and other panopticons, give us objective knowledge about human kinds must be qualified in a significant way. For Foucault (1977), what is observed in prison is the ‘delinquent’, which is different from the agent of a crime. Agents are understood as having free will or autonomy, as having chosen to act as they did. Delinquents, on the other hand, are approached more in the way that zoologists study nonhuman animals: in terms of drives or tendencies that determine how they will behave. Foucault (1977: 253) thus refers to the production of knowledge in prisons as ‘a zoology of social sub-species’. Unfortunately, criminologists have the same problems that zoologists have when they observe animals in captivity: the animals frequently self-mutilate, self-starve or otherwise harm themselves, each other and their keepers, go mad or die from broken hearts, stress and despair in their cages (Jamieson, 2002). Zoos are not actually good sites for zoological observation because the animals do not generally survive as well as they do in the wild and they do not behave ‘naturally’; zoos, like laboratory cages, make captive animals go insane. Thus, one does not learn much about animal behaviour when one puts animals in a setting of captivity that is traumatizing, unnatural and depressing to them. In the same way, social and ‘psy’ scientists do not learn much about the human animals they observe in prisons other than how captivity crushes and deranges them. It is in the chapter entitled ‘Illegalities and Delinquencies’ that we see that Foucault (1977) is a prison abolitionist, even though he never clearly described himself as such. The chapter’s title suggests a shift from illegal acts to a kind of identity: the identity of the delinquent, a being for whom criminality is a way of being. Such a subject is nearly bound to reoffend in virtue of who they have been constructed to be. Prisons, in producing delinquents, result not in safer communities, but in more crime. Yet, as Foucault argues, the proposed solution to this glaring problem with prisons has never been to do away with these institutions, but has always been more prison. Foucault describes a kind of cycle in which the failure of the prison always leads to extensions of the prison, with the prison always ‘offered as its own remedy’ (Foucault, 1977: 268). In contrast, for Foucault the solution to prison is not prison reform. If prison is the problem, then more prison is never going to be the solution. In rejecting prison reform, Foucault is taking an abolitionist stance. What, though, does Foucault think would be a better way of responding to crime? Although Foucault never spells out an answer to this question, in Discipline and Punish he does make it clear that the actual cause of what gets socially constructed as crime is usually poverty (Foucault, 1977: 276). Thus, it would follow for him that if we really wanted to fight ‘crime’ effectively, we would strive for a more egalitarian society. He would thus have advocated for redistributive responses to social harms. Instead, however, we continue to pour resources into policing and prisons in the full knowledge that this merely leads to more poverty and thus more crime. It is remarkable to Foucault that, having long been aware that the prison and its disciplinary practices fail in their proclaimed goal of rehabilitating criminals, we have never seriously considered abolishing the prison. Rather, critiques of the prison lead only to prison reform and to an extension of the logic of the prison; the antidote to the problems of the prison has always been more prison. Indeed, since Foucault wrote Discipline and Punish, the prison has not only seen a colossal expansion, particularly in the US, but many of these disciplinary practices of the penal system have been intensified. This is most obvious in strategies of community notification, police registration, and periods of probation and parole involving scheduled and unscheduled visits from surveillance officers and parole officers as well as mandated ‘therapeutic’ treatments. The irony for Foucault is that these disciplinary measures do not so much fashion the subject away from their crime as constitute them in terms of it. Since it has been known all along that prisons produce rather than rehabilitate delinquents, yet we continue to build and fill more prisons, Foucault thinks we must return to the question that has structured critical prison studies since Discipline and Punish was first published in French in 1975: what are the true functions of the prison such that it is in fact not a failure but a success? What is really at stake in the prison such that, despite its well-known recidivist-producing effect, it maintains its apparently unquestionable appeal? What is the prison doing well such that it is indispensable to the biopolitical state? Foucault provides a series of answers to these questions, suggesting that the production of delinquents serves the political and economic interests of the middle and upper classes at the expense of the poor, who are those overwhelmingly incarcerated. In the contemporary context, Ruth Wilson Gilmore (2007) has described the ways in which the prison system serves as a capitalist response to surplus labour. The prison industry has vested financial interests in the construction of delinquency. Many rural communities near to which prisons have been built are now dependent on staffing and supplying prisons for their existence (Davis, 2003; Kutchins and Galloway, 2007). As Gottshalk writes, ‘prison guards’ unions, state departments of corrections, law enforcement groups, the private corrections industry and the financial firms that devise bonds and other mechanisms to fund the carceral state are all politically committed to the prison’s perpetuation (Gottshalk, 2015: 14). For example, the largest and most powerful prison guard union, the California Correctional Peace Officers Association, has ‘repeatedly stymied sensible proposals to modestly reduce California’s prison population. It also has aggressively challenged public officials and political candidates who have sought to reduce the incarceration rate and to prosecute guards who abuse prisoners’ (Gottshalk, 2015: 160). Economic interests in the perpetuation of the carceral state are not an inconsiderable factor, given that today Correctional Services is the third-largest employer in the US, outnumbered only by Manpower Incorporated and Walmart, and ahead of General Motors (Wacquant, 2009: 157). Beyond this, Foucault (1977) argues that taking an unruly population of occasional lawbreakers and turning them into recidivist, pathologized offenders has depoliticized crime. The rationale behind prisons has made crime a psychiatric and sociological issue rather than a political issue related to poverty. For Foucault, the real function of the prison has thus been to transform politicized offenders into psychiatrized and stigmatized delinquents, people viewed as social problems or enemies of society. Importantly, depoliticizing crime in this way has driven a wedge between the poor and criminals. Thus, although criminals are still overwhelmingly poor people, there is often hostility towards criminals on the part of the poor. The dissolution of solidarity between the poor and the criminalized results in shame and secrecy on the part of the criminalized class and prevents the kind of spontaneous political uprisings around issues of penality and poverty that existed prior to disciplinary transformations in punishment. Thus, a significant consequence of the transformation of the lawbreaker into a delinquent is that the poor have largely ceased to identify and empathize with those subjected to the criminal punishment system. Crime is no longer understood as a normal response to conditions of poverty, distress and oppression, but is perceived to arise from a pathologized identity from which all who can dissociate themselves. The shame around criminalization results in silence on the part of those who most directly experience the injustices of incarceration, who are disproportionately people of colour. It is this consequence of the production of delinquency that has allowed for the astounding expansion of the prison across the Western world in recent decades, which has unfolded with little dissent and indeed with widespread public approval. For Foucault, therefore, the purpose and function of the prison is not to rehabilitate offenders, despite our continual rhetoric to this effect, but to discipline offenders into delinquents: manageable objects of knowledge cut off from the rest of the population, or contained criminal cases rather than political threats. In all these ways, although it does not prevent crime, rehabilitate criminals or make the population safer, the prison is instrumental to the interests of the capitalist, biopolitical and racist state. Foucault’s influence on prison abolition scholarship and activism

#### All alternatives or reforms fail. Prisons’ teleology is a eugenic genocide and enslavement of black and brown populations, and increase biopolitical control to enforce normativity

Taylor 25 [Chloë Taylor, Professor of Women’s and Gender Studies at the University of Alberta, 2025, "8 Foucault and Prison Abolition,” Bristol University Press, https://www-jstor-org.ezproxy.library.unlv.edu/stable/jj.12348235.13?seq=1]/Kankee

Foucault’s influence on prison abolition scholarship and activism Prisons are functioning exactly as they are supposed to Foucault’s argument about the political instrumentality of prisons has been central to the critical prison studies scholarship and activism that has emerged in the 50 years since Discipline and Punish was published, to the extent that versions of this argument are frequently made both with and without reference to Foucault. In particular, critical race and decolonial scholars have adapted Foucault’s argument to address the racist and colonial functions of prisons in North American contexts. In Are Prisons Obsolete?, Angela Davis (2003) situates prisons in the history of anti-Black racism in the US. As she notes, when slavery was theoretically abolished after the American Civil War, it was with one significant exception: involuntary servitude was still permissible ‘as a punishment for crime, whereof the party shall have been duly convicted’ (cited in Davis, 2003: 28). Thus, slavery was still perfectly legal in the form of the hard labour to which prisoners could be condemned as part of their punishment. As Davis observes, White people in the American South were quick to take advantage of this legal loophole to begin mass incarcerating Black people in order to put them back to work at the hard and unpaid labour they had been obliged to do as slaves. In this way, she argues, the criminal punishment system in the US ‘recapitulated and further extended the regimes of slavery’ (Davis, 2003: 33). In Punishing the Poor, Wacquant (2009) argues that the racialized ghetto emerged in the US as a means of containing African Americans following the elimination of Jim Crow Laws. When the urban ghetto was rendered partially obsolete by Black protests and race riots, the prison, with its ‘slaughterhouse approach to justice’ (Wacquant, 2009: 23), underwent a ‘grotesque’ expansion in order to function as a ‘surrogate ghetto’ (Wacquant, 2009: 196). In ‘Life Behind Bars: The Eugenic Structure of Mass Incarceration’, Lisa Guenther (2016) argues that prisons perpetuate eugenics in both the US and Canadian contexts. As she demonstrates, not only do nonconsensual eugenic sterilizations continue to be practised by prison doctors, but the sexsegregated nature of prisons, in which racialized, poor and disabled people are separated from their children and are frequently detained for all or many of their childbearing years, prevents both the biological and social reproduction of biopolitically devalued populations. In ‘The colonialism of incarceration’, Robert Nichols (2014) examines the hyperincarceration of Indigenous people in the Canadian context and the ways in which the prison functions as a tool of ongoing colonial control. As Nichols argues, the incarceration of Indigenous people substituted for the use of residential schools when the latter were eliminated, and Indigenous people are discriminated against at every level of the criminal punishment system, from policing to trials to the security level of the prisons in which they are placed. Still other critical prison scholars have observed that one of the most significant functions of the prison today is to control immigration, with increasing numbers of both documented and undocumented immigrants being held in detention centres (Gottshalk, 2015; Walia, 2013). Critical disability studies and Mad studies scholars observe that the prison has taken over the role of psychiatric asylums and residential homes for the intellectually disabled, with prison expansion occurring in the wake of the deinstitutionalization of these populations (Ben-Moshe, 2014). In the wake of so-called ‘de-institutionalization’, we have seen a criminalization of mental illness. As Michael Rembis has argued, there are ‘important relationships among the rise of the prison industrial complex and the increasing psychiatrization of both socially “deviant” behavior and incarcerated populations, as well as the psychic trauma associated with incarceration’ (Rembis, 2014: 139). Feminist and queer critical prison scholars have demonstrated the instrumentality of the prison in the biopolitical objectives of policing gender (Mogul, Ritchie and Whitlock, 2012; Lydon, 2016). Penitentiaries were originally established in 18th-century England to house ‘penitent’ sex workers, punishing and reforming their aberrant gender and sexuality (Mogul, Ritchie and Whitlock, 2012: 94). ‘Fallen women’ were made to do domestic work in penitentiaries in training for the gendered roles of wives and domestic servants upon their release (Davis, 2003). According to queer theorist Gayle Rubin (2011), there have also been ulterior motives for the criminalization of aberrant sex acts, which have had less to do with protecting women, children or society than with fortifying the patriarchal, heteronormative family and its values. Mogul, Ritchie and Whitlock (2012) report the ways in which gender nonconforming people incarcerated in women’s prisons are taunted and harassed by guards, referred to as ‘little boys’, and separated from the general population to be housed in a ‘butch wing’, ‘little boys’ wing’ or ‘studs’ wing’ (Mogul et al, 2012: 109). Gay and bisexual prisoners who can pass as straight often do so to avoid violence, administrative segregation and ridiculing by homophobic guards (Kunzel, 2008: 2, 8–9). Trans prisoners are often denied the gender-affirming medical care that they need, as well as gender-affirming clothing and cosmetics. Their gender is also routinely denied by placing them in sex-segregated prisons based on the gender they were assigned at birth, where they are at great risk of sexual violence (Spade, 2011; Lydon, 2016). Needless to say, all of these factors incentivize normative gender performance and normative sexuality with life-and-death stakes. In his 2011 book Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law, prison abolitionist and critical trans legal theorist Dean Spade takes up Foucault’s theories of power to argue that the oppression of trans people occurs largely at the level of administrative violence: everyday administrative decisions that are products of social norms and curtail the life chances of trans people. For these reasons, he argues that trans oppression is not effectively addressed by legalistic responses to discrimination and harm that rely on a racist, xenophobic, colonial, sexist, homophobic, transphobic and ableist juridical-legal system. Therefore, even if the prison fails to prevent crime or rehabilitate prisoners, it is deeply embedded in the contemporary economy and has proved remarkably successful as a multi-purpose tool of capitalist, White supremacist, xenophobic, ableist, saneist, gender normative and heterosexist social control. Critical prison studies scholars working in the Foucauldian tradition have persuasively argued that this is what explains the prison’s ongoing existence. Prison reform extends the power of the prison

### Contention 5: Trials Bad (Victims)

#### Snitching scares kids

Stolzenberg and Lyon 14 [Stacia N. Stolzenberg, researcher at the Gould School of Law, University of Southern California, and Thomas D. Lyon, researcher at the Gould School of Law, University of Southern California, 2014, “How Attorneys Question Children About the Dynamics of Sexual Abuse and Disclosure in Criminal Trials,” Psychology, Public Policy, and Law, https://research-ebsco-com.ezproxy.library.unlv.edu/linkprocessor/plink?id=593840ac-cc81-39ec-b711-b7acaf170f2e]/Kankee

Because of their preexisting relationship with their child victims and their grooming methods, perpetrators need not use force to accomplish abuse or to guarantee silence. In most sexual abuse cases, the suspect is familiar to the child, often a close relative (Goodman-Brown, Edelstein, Goodman, Jones, & Gordon, 2003; Smith & Elstein, 1993). Such a relationship gives the perpetrator access to the child and allows him or her to capitalize on the child’s trust. Research questioning perpetrators about their modus operandi reveal how they actively develop trust, compliance, and silence (Leclerc, Proulx, & Beauregard, 2009). For example, Kaufman and colleagues (1998) interviewed 228 perpetrators who reported that, over time, they would increasingly talk about sex, encourage children to wear less clothing, and tell children that they would “teach them something” before engaging in sexual acts. The progressive nature of the abuse enabled perpetrators to assess the risk of disclosure before the sexual behavior became overt, so that any disclosures could be explained as innocent or misinterpreted (Lang & Frenzel, 1988). Once overt sexual acts occurred, children would be deterred from disclosing because the earlier acts made them feel as if they had consented and led them to fear that they would be blamed for failing to complain (Kaufman et al., 1998). Perpetrators sometimes overtly threaten children not to disclose the abuse. In 27–33% of criminal cases, children recall overt threats (Gray, 1993; Smith & Elstein, 1993; M ages 9 years old). According to Smith and Elstein (1993), Warnings ranged from pleas that the abuser would get into trouble if the child told (or that the abuser would be sent away and the child would never see them again—a powerful message to a young child whose abuser is also a “beloved” parent), to threats that the child would be blamed for the abuse (especially troubling were children who were told that the defendant’s intimate—the child’s mother—would blame the child for “having sex” with the defendant and would thus turn against him or her), to ominous warnings that the defendant would hurt or kill the child (or someone he or she loved) if they revealed the abuse (p. 86). Perpetrators themselves have described how they discourage children from disclosing (Elliott, Browne, & Kilcoyne, 1995; Smallbone & Wortley, 2001). They emphasize the way in which disclosure will lead the child to lose positive factors in his or her life, such as love, affection, friendship, and family stability (Lang & Frenzel, 1988; Smallbone & Wortley, 2001; Smith & Elstein, 1993). For example, in a criminal sample of convicted offenders of child sexual abuse, 33% of offenders specifically told their victims not to tell and an additional 20% of offenders reported having threatened loss of love or said the child was to blame to maintain abuse and discourage disclosure (Elliott et al., 1995). This was also reported by Conte, Wolfe, and Smith (1989), who found that perpetrators encouraged silence by telling victims their friends wouldn’t like them anymore, their mom might be mad, or just by generally advising children to be careful not to tell anyone. The efficacy of perpetrators’ methods is demonstrated by delays in disclosure. The closeness of the relationship between the perpetrator and the child increases the likelihood of delayed disclo sure (Sas & Cunningham, 1995). Criminal samples reveal that children typically delay disclosure until multiple instances of abuse have occurred, with one third of children waiting at least a year (Sas & Cunningham, 1995). In addition, children are capable of describing their reasons for failing to disclose. Sas and Cunningham (1995) interviewed 135 children (M age 10 years) after their case was prosecuted and found that the most common reasons for delaying disclosure were: (a) fear of harm to self or others, (b) fear of being rejected by a nonabusive caregiver, (c) concern for family and thinking that non- or delaying disclosure might protect family, (d) fear that their disclosure would not be believed, (e) concern that bad consequences will harm the perpetrator, (f) inability to trust anyone to whom to disclose, and (g) wanting to protect other children, including siblings, from abuse. These research findings suggest that, from the prosecutor’s perspective, much can be understood about the dynamics of abuse by inquiring into what the suspect has said to the child, both to reveal grooming and to uncover any admonishments against disclosure. Furthermore, it is likely that the child will have delayed disclosing the abuse, and it is worthwhile exploring the reasons for the delay so that the jury understands. Indeed, prosecutors are advised to explore the dynamics of abuse (Long et al., 2011), and the courts have been receptive to efforts to educate juries about the reasons for children’s delays and inconsistencies (People v. Housley, 1992). The Defense Perspective

#### Plea deals are better for victims – closure, certainty, no traumatic trials

**Conklin 13** [Michael Conklin, Visiting Assistant Professor of Business Law at Texas A&M University, top 50 legal scholar on SSRN, published in 100+ academic journals, with expertise in energy contract negotiation and interdisciplinary research bridging theory and practice, 2013, “Chapter 18: Defenses for Plea Bargaining”, Plea Bargaining Handbook, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=4695607]/Kankee

As previously explained, some punishment for most defendants is better than maximum punishment for a few defendants. This same principle holds true for society as well. An analogy serves to illustrate.  Imagine a prosecutor has thirty cases to prosecute. Each defendant is charged with a crime that carries a twenty-year sentence and a 95% probability of conviction. The complete trial process for each case—including preparation—would be fifty hours while a plea hearing would take less than one hour. Given the high probability of conviction at trial, it is determined that a six-year plea offer would illicit a guilty plea from the thirty defendants. Therefore, in less than thirty hours this prosecutor could sentence all thirty defendants to six years—assuming they accepted the pleas. Compare this outcome to the alternative where the prosecutor could invest fifty hours and probably sentence one defendant to twenty years and drop the charges against the other Clearly, more **net justice** is obtained through plea bargaining even though each defendant received far less than twenty years.4 Additional benefits to society from plea bargaining are those received by the victims. When pleas are accepted, victims receive immediate closure. They are spared the potentially traumatic experience of reliving their victimization at trial, the possibility of watching their victimizers go free, and the uncertainty of a potential successful appeal. Also, with a plea bargain, the victim’s complaint is vindicated by the admission of guilt by the defendant. At a trial, however, the defendant maintains his innocence;5 thus, effectively accusing the victim of lying. Abolitionists sometimes attempt to diminish the significant financial benefits of plea bargaining by juxtaposing cost with justice, as if they are mutually exclusive. They may point to quotes such as the following by Chief Justice Warren Burger: “An affluent society ought not be miserly in support of justice, for economy is not an objective of the system.”6 But this view of justice versus cost is a false dichotomy. Plea bargaining allows prosecutors to not spend money where it would be wasteful and instead spend it where it would promote the most justice—thus, enhancing both monetary savings and justice when compared to the alternative of abolishment.

### Contention 6: Jury Duty Bad

#### Mass lying for financial reasons prove jury duty is economic devastation for poor folk

COSCA 23 [Conference of State Court Administrators, 2023, “CITIZENS ON CALL: Responding to the Needs of 21st Century Jurors,” Conference of State Court Administrators, https://www.ncsc.org/sites/default/files/media/document/COSCA-Citizens-on-Call.pdf]/Kankee

The cost of jury service Serving on a jury has long been understood as a citizen’s “civic duty;” an obligation born from our collective commitment to a system of government that guarantees the right to a jury of one’s peers. When public trust in government was higher, serving on a jury may have been an obligation willingly undertaken based on this shared commitment. This may explain why juror pay has historically been nominal – because citizens were more willing to serve despite the hardships that sometimes come along with jury service. Today we cannot take that commitment for granted. A 2017 Pew Research Center study found that young people and minorities are less likely to view jury duty as an element of good citizenship.28 In addition to the public’s decreasing trust in public institutions, the burden of serving on a jury has only increased. To address these issues, states need to be proactive in removing the biggest barriers to juror service: financial hardship compounded by extensive time commitments. In a recent survey of 1,184 Americans, 9% of respondents claimed to have lied to get out of jury service. Forty-eight percent lied because of financial concerns. Nineteen percent lied because they feared consequences from their employer and 16% lied because of a lack of childcare.29 While jurors may assert financial hardship to be excused from jury duty, whether to grant the excusal is judge dependent and may be rarely granted absent compelling circumstances. Excusals for this reason disproportionately reduce the number of low- income workers whose experience and perspective bring greater diversity of thought to jury panels. Courts need to actively address the financial hardship caused by jury service to improve participation from citizens across the economic spectrum RECOMMENDATION: Courts should advocate for adequate per diem pay and other cost mitigation measures. For most states, it is the legislature that sets base per diem rates, mileage or transportation reimbursement rates, and other lawful use of funds to provide for jury service.30 It is naïve to expect that rates of juror compensation will rise to a level of awareness that will put it at the forefront of a legislative initiative unless a legislator has recently been contacted by a constituent or actually served as a juror. The judiciary is the only branch of government that has first-hand knowledge of the effect of low juror compensation on response rates and hardship excusals and the ability to regularly solicit input from potential and actual jurors regarding juror compensation. As such, courts have a duty to be a firm advocate for adequate juror compensation. Most people who work hourly wage jobs are not paid if they do not work, so spending any time away from work waiting to be selected for a jury or actually serving on a jury means foregoing income. All states have laws prohibiting employers from interfering with or retaliating against an employee because of jury service, but most states do not require that employers provide employees with paid time off to perform jury service. Those jurisdictions that do require employers to pay employees for jury service limit such obligation to larger companies and limit the benefit to full-time employees who work regular schedules.31 Consequently, even in states with the most generous juror compensation, those individuals working for a small employer or working multiple part-time jobs to make ends meet — the people who are the least likely to be able to afford to step away from their sources of employment — have the least protection from financial hardship. Over the years, juror pay has not kept pace with changes to the minimum wage, inflation or cost of living.32 Nationally, flat per diem rates vary from $4 to $50 per day.33 States with graduated rates for juror compensation attempt to reconcile extended service and compensation rates, however, the high-end of these graduated rates, notwithstanding Arizona’s recent increase, is still low, topping out at $50 per day. New Mexico is the only state that has tied juror pay to the prevailing minimum wage. That rate is currently $12/hour, and equates to $96 for an 8-hour day. Arizona is the first state to pay per diem rates tied to the actual wages of jurors. Under this model, jurors can claim up to $300 per day for wage replacement. Effective strategies for raising juror pay have included an emphasis on the number of years and the changing cost of living since the last time juror pay was increased and a repudiation of using other low-paying jurisdictions as a reason to continue to keep per diem rates low. As noted by Arizona State Court Administrator Dave Byers, courts should not be content to argue for incremental adjustments to juror pay. Instead, they should make a robust argument for a rate of pay that is fair to jurors and will make an actual difference in response rates. STRATEGY: Lengthy Trial Funds

#### Jury duty is regressive, obliterating poor folks’ income by missing work

Pattison-Gordon 25 [Jule Pattison-Gordon, senior staff writer for Governing with a B.A. from Carnegie Mellon, 3-25-2025, "How Courts Are Trying to Make Jury Duty More Appealing", Governing, https://www.governing.com/policy/how-courts-are-trying-to-make-jury-duty-more-appealing]/Kankee

In Brief: A 2023 report found some courts compensate jurors as little as $4 a day for missing work to serve, and some only pay starting on the second day of service. When compensation is low, jury duty can result in painful lost income and prompt more low-income people to seek exemption from serving, making juries less diverse. Some states are rethinking how much they reimburse jurors. Courts also work to fine-tune exactly how many jurors they call in, using algorithms to calculate the likelihood that enough jurors will show, and adopting new processes to reduce time spent waiting in the courtroom. Trial by jury is meant to be an important safeguard in ensuring justice and keeping courts responsive to the people they serve. But today, jury duty is often seen as a pain — whether an annoying inconvenience or genuine hardship. One major challenge is that jurors are often forced to miss work. Their employers might not compensate them, and most courts pay only nominal fees that do not go far toward replacing lost wages. Jurors also report frustration about waiting around for hours at a courthouse only to be told to go back home. As courts continue looking for ways to improve the juror experience, some have been working to improve compensation and minimize the time jurors spend waiting, in the hopes of making it easier to serve, thereby improving the diversity of juries and changing public attitudes about jury service. Many people are wary of jury duty, says Pamela Wood, jury commissioner of the Massachusetts Court System. “People think, ‘Oh, I'm going to be sequestered and on a three-month racketeering and gang trial, and it’s going to be awful,’” Wood says. Her office’s public outreach program tries to dispel that view and educate people about what the experience is more likely going to entail: “You’re going to go to a nice little suburban courthouse, and you’re going to sit on a three-hour OUI [operating under the influence] case and you're going to deliberate for an hour or two and return a verdict and be home in time for dinner. And then you will have done your civic duty and ... you're probably going to find it to be one of the most interesting and inspirational experiences of your life to actually see the process in action.” Deciding How Many to Call When courts can better determine how many jurors they’ll need — and avoid calling too many — it’s a win for everyone. It spares residents from taking time away from their lives to come in. It also helps the courts avoid burning through their list of potential jurors unnecessarily. That’s because in some systems, people who turn up for their jury duty dates are exempted from serving again within a certain time period, regardless of whether they wound up impaneled. Getting the number right can be tricky, however. Courts need to call in a few more jurors than they expect to actually use, in case something unexpected happens. But if they overdo it, many prospective jurors will be left waiting around. To see how well they’re doing, courts can look to their “juror utilization rate,” which is the percentage of the total pool of “qualified and available jurors” who are used at least once in a trial or who are questioned by attorneys and the judge for their suitability to serve in a trial (a process known as "voir dire"). A juror might go unused if the judges and attorneys have already impaneled all the jurors they need for the day’s trials, if the trial gets canceled or postponed, or if case participants decide to do a plea deal or settlement instead of going to trial. The National Center for State Courts recommends in a 2023 report that courts aim to have a 72 percent juror utilization rate. At that time, however, state courts were falling “woefully short,” and averaging just a 25 percent juror utilization rate. The situation was especially bad in larger jurisdictions, with courts that serve 500,000 or more people averaging only a 16 percent juror utilization rate, while courts serving fewer than 25,000 people averaged a 31 percent rate. Some courts look to historic data to help them estimate how many jurors to summon. The Massachusetts Court System, for one, uses algorithms to assess how many jurors to call in and how many of the people who said “yes” to the summons are actually likely to show up (as well as how many of the people who deferred or didn’t reply might show up too). That then lets the court system see if there are any superfluous jurors who can have their service canceled. “Each of our 65 courts we analyze separately using computer algorithms,” explains Wood. The algorithms consider how each courthouse’s unique characteristics might influence jurors’ likelihood of appearing. That means considering the availability of parking or public transportation and the reputation of the surrounding neighborhood. But the court is still working to get a handle on the ways that COVID-19 changed things, and introduced new factors that can influence who shows up. For example, people who are immunocompromised may be more wary of coming into a courthouse to serve, while people who think pandemic concerns were overblown may try harder to show up, to make a point about unnecessary caution. “Everything we do in terms of figuring out how many summonses to send out — and how to hit the target and not bring in too many, but be sure to supply enough, etc., etc., — is based on historical data of how certain types of people behave in certain courts, and there is no historical data on how people behave during and after a pandemic.” Wood says. Minimizing Time in Court The Superior Court of Arizona in Maricopa County has also been fine-tuning its approach to jury management, to reduce the time jurors spend waiting at the courthouse. That can make jury service a far less burdensome experience. Last year, the court began piloting “remote case-specific questionnaires,” explains Deputy Jury Commissioner Tiana Burdick. The court emails or texts jurors a digital questionnaire they can answer at home. Afterward, judges and attorneys review the responses to determine who to strike. This lets the court alert struck jurors that they won’t be needed before they even leave their homes — while the jurors who aren’t struck only have to show up when they’re needed for a particular case. That might mean coming in at 10:30 a.m. or 1:30 p.m., rather than the usual 7:45 a.m. or 8:30 a.m. When remote questionnaires aren’t used, jurors need to show up early to complete an on-site questionnaire, then wait as judges and attorneys decide which jurors to strike and which to keep for afternoon trials. That could mean jurors waiting around until noon to find out if they’ll serve. “In calendar year 2024, over 3,000 jurors never had to even come downtown. They were struck in advance, but yet they still got to participate,” Burdick says. “They never had to take a day off of work; they never had to make the drive downtown, but yet still participated.” The Conference of State Court Administrators has endorsed such practices, recommending in a 2023 report that courts let jurors complete online questionnaires in advance, to allow for disqualifying or excusing jurors without first requiring them to come in to the courthouse. Raising the Pay Poor compensation for jury service is a financial hardship for people with low income or whose employers don’t pay them for days they attend jury duty. Not all states require employers to provide paid time off for jury service, and in those that do, the obligation is typically reserved for full-time employees at large companies, per the Conference of State Court Administrators. People paid hourly wages, working for a small company, self-employed or working part time at one or more jobs may suffer lost income from serving on a jury. Court-provided compensation for jury duty often doesn’t keep up with minimum wage. A 2023 report found some courts paying as little as $4 per day for each day of service. Some courts, like the Alaska court system, paid nothing for the first day of jury service, only providing compensation starting on the second day. Lost income can be significant; in Washington state at the time, there was a $237 gap between the daily per capita income in the state and the maximum daily juror compensation. Some courts excuse people for whom serving is a financial hardship, but this can mean cases are stuck with juries that have less diversity of life experiences. San Francisco is one jurisdiction that increased pay for jurors with low or moderate incomes. “Higher jury pay does, in fact, diversify juries. When juries are more reflective of the communities they serve, they spend more time in deliberations and are less likely to presume guilt,” said Assemblymember Phil Ting in a press release statement announcing continuation of the compensation program. In the past several years jurisdictions across the country have been upping compensation, realizing that low pay “is a barrier to diversity and representativeness,” says Wood. A current bill in Massachusetts could help, by raising the rate of jurors compensation to $100 per day, up from $50/day — a rate that was a “princely sum” back when it was set in 1979 but which doesn’t keep up today, Wood says. New Mexico takes the unusual approach of tying juror compensation to the minimum wage and paying by the hour, at $12/hour. In September 2022, Arizona became the first state to link the level of per diem compensation to the actual amount of income jurors lost by serving. Jurors impaneled on superior court cases now can apply online for reimbursement of up to $300 per day of lost income. And Burdick’s court in Maricopa County also now offers bus passes so people who cannot or do not drive can get to the courthouse. Who’s on the Jury Lists? Along with increasing compensation, getting a representative list of potential jurors can improve diversity. Court systems randomly select names from this list to determine who to send out summons letters to. Many courts create their list of names from records like voter registration and drivers' licenses lists. But relying on records related to optional activities can limit what slice of the population juries are drawn from — for example, only those who’ve chosen to vote or who have the money and need to acquire a car. Massachusetts courts have the good fortune of a more expansive list, Wood says. Cities and towns throughout the state must conduct censuses every year, with the information used by many different government agencies, including the courts.

#### Jury duty is a net negative financially due to expenses, harming low-income folk

Amos 25 [Denise Amos, California Voices Deputy Editor and graduate from Northwestern University’s Medill School of Journalism, 07-11-2025, "California courts owe defendants a jury of their peers. It’s still too hard to get one", CalMatters, https://calmatters.org/commentary/2025/07/california-courts-jury-pay-peers/]/Kankee

Picking a jury when there’s ‘undue hardship’ For the San Diego murder trial, the judge called in a jury pool of nearly 110 people. He explained that it takes that many people and two full days to eventually select 12 jurors and four alternates for a criminal case expected to last several weeks. Some prospective jurors won’t serve because of “undue hardship,” he said. Too many employers are refusing to pay workers on jury duty. California law says employers can’t fire workers serving on juries, but it doesn’t make employers pay them. That’s why California consistently fills juries with retirees or people who work in white-collar jobs or who have the money to go without pay. Equal justice is just an empty promise if a minimum wage worker earns eight times more than jurors make in a day. Add to that, a juror’s expenses can easily outstrip the daily pay. In San Diego, jurors who drove had to pay to park —- that’s $25 to $40 a day — and pay for lunch, which ran about $20 at nearby restaurants. I rode the trolley and packed lunch to save money. During my first two days of jury duty, people described their financial hardship. One young man told the judge — in front of everyone — that he had been unemployed for months and was still looking for work. A woman complained she couldn’t afford several weeks of child care. Another man was unsure he’d keep his job beyond two weeks on jury duty. None of them were picked for the jury. Besides finances, certain life experiences can be factors in shaping a jury. In this trial, the 108-member jury pool was given a 75-question survey designed to identify bias. Some questions made me suspect I might be disqualified, like the question about whether I or a family member had been a victim of a crime. Yes, my mother was violently mugged years ago, I wrote, and the police didn’t arrest anyone. I answered ‘yes’ to a question about whether anyone in my family had been arrested. When my brother was a preteen, he got caught entering an abandoned factory with friends. He took a plea deal and stayed out of jail, but knowing how few Black boys got breaks, I was terrified for him, I wrote. While scribbling my answers I wondered how many other juror candidates had similar responses? Would negative experiences with police make us unsuitable? There were other, more obvious potential disqualifiers: I’m a Black woman, so a lawyer might assume I don’t trust police or the courts. And I’m a journalist, a profession often excluded from juries for various reasons. After reading the questionnaires, the judge interrogated us. By the time he got to me, about a dozen people — including several white people — told the judge that they were not confident a person of color could get a fair shake in the legal system. I was surprised at how many held that view. But a woman next to me whispered that they weren’t all taking principled stands; some just thought it might get them out of jury duty. The judge grilled me about my family’s encounters with police. He asked point-blank if I thought my brother was treated fairly by the court. I told him that since my brother didn’t have to serve jail time, maybe he was. I guess my answer was acceptable. When the judge empaneled the jurors and sent the rest home, I was the last juror selected. The right to a jury trial is so vital that it’s spelled out in the Constitution and the Bill of Rights. But seeking a jury of peers does not mean that male defendants will only be tried by men, or Asians by Asians, or African Americans by African Americans. It does mean a court cannot intentionally exclude someone because of race or gender. To me that doesn’t go far enough. California should make it easier for jurors to serve, especially those who come from the world the defendant lives in. If it costs California $27 million to try to reach that standard in seven counties, it’s worth it.

#### Low pay is “institutional exclusion” for black and poor folk

Williams 25 [June Williams, reporter on judicial issues, 2016, "Low Jury Pay Excludes Minorities & Poor, Class Says in Washington", Court House News, https://www.courthousenews.com/low-jury-pay-excludes-minorities-poor-class-says-in-washington/]/Kankee

Low pay for jury service has caused grumbling for decades. Now Washington residents have filed a class action claiming the $10 a day stipend violates minimum wage laws and prevents low-income minorities from serving, with a "pernicious effect on the judicial system." King County's $10-per-day reimbursement for mileage or travel hasn't changed since 1959, lead plaintiff Ryan Rocha says in the complaint in Pierce County Court. He says the low pay effectively prevents minorities and poor people from participating in jury service. A Seattle worker earning minimum wage would make $104 for an eight-hour day, and all minimum-wage workers in Washington earn at least $75 for eight hours. Rocha et al. sued in Pierce County Superior Court to avoid a conflict of interest in King County, whose seat is Seattle. King County, pop. 2 million, is the largest county in Washington by population and the 13th most populous county in the United States. Pierce County, whose seat is Tacoma, just south of Seattle, is the state's second most populous county, with 800,000 residents. Rocha and co-plaintiff Nicole Bednarczyk say they want to serve as jurors but their employers don't pay for jury duty so it would be too much of a financial hardship. "Plaintiffs Ryan Rocha and Nicole Bednarczyk are individuals of low economic status who work for employers that do not compensate employees for jury service. Plaintiff Rocha is also black, and issues of income inequality and financial instability disproportionately affect King County's communities of color. Plaintiffs Rocha and Bednarczyk are eligible and eager to serve as jurors in the courts of King County but cannot afford to forgo the income they would lose while doing so," the complaint states. "If King County summoned them to perform jury service today, plaintiffs Rocha and Bednarczyk would be forced to request financial hardship exemptions despite their desire to participate in the judicial process. Indeed, King County has previously excused plaintiff Bednarczyk from serving as a juror on the basis of financial hardship. Because King County refuses to pay individuals for time spent performing jury service, plaintiff Rocha, plaintiff Bednarczyk, and others are being excluded on the basis of economic status, race, and color." The other named plaintiff, Catherine Selin, served on a jury for 11 days last year, and also worked for an employer that did not compensate her. She says King County violated the state's minimum wage act by not paying her. "King County is violating Washington law in the operation of its jury system. Specifically, King County's failure to pay individuals for time spent performing jury service has a disparate impact on low-income people and people of color, preventing them from jury participation. This form of institutional exclusion and discrimination violates state law and has a pernicious effect on the judicial system and American democracy," according to the complaint. Their attorney Jeffrey Needle said in a statement: "Citizens aren't required to give up their incomes in order to vote, and they shouldn't have to do so with jury service either." They seek class certification and an injunction requiring King County to pay minimum wage to jurors who are not compensated by their employers, and damages for jurors who already served without being compensated. They are represented by Toby Marshall with Terrell Marshall and Jeffery Needle, both of Seattle.

#### Jury service implodes jurors mental health – anxiety, PTSD, and vicarious trauma

COSCA 23 [Conference of State Court Administrators, 2023, “CITIZENS ON CALL: Responding to the Needs of 21st Century Jurors,” Conference of State Court Administrators, https://www.ncsc.org/sites/default/files/media/document/COSCA-Citizens-on-Call.pdf]/Kankee

CHALLENGE 4: Post-trial anxiety, guilt and vicarious trauma In addition to security and privacy concerns, the impact of jury service on juror mental health is a serious consideration that warrants the attention of the courts. In a recent survey, 26% of jurors admitted to struggling with persistent negative emotions after completing jury duty, with nearly 50% reporting high levels of anxiety. Other symptoms included guilt, shame, anger and fear. The survey found that negative emotions persisted for an average of two years following service.65 Vicarious trauma has been defined as, “the emotional residue of exposure to traumatic stories and experiences of others through work; witnessing fear, pain, and terror that others have experienced; a pre-occupation with horrific stories told to the professional.”66 The term is sometimes used interchangeably with terms such as compassion fatigue, secondary trauma, or insidious trauma. This phenomenon is most often related to the experience of being exposed to stories of cruel and inhumane acts perpetrated by and toward people in our society.67 By virtue of their responsibilities, judges and court staff are susceptible to vicarious trauma “due to the combination of working in a busy court, hearing repeated accounts of harrowing or traumatic events, and worrying about safety issues that may arise around volatile or emotionally charged cases.”68 Likewise, jurors who are exposed to these same cases and stories, and whose function it is to evaluate and analyze gruesome evidence and facts, are at risk for the same kind of trauma. A 2002 study conducted by Sonia Chopra at Simon Fraser University describes how taxing it can be to serve on a jury. Two-thirds of former jurors interviewed for Chopra’s study reported experiencing stress as a result of their jury experience, and nearly half of them said they believed that stress affected the decisions made by their fellow jurors. A third said they had difficulty sleeping as a result of their trial memories, while almost 20% said the experience left them feeling “more fearful” than before.69 According to the U.S. Department of Justice, Office of Crime Victims, some of the negative effects of vicarious trauma may include: • Difficulty managing emotions; • Feeling emotionally numb or shut down; • Fatigue, sleepiness, or difficulty falling asleep; • Physical problems or complaints, such as aches, pains and decreased resistance to illness; • Being easily distracted, which can increase one’s risk of accidents; • Loss of a sense of meaning in life and/or feeling hopeless about the future; • Relationship problems (e.g. withdrawing from friends and family, increased interpersonal conflict, avoiding intimacy); • Feeling vulnerable or worrying excessively about potential dangers in the world and loved ones’ safety; • Increased irritability, aggressive, explosive, or violent outbursts and behavior; • Destructing coping or addictive behaviors (e.g. over/under eating, substance abuse, gambling, taking undue risks in sports or driving): • Lack of or decreased participation in activities that used to be enjoyable; • Avoiding work and interactions with clients or constituents; and • A combination of symptoms that comprise a diagnosis of Post-traumatic Stress Disorder (PTSD). In 1998 the National Center for State Courts released “Through the Eyes of the Juror.” 70 This manual identifies causes of juror stress at all stages of jury service and includes extensive recommendations on mitigating the impact of those stressors. Twenty-five years after this manual was published, only a handful of courts have implemented strategies to actively support jurors following their service, though that trend may be starting to change in light of society’s increased acknowledgement of vicarious trauma and heightened awareness of the importance of mental health. 29 Citizens on Call: Responding to the Needs of 21st Century Jurors RECOMMENDATION: Courts should follow in-trial best practices for mitigating trauma and should establish a post-trial trauma program for certain case types.

#### Jury duty is a massive privacy rights violation – post trial humiliation and data searches

COSCA 23 [Conference of State Court Administrators, 2023, “CITIZENS ON CALL: Responding to the Needs of 21st Century Jurors,” Conference of State Court Administrators, https://www.ncsc.org/sites/default/files/media/document/COSCA-Citizens-on-Call.pdf]/Kankee

CHALLENGE 3: Privacy concerns and fears about personal and family safety Juror Privacy In recent years, more attention has been given to juror privacy and the consequences of publicly releasing personal information.38 The debate over these issues has led to discussions about a defendant’s right to a fair trial and the need to ensure juror impartiality. The Sixth Amendment requires that a criminal defendant be tried publicly. The media and public have rights under the First and Fourteenth Amendment to observe many criminal proceedings including trials and often the process to evaluate jurors for partiality.39 Courts in both civil and criminal matters frequently find it necessary to inquire about personal matters during questioning.40 Juror names and addresses are often revealed during the trial’s voir dire phase. Transcripts from preliminary hearings concerning jurors are often available to the public. Moreover, juror information is generally made available after a verdict. This helps ensure that the proceedings are conducted fairly. But this threat to juror privacy may impact a willingness to serve. “[J]urors do not deliberately seek out this particular form of public service and do not, therefore, automatically surrender all expectations of privacy.”41 With the advent of social media and the availability of information on the internet, the debate over whether the public’s right to monitor the trial outweighs the jurors’ right to privacy continues to intensify. Throughout the voir dire process, jurors are often asked questions about their relationships, family, and friends. Jurors have expressed worry over the release of information about their residence, occupation, and educational background.42 They fear that the release of private information in their completed questionnaires may cause personal embarrassment.43 Questions about personal health issues, use of legal and illegal medications, or experience as crime victims are common. 44 Some have expressed overall worry about the extent of media coverage of the trial and the consequences of that coverage for their exposure during and after the trial, including to their employment or reputation in the community.45,46 Privacy concerns beyond voir dire Juror privacy also remains at risk outside the voir dire process. Investigation of both potential and seated jurors has become a regular occurrence in jurisdictions that provide access to juror contact information. Private attorneys may hire jury consultants or private investigators to search juror backgrounds and scour social media accounts, while government lawyers may use existing government resources to do the same.47 In a 2021study of jurors and new media, 40% of judges and lawyers reported that attorneys frequently use the internet to conduct research on prospective jurors and another 30% reported that they sometimes do.48 Privacy issues have only been exacerbated with increased use of social media platforms. With sites like Facebook and X, formerly known as Twitter, lawyers and litigants now have a treasure trove of information at their fingertips. There is no recognized right to monitor a juror’s use of social media. However, it has become standard practice for counsel and jury consultants to do so. A 2019 article in a publication of the American Bar Association titled Voir Dire Becomes Voir Google: Ethical Concerns of 21st Century Jury Selection,49 devotes one paragraph to concerns about invading juror privacy and several pages to the dangers of forgoing such a search. A lawyer risks alienating a juror by violating privacy. But there are risks of not conducting online research. Jurors may engage in online misconduct risking a mistrial. There are many instances in which a case has been undone by the actions of a single juror who has taken it upon his or her self to research the issues, parties, and even evidence in a case, or to communicate with third parties about the case. Jurors have posted on Facebook about their deliberations or sent “friend” requests to parties Big Data The emergence of “big data” threatens to further complicate the landscape. Commercial providers possess, and many government databases contain, better, more targeted, but very personal data in easily accessible formats. Courts could use this data to select a larger jury venire, and litigants could use this data to select the particular jury panel. For court administrators, the availability of additional information provides the potential for increased jury diversity, beyond the categories of race, gender, and geography. For litigants, the available information could provide a wealth of insights once only available from expensive jury consultants. “Big data could democratize access to information about jurors, leading to more diverse juries and jury venires, and potentially less discriminatory jury selection practices.”50 At the same time, court use of big data technology carries real risks. Increased collection of personal information involves an invasion of privacy that could result in significant backlash against jury service. “Jurors summoned to serve in the venire or questioned for the jury panel do not expect that jury selection will involve use of the full range of available consumer data. Jurors generally expect to be anonymous, more a juror number than a name. Jurors expect to arrive as citizens, do their job, and then disappear back into society as faceless, nameless members of a jury. Equalizing the availability of big data information about jurors and making it a part of the jury selection system, raises practical, theoretical, and constitutional dilemmas which must be addressed.”51 If courts are going to venture into the use of big data, they must inform potential jurors about the use of the data collected by the court and, to the extent possible, take steps to prevent commercialization of the data by third parties. Protection for jurors Recently more attention has been paid to protecting both jurors and the accused without undercutting First Amendment rights to observe criminal trials. In response, courts have recognized some limited privacy rights for jurors. The Supreme Court has called juror privacy a “compelling interest” when balancing privacy rights with the First Amendment right of the press to know about public jury trials.52 Many trial judges and court staff are becoming more sensitive and sympathetic to the privacy concerns of jurors and are modifying their jury procedures.53 54 “The result is a national hodge-podge of court procedures concerning litigant and public access to juror information— few of which adequately address all facets of juror privacy and many of which are of questionable legality given the strong statutory and constitutional policies in favor of open court proceedings and records.”55 Jurors are not volunteers. They come to court under summons and answer questionnaires under court order. The sharing of private information is compelled under threat of contempt of court.56 In her article, Hannaford speaks to a number of tactics employed by courts to protect juror privacy but notes that they are often limited and inadequate in many cases. “Most citizens understand the importance of revealing personal information in the context of a specific trial, but are less convinced that the court should permit unrestricted public access to that information in the context of a specific trial, …[and] are less convinced that the court should permit unrestricted public access to that information forever.”57 Recognizing the growing concerns about juror privacy and safety, Oregon adopted a statutory provision in 2021 which prohibits identification of a juror by name in any court proceeding that is open to the public. The statute protects the parties right to the names of the jurors, unless the court determines there is good cause to order otherwise.58 With the recent explosion of information readily available to litigants, the tension between juror privacy and the need to ensure juror impartiality can be expected to intensify. RECOMMENDATION: Courts should establish an expectation that parties conduct pre-service background checks only as authorized by court order or through supplemental questionnaires that have been approved by the court.

### Contention 7: Jim Crow Juries Bad

#### Juries are majority white - peremptory strikes, summons lists, financial hardship, past criminal records

O'Brien and Grosso 25 [Barbara O'Brien, Professor of Law at the MSU College of Law, and Catherine M. Grosso, Professor of Law at the MSU College of Law, 2025, “The Costs to Democracy of a Hegemonic Ideology of Jury Selection, Ohio State Journal of Criminal Law, https://heinonline.org/HOL/P?h=hein.journals/osjcl22&i=66]/Kankee

The high burden to win even these narrow claims undermines a true commitment to juries that are actually racially diverse and representative. Moreover, prevailing on either a fair cross-section or a Batson claim is extraordinarily difficult because even substantial evidence of racial disparities yields to the state and litigants' theories about what constitutes a reasonable effort to summon a fair cross section of jurors and who makes a good juror, however unsupported those theories may be. Put simply, aspirations about broad democratic participation in juries always seem to take a back seat to the desire to exercise firm control over the selection of a jury. Indeed, the dominance of the Ideology of Jury Selection is evidenced by courts' and lawyers' ability to exercise almost complete control over who may and may not serve as jurors. The unquestioning adherence to current capital jury selection procedures, including Witherspoon exclusions,'o2 and the availability of expansive peremptory strikes, despite their well-documented and well-articulated costs to jury participation by people of color, reflect a hegemonic ideology that runs up against values arising from the role of juries in the U.S. democratic system. The following section takes stock of these costs. III. JURY SELECTION UNFAILINGLY RELEGATES FULL DEMOCRATIC PARTICIPATION Race has long been used-explicitly and implicitly-to exclude citizens from jury participation.1 03 Early state laws strictly limited jury participation to white male property owners.1 04 The exclusion of Black citizens from juries through the middle of the last century was "near absolute." 105 Decades later, racism-explicit, implicit, and structural-continues to produce disparities in how jurisdictions summon potential jurors, whom the court excuses for cause or hardship, and how lawyers exercise their peremptory strikes.1 06 In many places, juries remain predominantly white even though the communities in which they sit are not.1 0 7 These disparities persist even though the law no longer tolerates explicit discrimination because efforts to rectify them conflict with much of the hegemonic ideology that dominates the law of jury selection. Each step in the process reflects choices and tradeoffs that ultimately undermine the goal of broad citizen participation and the seating of diverse juries. To begin the process of jury selection, each jurisdiction creates a jury summons list to call potential jurors to the courthouse. As noted above, the Sixth Amendment fair cross-section right requires that jury summons practices include groups in the community and provide them fair and reasonable representation on venires. 10 8 Historically, exclusion has been the norm. As noted, juries originally included only white men with property. Over time a fair cross section of the community came to include women and people of color, at least in the abstract. The way a jurisdiction compiles its summons list, however, often causes it to underrepresent some segments of the population. Voter registration lists underrepresent people of color, yet voter registration records alone or in combination with other databases remain predominant in jury selection across the country, followed only by driver's license lists, a list also likely to exclude people of color disproportionately.1 09 At the end of the day, "this country's history with respect to [] Tocqueville's free school is not one of wide availability-especially for racial and language minorities."" 0 Limits on juror qualifications may also contribute to the exclusion of people of color from juries. For example, many jurisdictions systematically disqualify people with previous misdemeanors or felonies; given the over-policing of people of color and their overrepresentation in criminal courts, this disqualification disproportionally limits participation by people of color."1 Excusing potential jurors for cause also undermines diversity. Thomas Frampton analyzed decision making in challenges for cause in 400 criminal jury trials in Louisiana and Mississippi, documenting that "black jurors' 'qualifications' for jury service, or lack thereof, operate as an important instrument of racial exclusion." 2 He found that Louisiana prosecutors moved to exclude Black prospective jurors for cause at 3.24 times the rate of white prospective jurors," 3 and Mississippi prosecutors in the study were 6.8 times more likely to seek a cause challenge against a Black prospective juror than a white prospective juror." 4 Anna Offit documented ways that cause dismissals for financial hardship disparately exclude jurors of color.'1 5 She noted that the concerns about the racialized experience of poverty featured prominently in federal hearings on jury selection in the late 1960s, and that 2019 poverty rates continued to reflect significant racial disparities.1 16 Offit observed that "even in the absence of explicit racial animus or bias, financial hardship stands as a persistent obstacle to representative jury participation,"" 7 noting previous research showing that jurors were "most likely to face dismissal during voir dire as a result of economic hardship, including the risk of lost income, and the need to care for a child or another dependent."'1 8 Offit analyzed 120 semi-structured interviews with state and federal prosecutors and public defenders across 30 civil and criminal proceedings 119 to show how judges, prosecutors, and defense attorneys worked collaboratively to document and justify these dismissals, often concluding that dismissals "were best serving everyone's interests."'20 They did so without regard to how the dismissals impacted jury diversity with respect to both class and race.1 2 ' The overwhelming majority of studies on cause challenges focus on the impact of "death qualifying" capital jurors under Witherspoon v. Illinois" and Wainwright v. Witt.2 3 As discussed in the previous section, the Supreme Court held that courts may dismiss potential capital jurors whose opposition to capital punishment would "prevent or substantially impair the performance of" their duties."' Scholars and lawyers have frequently raised concerns that the process of "death qualifying" juries would limit diversity, undermine jury community representativeness, and lead to more punitive juries.' 5 Death qualified jurors tend "to hold more favorable attitudes toward crime victims, have more negative attitudes toward defendants, see themselves as similar to crime victims, and perceive the defendant's chances of rehabilitation in prison to be less likely."126 These jurors also tend to focus more on factors that make the defendant's crime worse and to be less able to empathize with some defendants. Death qualified jurors are also whiter. In a large-scale survey of 3,284 jury- eligible Americans conducted in November of 2020, Black mock jurors were significantly less likely to satisfy death qualification requirements.' 27 In addition, "mock jurors who were more racially biased (as assessed by the voir dire questions), more politically conservative, and wealthier, were more likely to pass death qualification."1 28 Mona Lynch and Craig Haney found that the death qualification process in their mock jury study resulted in "the significant underrepresentation of African American" mock jurors and ultimately "systematically whitewash[ed] the capital eligible pool."1 29 Lynch and Haney demonstrated that the process of death qualification resulted in a capital eligible pool that "does not represent the views of its community."" 0 Aliza Cover's study of death qualification in eleven capital trials in Louisiana raised a similar concern.13 1 She found that Black jurors were removed on the basis of their death penalty opinions at "markedly higher rates,"132 producing qualified capital jury pools that differed significantly from the summoned venires.1 33 Cover noted that jurors removed under Witherspoon and Witt "are excluded not only from capital jury service in each individual case but also from the constitutional conversation about whether the death penalty violates the Eighth Amendment."13 1 Jury decisions in capital cases contribute to the Supreme Court's analysis of evolving standards of decency under the Eighth Amendment.' Verdicts reached by death-eligible jurors may not represent wider community norms.' 36 Extensive research has also documented the influence of racial discrimination on the exercise of peremptory strikes and on the ineffectiveness of the framework designed to counter racial discrimination.' In death penalty cases, a portion of peremptory strikes against Black venire members may relate to greater reluctance to impose the death penalty within this community, but controlling for death penalty attitudes did not substantially mitigate the race disparities in one statewide study. 138 This North Carolina study found that while the expression of death penalty reservations greatly increased the odds that a prosecutor would strike potential jurors of any race, Black jurors with death penalty reservations were still significantly more likely to be struck than their non-Black counterparts expressing similar views. As noted, several states passed laws or court rules reforming the Batson test to eliminate the disproportionate exclusion of potentialjurors based on race or ethnicity.1 39 These changes typically lower the threshold for a successful objection and may lead to the seating of more diverse juries. The study presented in Part IV demonstrates the high costs of the combined jury selection rules to full democratic participation by willing citizens in one North Carolina county. Different jury selection rules serve different purposes, and some- as currently practiced or potentially after refinement-may be essential to holding a fair trial. However, practices can become so deeply entrenched that they seem like the only reasonable way of doing things, rather than reflecting a choice with real tradeoffs. Our goal here is not to deny the concerns these rules are designed to address, but to make explicit the real costs of these practices to diversity and democratic engagement. Viewing these rules as the products of choices to advance certain objectives over others reveals the values and priorities of the legal system. IV. CAPITAL JURY SELECTION IN WAKE COUNTY, NORTH CAROLINA, 2008-2019

#### White juries overly punish defendants of color, cause more capital convictions, and undermine justice system legitimacy

O'Brien and Grosso 25 [Barbara O'Brien, Professor of Law at the MSU College of Law, and Catherine M. Grosso, Professor of Law at the MSU College of Law, 2025, “The Costs to Democracy of a Hegemonic Ideology of Jury Selection, Ohio State Journal of Criminal Law, https://heinonline.org/HOL/P?h=hein.journals/osjcl22&i=66]/Kankee

B. Findings This section reports our findings starting with race and gender disparities that result from requiring excusal of venire members based on death penalty opinions ("Witherspoon exclusions"), then turns to the race and gender disparities in the state's exercise of peremptory strikes. The final section reports the combined impact of Witherspoon exclusions and state peremptory strikes on the population of Black and white venire members.'5 2 1. Racial and Gender Disparities Resulting from Witherspoon Exclusions This section reports the race and gender disparities that result from the operation of rules requiring the dismissal of venire members because of their opinions on the death penalty. Table 2 presents the rates at which jurors are removed from the venire because of their opposition to the death penalty under Witherspoon v. Illinois and related cases.153 Fifteen percent of the venire members were excluded because of their opposition to the death penalty. This decision impacted 192 venire members. Fifty-three venire members (4%) were excluded because they would automatically impose the death penalty. Black venire members were excluded for their opposition to the death penalty at a significantly higher rate than white venire members. As reported in Table 2, Column B, 27% of Black venire members were removed under the Witherspoon rules (65/237) compared to 12% of white venire members (127/1,059)."4 This is a relative ratio of 2.25 (27%/12%). The disparity is statistically significant (p <.0001). This disparity persists if we focus on venire members for whom the transcript presents no basis for cause removal other than failure to be death qualified. This reduces the number of Witherspoon exclusions from 192 to 182, removing 14% of venire members overall. Black venire members were removed for their death penalty opinions with no other basis for cause removal 25% of the time (60/237), whereas white venire members were removed on this basis with no other basis for cause removal 11% of the time (122/1,059). The relative rate of dismissal remains over two, at 2.27 (25%/11%). The disparity remains statistically significant (p <.0001). We also calculated the rate at which men and women were excused based on their death penalty opinions. Women were excluded at a higher rate than men. In particular, 19% of women (120/640) compared to 11% of men (72/656) were death disqualified. This relative disparity is statistically significant, but smaller than that observed for race: 1.73 (19%/11%) (p < .001). The gender disparity is concentrated among the Black women who appeared for jury duty in these cases. Table 3, Column B, reports that 36% of Black women were excluded under Witherspoon for their opinions about the death penalty (47/131). This rate is 2.4 times the 15% overall rate of Witherspoon exclusions in this study (36%/15%) and 3.0 times the 12% rate of all other venire members (145/1,165). The disparity is statistically significant (p < .001). It is higher than we identified for any other race-gender combination in separate analysis. The cost of removals required under Witherspoon v. Illinois and related cases had a large and disparate impact on the ability of Black citizens in general and Black women in particular to participate in these capital juries. 2. Racial and Gender Disparities in the Impact of State Peremptory Strikes As noted above, research has demonstrated the ongoing significance of race in the exercise of peremptory challenges.'5 7 This section presents the rate at which prosecutors exercised peremptory challenges against Black versus white venire members when they had the opportunity to strike. As noted, North Carolina rules provide fourteen peremptory strikes to each side in a capital jury selection.1 58 This analysis is limited to those venire members who were "strike eligible" to the prosecutors.1 59 As earlier North Carolina research found, prosecutors in Wake County struck Black venire members at a significantly higher rate than white venire members.1 61 Table 4, Column B, reports that state strikes removed 51% of eligible Black venire members (38/75) compared to 25% (93/366) of eligible white venire members. The relative strike ratio is 2.04 (51%/25%). This disparity is statistically significant (p < .0001). We replicated the gender analysis presented in Subsection i but did not observe disparities in prosecutorial exercises of peremptory strikes against all women. We did, however, observe significant disparities in strikes against Black women. 162 Table 5 shows that the state removed 55% of eligible Black women with peremptory strikes (17/31) compared to 28% of all other venire members (114/410). This is a relative strike ratio of 1.96. This disparity is statistically significant (p < .01). 3. Combined Impact of Witherspoon Exclusions and State Peremptory Strikes by Race Section 3 presents the combined effect of death qualification and state peremptory strikes on the participation in these capital juries by Black citizens. Table 6 collects information presented in previous tables to illustrate the combined impact of the Ideology of Jury Selection in these cases. Column B reports the number of Black and white venire members in the study overall. Remember that this starting point underrepresented Black venire members relative to their presence in the community. Column C presents the actual number of Black and white venire members removed under Witherspoon. Column D presents the actual number of Black and white venire members removed by state peremptory strikes. Column E combines the number of venire members removed under Witherspoon with those removed by state strikes and presents the total number of Black and white venire members excluded from jury service. Finally, Column F presents the number of Black and white venire members in the reduced population. Table 6 also presents basic calculations concerning the cumulative impact of these decisions on jury diversity. Column G shows that Black venire members were removed at more than twice the rate of white venire members (43%/21%). This may be in part because Black venire members make up only 18% of the initial venire (Column B), but removals of Black venire members constitute 32% of the total removals (Column E), almost twice the rate of their presence in the overall population. Moving to the second row in the same columns, removals of white venire members, by contrast, constitute 68% of total removals, a rate more than 14 percentage points lower than their representation in the initial venire (82%). The cumulative effect of the death qualification process and the state's exercise of peremptory strikes meant that Black potential jurors were removed at almost twice the rate of their representation in the population of potential jurors (1.8 times, 32%/18%), whereas white potential jurors were removed at 0.8 times their rate (68%/82%). Figure 1 illustrates this change. The findings of this study echo earlier findings and illustrate the magnitude of the cumulative costs to diversity of jury selection rules. Transcripts from jury selection in these cases illustrate the extent to which the rules authorizing removal of potential jurors based on their death penalty opinions and the availability of a large number of peremptory strikes operate as accepted but consequential parts of the process. Prosecutors and defense counsel raise arguments about whether a potential juror's opinions qualify for removal under Witherspoon without challenging the overall cost of this inquiry to the democratic jury ideal. Peremptory challenges quietly backstop and expand Witherspoon's reach-allowing prosecutors to remove even those whose opinions satisfy the constitutional standards for allowable concerns about capital punishment.1 64 This practice puts the rules for selecting capital juries in direct tension with our democracy ideals. V. A COLLISION OF IDEOLOGIES THAT HARMS JURY DEMOCRACY Section II reviews research documenting the costs of current jury selection procedures generally, and jury selection in capital cases in particular, to the diversity of seated juries. Section IV presents the results of a new study documenting similar results and showing the cumulative costs of the Ideology of Jury Selection in one county. This Section collects evidence documenting the costs of the predictable lack of diversity that undermines the vibrancy valued under Ideology of Jury Democracy. Diversity enhances the quality of deliberation.' 65 These benefits include the opportunity to present and discuss differing interpretations of the evidence or even varying memories about the details of the case.1 66 For example, Sommers used a mock jury experiment to examine "the processes through which racial diversity influences group decision making."167 Study subjects, recruited from an actual jury pool of people responding to jury summons, deliberated in heterogeneous groups (four white and two Black mock jurors) or homogeneous groups (six white jurors). In this study, "heterogeneous groups deliberated longer and considered a wider range of information than did homogeneous groups."1 68 Sommers also observed that white participants in heterogeneous groups raised more case facts, made fewer factual errors, and engaged more comfortably in race-related issues.1 69 Subsequent research has documented ways in which "diversity provides diverse perspectives, and also promotes perspective taking." It "increases people's tendency to process information more deeply" and "can raise their tolerance of ambiguity and open-endedness." 70 Alternately stated, diversity of perspective reduces the risk of biased outcomes because the range of views expressed prevents one dominant view from determining the outcome. Diversity means accountability: people process facts more deeply because there are voices that challenge the prevailing status quo and assumptions about defendants and victims. These qualities enhance the truth-seeking function of the jury inherent to the Ideology of Jury Democracy. The persistent harms to jury diversity that arise from the hegemonic Ideology of Jury Selection- from decisions about assembling jury summons lists, to the failure to accommodate situations that require hardship removals, to race disparities in the exercise of cause excusals and peremptory strikes''-never stand out in higher relief than they do in this respect. A second important cost of a lack of diversity arises from the juries' role as a check on government power. Juries lacking in diversity have been found to be more punitive.' 2 A jury that is more punitive than the community in which it sits is simply less well prepared to carry out this role. Shamena Anwar and colleagues collected information on 300,000 individuals who responded to jury summons for felony trials in Harris County, Texas. They observed that Black defendants were much more likely to be convicted and to receive more severe punishments when juries had a higher share of residents from predominantly white and high-income neighborhoods. They also documented that residents from these neighborhoods tended to be substantially overrepresented on juries. 173 A second study from the same research team looked at the impact of the racial composition of jury pools on trial outcomes in felony trials in Florida between 2000 and 2010.14 This comparison was possible because 36% of the jury pools had no Black members. The scholars found that juries formed from all-white jury pools convicted Black defendants sixteen percent more frequently than white defendants. They also found that this disparity in outcome disappeared entirely when the jury pool included at least one Black member. This research builds on earlier research concluding that lack of diversity can exacerbate a racial gap in conviction rates.17 5 This harm to diversity of perspectives can arise from the removal of candidate jurors based on widely accepted grounds. Emily Shaw and colleagues studied the importance of racial diversity when judging the strength and quality of evidence presented in criminal cases.1 ? 6 Their 2021 study examined whether attitudes and beliefs about law enforcement help explain the racial gap among jurors in support for conviction.' 77 Participants were presented with a hypothetical federal drug conspiracy case in which the race of the FBI informant-whose testimony was a major part of the government's case-varied. The authors found Black participants significantly less likely to convict than white participants, especially when exposed to the white informant condition. Black participants also rated the law enforcement witness as less credible and viewed police more negatively.7 "' Shaw and colleagues caution, however, against using this finding to justify excluding skeptical jurors from service because "removing jurors due to their skepticism about the police runs a high risk of seating a biased jury."1 79 They continue that "our findings suggest that the legal processes that are used to excuse jurors from service, either peremptorily or for cause, need to be reconsidered to ensure that views of police, including those rooted in actual experience or knowledge about problems with fair and just policing, are not used to disproportionately exclude persons of color, or to seat juries overrepresented by people who blindly trust and support police." 180 Removing jurors based on their views of police-that is, by favoring jurors who have never had a negative interaction with police-prioritizes the existing power structures wherein the hegemonic Ideology of Jury Selection dominates.1 81 Similarly, the practice of peremptory strikes against potentialjurors-who have not been excused for cause and have therefore been deemed acceptable by the judge-privilege litigants' rights over those of citizens to participate in the. democratic function of the jury.182 That parties can exercise peremptory strikes for any reason-bar race, gender, or ethnicity-"no matter how 'implausible or fantastic,"' suggests that idealistic notions about the jury's role in participatory democracy are subordinate to litigants' rights to exercise control over who can and cannot take part.183 This is not necessarily a problem; the interests of a defendant facing the prospect of a criminal conviction outweigh those of a prospective juror whose biases or personal connection to the case would render them partial. But the choice to allow parties to strike for even reasons that have no basis in fact or logic demonstrates just how readily ideals of democratic participation yield to other values. The higher rates of opposition among Black citizens to capital punishment have historically led to their disproportionate removal from juries, contributing to the production of homogeneous juries."' Given this, the process of removing potential jurors based on their death-penalty attitudes leads to a "demographic dilemma" where the "lack of support for the death penalty among African Americans compromises the composition of capital juries in such a way that the capital sentencing process threatens to become a system in which minority jurors are excluded from this critical aspect of the criminal justice process altogether."1 85 Witherspoon exclusions have the potential to impact diversity of perspectives in other respects as well.1 86 On top of Witherspoon, the exalted view of juries as fundamental to democratic participation conflicts with a deep mistrust of jurors themselves. As Laura Gaston Dooley argues, trial lawyers are trained to look upon jurors as fickle and easily swayed by superficial factors such as an attorney's mannerisms and clothing. 187 Capital jurors have direct influence on both guilt and sentencing decisions in the cases in which they serve. Juries' decisions also contribute to how reviewing courts interpret the Eighth Amendment. The Supreme Court established more than a century ago that the Eighth Amendment's prohibition on cruel and usual punishment derives its meaning in part from public opinion that may evolve or change "as public opinion becomes enlightened by humane justice."188 The Court emphasized its commitment to measuring "evolving standards of decency" in determining the constitutionality of the death penalty in Gregg v. Georgia.189 The GreggCourt sought to identify "objective indicia that reflect the public attitude,"190 noting that the "jury .. . is a significant and reliable objective index of contemporary values, because it is so directly involved" in the administration of capital punishment.1 9 ' The Court has looked to patterns in capital jury decisions as part of its evolving standards of decency analysis in decisions limiting the execution of intellectually disabled defendants,' 92 prohibiting the execution of juveniles,1 93 and repeatedly limiting the death penalty to homicide cases.'94 But that process necessarily excludes essential information about public attitudes and values when jury selection procedures lead to juries that are more likely to convict or issue death sentences, or that are less representative of society's opinions.1 95 As such, the selection procedures create a skewed picture that imposes an independent cost to constitutional interpretation itself. This process also undermines the expected authority of juries under the Ideology of Jury Democracy. For example, Cohen and Smith note that at the time of the founding, a potential juror's "view on the constitutionality of a particular law . . . marked an important component of society's deliberative process."' 96 They suggest that cause strikes undermine the deliberative process needed to give the jury its full and expected role.19! "Far from being a prohibited 'bias'," they argue, "the jury's beliefs on the appropriateness of the law or its punishment served an important function both in the English system and in ours at common law."'9 8 Similarly, Frampton notes that the "version of the 'impartial jury' that now reigns in American criminal procedure-distant, dispassionate, ignorant of the parties and allegations- contrasts with the 'local jury' that predominated ... at the country's founding."1 99 This concern parallels Carroll's image of jury democracy where the jurors play an essential role in "grounding the law in the living world of the citizens whose obedience it commands."200 Current jury selection methods not only distort information communicated to the Court regarding evolving standards of decency, but they also send a troubling message to the public about the value of their participation. Justice and Meares conceptualize the costs in terms of procedural justice of the "disproportionate exclusion and inclusion of various groups in society," noting that "this cherished (if impotent) form of civic education sends a clear message that some people are worthy citizens whose opinions and judgments are valued, while other citizens' views do not count." 20 ' These exclusions undermine public confidence in jury decision making and, in turn, in public confidence in the justice system as a whole. 2 02 The pervasive Ideology of Jury Selection harms the system as a whole. The following section notes initiatives that introduce "productive discourse" that challenges the hegemonic ideology and protects democratic engagement. 203 VI. AVENUES TO RECENTER THE IDEOLOGY OF JURY DEMOCRACY

#### Excluding black jurors otherizes the black experience causing follow-on police discrimination

Paulose 22 [Rachel Kunjummen Paulose, Visiting Professor at the University of St. Thomas School of Law, a former United States Attorney, and graduate from Yale Law School 2022, “Black Jurors Matter: Why the Law Must Protect Minorities' Right to Judge,” Berkley Journal of Criminal Law, https://heinonline.org/HOL/P?h=hein.journals/bjcl27&i=301]/Kankee

Still, key differences in perception persist. About two-thirds of Black people have experienced racially discriminatory situations where they were treated with suspicion, whereas only one-quarter of white people have expressed similar concerns.144 Black people are five times more likely than white people to assert they have been racially profiled by police. 145 Black people's ratings of police competence are far lower than those of white people. 146 Most white Republicans dispute the notion that police treat Black people unfairly. 147 Even amongst police officers, views regarding racism in policing vary dramatically based on the race of the officer. 148 Yet self-described conservatives, including Justice Amy Coney Barrett, have acknowledged the existence of implicit bias in the legal system. 149 However, the juror selection process reflects none of this reality. The jury selection system presently reflects only the Anglo perspective. The minority perspective is viewed as inherently biased.150 When a person of color truthfully describes her experience, e.g., being profiled by law enforcement, she is automatically categorized as biased against law enforcement when in fact she has simply repeated what is well established as fact: as a group, people of color, particularly Black men, are targeted by law enforcement in ways that white people are not. Similar questions during voir dire questions touching on how people perceive law enforcement, if they have had any prior contacts with law enforcement, and whether they know anyone who has been arrested, indicted, convicted, or jailed all are likely to lead to different answers by people of color than white people because of the systemic bias of police. By otherizing the minority perspective, the law has perpetuated discrimination that has gone largely unchallenged in the courtroom.15 1 In other words, the law demands that people have a monolithic experience, the white experience, or otherwise be labeled "biased." This discrimination also justifies and perpetuates police discrimination against people of color; what starts on the streets carries into the courtroom. 2. Courts Rarely Focus on Implicit Bias

#### Racialized poverty causes a disparate impact for summons rolls, jury now-shows, and juror challenges – all ensure juries will be majority white, deepening racial harms

Offit 21 [Anna Offit, Assistant Professor of Law at the SMU Dedman School of Law with an AB from Princeton University a MPhil from University of Cambridge, JD from Georgetown Law and a PhD from Princeton University, 2021, “Benevolent Exclusion,” Washington Law Review, https://heinonline.org/HOL/P?h=hein.journals/washlr96&i=625]/Kankee

A. Cause Challenges Are an UnderstudiedMechanism for Juror Exclusion The process by which ordinary people are empaneled as jurors is one that is stacked, at every turn, against the poor. The first exclusionary juncture lies at the creation of source lists from which jurors are summoned to court." Though the JSSA attempted to make such rolls more inclusive, many states today use Department of Motor Vehicles (DMV)-generated lists limited to those with a driver's license, registered voters, or those with a voting record.78 In an effort to expand these lists, California may soon become the latest state, joining seventeen before it, to include tax records as a way to access a broader sample of eligible jurors. 79 Still, as long as people who are poor are underrepresented in these expanded source lists, the process of assembling juror lists will remain a site of exclusion. The next point of attrition for prospective jurors who face financial hardship, after source lists are compiled and jurors are summoned, is their arrival to court. On average, 9% of summoned jurors will fail to respond to their summonses-with a rate in some states as high as 50%.80 Though some judges have attempted to enforce compliance by issuing warrants for "Failure to Appear" or putting a lien on the property of those who do not show up, this approach is by no means universal. 81 Upon receipt of a summons, prospective jurors can often respond with proof that there is a reason they should not appear in court in advance of their date of service. 82 Jurors can also seek excusal from jury service by completing written questionnaires which they can submit to the court by mail in advance.8 3 Jurors may also be dismissed from service after reporting to court in person. Though it is possible for an attorney to challenge the composition of a jury panel, or venire,84 in practice there are two predominant ways that jurors are relieved of their duty: Through peremptory challenges and through cause challenges. 85 Both routes of juror excusal take place during an extended period of juror questioning, known as voir dire, during which attorneys and judges question jurors about their ability to serve. 86 Cause challenges, which can be exercised by judges without restriction, are the first and most significant means by which racial disparities are introduced to empaneled juries.8 7 One function of the cause challenge is to excuse citizens the judge believes harbor biases that might prevent them from fairly and impartially assessing evidence. 88 Recognizing that one's right to an impartial jury is an integral part of the American legal system, 89 cause challenges are perceived to be an essential strategic resource for litigants; 90 they promote the removal of jurors who appear as though they cannot follow legal instructions or assess evidence fairly.91 In practice, judges dismiss jurors for cause for a variety of reasons. In the federal context, for example, Rule 24 of the Federal Rules of Criminal Procedure, which governs jury selection, has widely been interpreted as affording judges broad discretion to determine the parameters and types of questions asked of prospective jurors.92 In civil cases, judges exercise similar discretion to identify prospective jurors who might have a prejudicial personal relationship with an attorney or party in a case.9 3 To the extent that a prospective juror has adverse interests that involve a party in the case, or a suit pending in the same court involving similar questions of fact, the removal of such jurors for cause is also common.94 In addition to addressing potential sources of bias, cause challenges are used to excuse jurors who fail to meet legal qualifications to participate. 95 Though restrictions on eligibility vary by jurisdiction, they generally require American citizenship and residency in the county from which one is summoned, a minimum and maximum age, English language proficiency, and the absence of a prior felony conviction. 96 Of particular significance, judges also frequently exercise cause challenges to remove jurors who indicate that financial impediments would constrain their ability to serve as jurors.97 Jurisdictional hardship guidance, however, does not provide a precise or consistent definition of financial hardship. In the federal context, jurors seeking direction from the U.S. Courts Administrative Office in Washington, D.C., which maintains a website, can expect to find little helpful information. The site notes that under the Jury Act, courts can excuse jurors on the basis of "undue hardship or extreme inconvenience," which can be requested in writing.98 The criteria for seeking such an excuse, however, are not specified. Assessments of hardship excuses, among other rationales for a cause dismissal, lie at the sole discretion of the judge.99 Cause challenge determinations are also rarely appealed, as the standard of review is abuse of discretion.0 0 The next Part of this Article will demonstrate that judges' cause challenge determinations are highly variable, with some showing deference to jurors' concerns, and others insisting that financial hardship should not warrant excusal.' 0' Lawyers who wish to preserve an error for argument on appeal are thus sometimes required to use peremptory challenges to excuse jurors they feel should have been removed for cause.10 2 Unlike peremptory challenges, which are limited in number and subject to anti-discrimination law, 03 cause challenges are theoretically limitless.0 4 And the dismissal of prospective jurors for reasons of financial hardship, though seemingly benevolent, can effectively purge the venire of jurors who defense attorneys view as advantageous to their clients.10 5 In one case, for example, a defendant argued- unsuccessfully-that hardship challenges were used to selectively remove Black prospective jurors with childcare commitments, even as White prospective jurors raised the same concern.1 06 This practice recalls the selective application of property requirements to fill venires with non- propertied White prospective jurors and serves as an important reminder that any discussion of undoing socio-economic exclusion is in the United States also a discussion of undoing race-based exclusion. B. Cause Challenge Dismissals DisparatelyExclude Jurorsof Color Judges' uses of cause challenges to excuse prospective jurors who raise hardship concerns results in juries that are socio-economically and racially homogenous. Past studies have focused on the extent to which inquiries into juror bias can lead to the disparate dismissal of jurors of color-sometimes based on past criminal convictions1 07 or even arrest records. 08 It is particularly notable, in light of the American jury system's fraught racial history, that the racialized experience of poverty has been absent from scholarship on jury demographics while featuring so prominently in hearings on the Jury Selection and Service Act of 1968.109 According to the Pew Research Center, White families in the United States have a net worth that is on average thirteen times greater than that of families of color." The poverty rate among Black and Hispanic Americans in 2019 was 18.8% and 15.7%, respectively, as compared to the 7.3% poverty rate among non-Hispanic White Americans."' White citizens are also more likely than citizens of color to own their own cars" 2 and homes."1 3 The consequences of this disparity for jury representativeness cannot be overlooked. One variable that may account for disparate juror summons response rates, for example, is the fact that renters tend to live at an address for shorter periods of time and may fail to update the address on their driver's license each time they move-both of which lead to less inclusive juror lists." 4 Research suggests that disparities in the number of individuals who report for jury service, based on race, often correspond to concern about the financial consequences of participating." 5 In Dallas, Texas, in the early 2000s, for example, The Dallas Morning News and SMU Law Review conducted a comprehensive study of jury participation in the county.! 1 According to that study, four out of five people summoned for jury service did not show up, and Hispanic residents in particular were under-represented.1 7 In a county in which more than one in four citizens was Hispanic during the period in question, only one in fourteen jury service participants was Hispanic." 8' And while 40% of the population lived in households earning $35,000 or less, only 13% of this population participated in jury service." 9 Beyond this data, which suggest that jury no-shows may stem, in part, from citizens' concerns about the financial consequences of participation,120 research participants completed surveys that revealed striking disparities. In particular, twice as many Hispanic respondents as White respondents found it difficult to spend time away from work during jury duty, and more than 19% of Hispanic persons and 17% of Black Americans earned no wages if they reported to court for jury service, compared to 5% of White citizens surveyed.121 There is evidence that the economic impact of the COVID-19 pandemic has exacerbated the racial and socio-economic disparities that continue to plague juries. A June 2020 informal survey of potential jurors in Dallas and Houston, for example, indicated that more Black and Hispanic potential jurors reported economic hardships if summoned for jury duty, and were also more likely to work in hospitals or other areas of increased viral exposure.122 When a Zoom-based virtual jury was later summoned for a criminal trial in Travis County, Texas, which encompasses the city of Austin, 73% of empaneled jurors self-reported their race as White and 83% self-reported having a post-graduate or college degree.1 23 U.S. Census data indicates, in contrast, that fewer than 50% of Travis County residents are either White or possess advanced degrees.124 This research demonstrates that legal scholars committed to eliminating racism from the American legal system must confront socio- economic disparities and their attendant forms of exclusion in our juries. In practice, people of color are removed from jury venires long before peremptory challenges are exercised; even in the absence of explicit racial animus or bias, financial hardship stands as a persistent obstacle to representative jury participation. The consequences of this are significant. In addition to violating a person's constitutional right to serve as a juror,25 the functional exclusion of people of color undermines public confidence in the jury trial,126 as well as in the accuracy of verdicts.1 27 In fact, empirical research suggests that jury deliberations are less satisfying for poor and historically underrepresented jurors, including those who are Black and Hispanic, than for White jurors regardless of class.12 In Taylor v. Louisiana,129 the Supreme Court specifically noted that public confidence in the trial system depended on the perceived fairness of jury selection procedures that ensured the broadest levels of participation possible.1 30 While public confidence is a worthy goal in and of itself, the stakes of jury exclusion may be greatest for criminal defendants. There is an abundance of psychological research, for example, indicating that deliberative bodies with broad representation have longer and more substantive discussions of evidence due to the confluence of different perspectives.131 Another study found that jury demographics affected participation during deliberation: All-White (mock) juries tend to be dominated by White males while White females are less talkative and perceived as less persuasive.1 32 When jurors of color were introduced to the mock panel, this dynamic changed; women became more active participants and their contributions were more impactful.133 With respect to guilty verdicts, a study has shown that White jurors are more likely to convict than Black jurors in cases involving Black defendants on trial for violent crimes.1 34 This may result, in part, from Black jurors' greater awareness (and experience) with the inequities of the criminal justice system.1 3 5 It may also result from the prejudicial tendencies of predominantly White juries. Studies have also highlighted the varying effect of jury demographics on the outcomes of different types of criminal cases.1 36 One such study, based on North Carolina data, determined that juries with more than one Black male member were more likely to acquit defendants.1 37 White juries, in contrast, were found to more often convict Black defendants in cases with White victims.1 38 Scholars have also highlighted instances in which reliance on racial stereotypes about jurors' likely sympathies when empaneling jurors of color have been unfounded and prejudicial in and of themselves. 13 Ensuring that jurors from diverse backgrounds are empaneled thus not only improves the public perception of the legal system, but influences the deliberative process by effectuating a more fulsome and measured review of evidence. The foregoing shows that despite a record of demonstrable progress, the American jury system remains vulnerable to socio-economic exclusion. Keeping people who are poor out of venires deepens the marginalization of already underrepresented groups, resulting in juries that are neither socio-economically nor racially representative of American society. This is an affront to the Constitution which, under Batson, protects a person's right to serve as a juror. 4 It also prevents empaneled jurors from feeling that they can speak and be heard. But a review of the ideal-typical process' 4 ' of assessing and challenging jurors does not offer a full picture of how things unfold in practice. In Part III, I draw on my own extended empirical studies of jury selection to offer an innovative look at socio-economic exclusion in real time. In particular, I identify the central role that benevolence plays as a common rationale for exclusion. In the nineteenth and early twentieth centuries the link between property, ability, and moral aptitude served to make socio-economic exclusion not only thinkable to its advocates but right and good. Today, I argue, the view of jury service as an impossible burden for those who are poor, and excusal from it as an act of benevolence, once more makes exclusion of certain people not only thinkable but right and good. Further, as I will discuss in the final section of this Article, the view of jury service as a burden for people who are poor and excusal as an act of benevolence reifies the jury system as something unchangeable, rather than a living system in which the financial consequences of service might be reduced, eliminated, or turned positive, by compensating jurors at a level that befits the importance of the service they render. III. AN EMPIRICAL CASE STUDY OF JUDICIAL AND ATTORNEY MANAGEMENT OF HARDSHIP EXCUSES

#### Structural racism and discriminatory lawyers cause all white juries and worse outcomes for black folks’

Levinso et al. 21 [Ariana R. Levinso, Professor of Law at the Louis D. Brandeis School of Law at the University of Louisville, Sonya Faber, researcher with a PhD and MBA from Bioville GmBh, Dana Strauss, researcher with a BS from the School of Psychology from the University of Ottawa, Sophia Gran-Ruaz, researcher with a BS from the School of Psychology from the University of Ottawa, Amy Bartlett, researcher with a LL.B. and LL.M. from the Department of Religious Studies from the University of Ottawa Maria Macaluso, JD candidate at the Louis D. Brandeis School of Law at the University of Louisville, and Monnica T. Williams, researcher with a PhD and ABPP from the School of Psychology at the University of Ottawa, 2021, “Challenging Jurors' Racism,” Gonzaga Law Review, https://heinonline.org/HOL/P?h=hein.journals/gonlr57&i=397]/Kankee

INTRODUCTION The most-watched trial of 2021 was likely that of Derek Chauvin, the officer who murdered George Floyd.1 Jury selection took over a week, in part because so many potential jurors had seen the video of Chauvin, a White police officer, with his knee on the neck of Floyd, a Black2 man, for over eight minutes.3 The issue of race was front and center during Chauvin's jury selection.4 The defense attorney began jury questioning by telling each juror that the case is not about "race." 5 Yet, empirical research and the social response to the trial told a different story: many studies document unjust outcomes for Black individuals in the legal system; 6 the Innocence Project has long documented the impact of race on criminal cases; 7 and the protestors outside Chauvin's trial were advocating for racial justice.8 Across the United States, jury selection contributes to structural racism in the legal system and to unjust outcomes for Black defendants and victims in both criminal and civil contexts. 9 Though progress has been made, existing legal tools and policies fail to adequately address this issue. The complex social and psychological factors at play in jury selection call for interdisciplinary solutions to equip lawyers and judges with the ability to identify and challenge racial bias in potential jurors. To date, efforts to root out systemic racism injury selection and deliberations have mainly focused on increasing jury diversity. 10 One vivid example of how important jury diversity is to ensure racially just outcomes in the United States is the case of civil rights activist Medgar Evers. In 1963, Evers, a thirty-seven- year-old Black man, was killed right outside his own home by a member of the Ku Klux Klan, Byron de la Beckwith." The State of Mississippi unsuccessfully prosecuted de la Beckwith twice in 1964.12 Each time the all-White juries failed to unanimously agree on conviction, resulting in a hung jury.13 In de la Beckwith's second trial, the Mississippi State Sovereignty Commission used state resources to help the defense identify and select sympathetic jurors during voir dire. This interference was only discovered in 1989 by a reporter. 14 It was not until de la Beckwith's third trial in 1994, after new evidence was introduced, that a racially diverse jury including both Black and White jurors finally convicted de la Beckwith of first-degree murder.' 5 By the time of the third trial, Byron de la Beckwith had admitted shooting Evers, and he was generally believed to be guilty of the crime. It is likely, although cannot be shown with statistical causal certainty, that the changed racial make-up of the third jury contributed to their ability to reach a unanimous conviction. More recent studies show that diverse juries deliberate longer than all-White juries and consider more facts and make fewer errors.1 6 Diversifying juries by race also positively affects decision-making, as recently shown in a study of mock juries. 7 From a psychology perspective, however, selecting a jury that will not let racism influence their deliberation and verdict is more complex than simply ensuring diverse racial representation. For example, while some White individuals can be fairly easily identified as holding racist viewpoints (e.g., willingness to say they believe Black people have more criminal tendencies than others), others have implicit biases. 18 Aversive racism, a psychological term for outwardly presenting as unbiased while still thinking and acting in a racially biased manner,1 9 is more difficult to identify in prospective jurors. Moreover, implicit bias is not confined to White jurors. For example, Black jurors can also manifest internalized racism, a form of implicit bias that can also affect their deliberations. 20 In addition, non-racist bystanders can include people who may be more easily influenced in deliberations by White people with explicit or implicit bias, while others may be White racial justice allies who will effortfully focus on the facts of the case without allowing racism to pervade their decision-making process.2 Therefore, the confluence of a juror's attitudes and behaviors towards different races and racism should be the focus in creating an impartial jury rather than simply the juror's race. Many legal sources providing advice about how to conduct voir dire to identify jurors whose racial prejudice render them unable to impartially decide the case are decades old and now outdated because our understanding of racism has evolved and manifestations of racism have changed over the years. 2 2 Lawyers and judges consulting available legal sources may be confused by contradictory advice. For example, different Supreme Court Justices hold different opinions about whether lawyers should directly raise race on voir dire and, if so, what questions to ask.23 Legal sources providing advice to lawyers performing jury selection and voir dire suggest numerous approaches and questions, some of which contradict each other.24 Many of these sources are behind paywalls or are academic in nature, making any helpful questions they propose less readily available to public-interest attorneys.2 5 Thus, a new approach is needed, one based on current science and that is readily accessible. Insights from the field of psychology are valuable resources for judges and attorneys who must determine whether a juror should be removed because of racial bias. Social science explains that when jurors deliberate and make decisions, several demographic, social, and psychological factors are involved, including explicit and implicit racial biases, cultural norms, and group behavior. 26 Psychologists and other social scientists offer attorneys evidence- based 27 means to identify jurors who will not be impartial due to racial bias or a demonstrated history of racial stereotyping. 28 Taking an interdisciplinary approach, this Article will assist judges and lawyers in selecting a jury that is more likely to be impartial and unaffected by racial bias. This Article is designed to serve as a launching point for researchers, as well as legal professionals, who see the value of bringing psychological research and leanings into their legal work and would like to cultivate a more well-informed and effective approach to anti-racism in the justice system. Part I provides background about the problem of racial bias in the U.S. legal system, specifically in the jury selection process. Part II provides background about the mechanics of jury selection and the existing tools to combat racism in jury deliberations. Part III describes psychological insights on racism and provides a taxonomy of different forms of racism. Part IV explains the types of questions judges and attorneys can ask in voir dire or in jury selection questionnaires to identify different types of racism and enable a challenge for cause or, at a minimum, use of a peremptory challenge. The Article concludes with suggestions for further research and proposed questions that attorneys and judges can use to implement the findings of this Article. I. HISTORY OF RACISM IN THE UNITED STATES LEGAL SYSTEM This Part provides an overview of the history of systemic racism in the U.S. legal system and describes how systemic racism directly impacts jury selection. However, racism permeates all aspects of the American legal system and results in disparate and unfair treatment of Black Americans. 29 While this Part uses Black American history as an exemplar, it is not intended to erase the racism experienced by other people of color in the United States. A. The Role of Race in the U.S. Legal System andJury Selection Due to the country's long history of racism, race matters in the context of the U.S. justice system,30 including the process of jury selection. 31 From independence through the Civil War, jury participation was almost entirely restricted to White men. 32 After the Civil War, the Thirteenth, Fourteenth, and Fifteenth Amendments abolished chattel slavery and guaranteed basic civil rights regardless of race, color, or previous condition of servitude for those who are not incarcerated. 33 Despite these legal advancements, many government officials directly excluded Black Americans from jury selection for another century after the Reconstruction Era.34 Furthermore, Black people were still subject to discrimination and harsh acts of violence through the enactment of government- sanctioned racial discrimination, such as Jim Crow laws.35 Jim Crow laws were enacted beginning in 1877 to limit the freedom of Black Americans by "dictating all aspects of the ex-slaves' lives, from work hours and duties to behaviors."36 For example, Jim Crow laws prohibited Black people from entering certain towns and cities, required literacy tests and poll taxes for Black voters, and required separate schools for White and Black children. 37 As a result, Black Americans were ostracized, their voices were marginalized, and their right to vote was suppressed. In other words, these laws enforced racial segregation and maintained long-lasting inequalities among Black and White Americans. 38 Despite the Civil Rights Act of 1875, which outlawed race-based discrimination in jury selection, Black people have historically been excluded from juries. 39 For example, the literacy tests required by Jim Crow laws prevented Black people from civil engagement because they excluded them from the voting polls, which is one of the main sources of jurors.40 Some laws were more explicit, like West Virginia's outright ban on Black jurors. Fortunately, the Supreme Court overturned this law in Strauder v. West Virginia when the Court held the ban violated the Equal Protection Clause of the Fourteenth Amendment. 41 Although this was a step towards equality and inclusion in jury selection, the legal advancements were rarely enforced and had little influence on the behavior of local officials.42 For instance, in some states the "names of black residents were included on the lists from which jury panels or 'venires' were drawn, but were printed on a different color paper so they could easily be avoided during the supposedly random drawing of the venire."43 Such policies applied vague requirements for jury selection to exclude Black people from the jury." Today, racism still permeates all areas within the American legal system and results in gross injustice towards people of color. For example, Black Americans, in comparison to White Americans, are arrested at a higher rate,45 are convicted of crimes at a higher rate,46 and have longer sentences imposed against them.4 7 Bail serves as a higher impediment to the release of Black Americans, as do barriers to probation. 48 For instance, Black Americans and Latinos are more likely than White Americans to have their bail denied and their bond set at a higher amount, which results in being detained longer because they cannot pay heir higher bonds.49 Further, Black probationers are more likely to be revoked than White probationers for similar behavior. 50 B. Racism in Modern Jury Selection Devastating Jim Crow laws have had a lasting impact on jury selection. Systemic discrimination produces a convergence of realities that result in significantly lower representation of Black Americans on juries than their proportion of the citizenry. 51 Jury lists drawn from voter registration records mean Black people are underrepresented in the jury pool.5 2 Even when included on the lists, Black people are more likely to be disqualified by a felony conviction or to qualify for a hardship exemption due to disproportionate rates of conviction and poverty. 3 Moreover, "[o]ver a century later, state-sanctioned racial discrimination in jury selection remains ubiquitous, and the racial composition of juries continues to shape substantive trial outcomes."5 As mentioned above, jury selection perpetuates structural racism in the legal system and creates unjust outcomes for people of color in both criminal and civil contexts. This occurs both through the exclusion of people of color from juries and inclusion of people with racial biases that may influence their performance." Several independent regional investigations indicate that juror exclusion on the basis of race is still occurring. 56 In criminal cases, prosecutors remove a disproportionate number of Black individuals from jury pools, and Black criminal defendants continue to be tried by all or largely White juries.57 This exclusion continues despite findings that juries with diverse membership spend more time in deliberations, discuss more case facts, and end up making fewer errors than juries composed solely of White participants.58 Moreover, this issue persists even with the existing Batson challenge that supposedly prevents attorneys from eliminating prospective jurors based on race. While all jurisdictions give attorneys some number of peremptory challenges, eliminating a juror solely because of the juror's race is prohibited."9 The seminal case Batson v. Kentucky, in which a Black defendant was found guilty of burglary after the prosecution used their peremptory challenges to remove all four Black jurors, requires the opposing attorney to have the opportunity to protest a peremptory challenge that appears to be based only on race. 60 To withstand such a protest, the attorney challenging the Black juror (or juror of any other race) must provide a non-race-based reason for the challenge. 61 In most instances, an attorney will be able to do so, and most judges will not prohibit the attorney from exercising the challenge. 62 Notably, "an attorney may exercise peremptory challenges based on a juror's occupation, age, or level of education." 63 For example, in one case involving claims of race discrimination and retaliation, a trial judge found that the defendant's assertion of striking one Black potential juror because they were a union member was pretextual. 64 On the other hand, striking another Black potential juror because they worked for the same employer as the plaintiff and attended church with a potential witness in the case was permissible. 65 The process, therefore, permits race to influence the jury selection process so long as some other nonracial reason is provided for the challenge. 66 Although in criminal proceedings a prosecutor cannot systematically challenge and strike all Black jurors, the existing system prevents a Black criminal defendant from receiving a diverse jury of their peers, which is arguably required in criminal cases where the Sixth Amendment guarantees an impartial jury. 67 The American Bar Association has recently recognized the challenge of confronting racial bias on the bench, including "the unfair exclusion of potential jurors based on race or ethnicity." 68 The nuances of systemic racism embedded within the legal process contribute to power advantages for well-financed legal teams in regard to jury composition. 69 These power advantages are then used by some legal teams to arrive at unjust outcomes for racialized70 people and have become so widespread that at least one state, California, has initiated investigations into how bias within the process of jury selection can be addressed. 71 Another state, Washington, reformed the peremptory strike process via court rule in 2018 to address implicit bias.72 II. THE MECHANICS OF JURY SELECTION

#### Implicit bias means juries are inevitably racist

Weeks 18 [Virginia Weeks, researcher at the University of Michigan Law School, 2018, “Fairness in the Exceptions: Trusting Juries on Matters of Race,” Michigan Journal of Race and Law, https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1282&context=mjrl]/Kankee

I. IMPLICATIONS OF IMPLICIT BIAS RESEARCH Jury verdicts involving Black parties are already tainted. 25 Social sci- ence research indicates that individuals have unconscious mental processes that lead to implicit biases toward others. 26 Further studies have examined implicit bias within the legal sphere, finding that such biases impact the justice system.27 The research thus indicates that it may be impossible to keep implicit racial bias outside of jury deliberations. If that is the case, then jury verdicts regarding Black parties are likely unreliable because they are inherently unfair. 28 There is much literature on implicit bias and its implications, but the broad consensus is that implicit bias is pervasive and unfavorable to African Americans. 29 Implicit or unconscious bias stems from cognitive processes over which individuals exercise no intentional control. 30 These processes include the formation of perceptions, impressions, and judgments, which in turn impact how individuals behave.31 These unconscious processes lead to development of implicit attitudes—how individuals tend to evaluate the world around them—and implicit stereotypes—individual mental associa- tions between a group and a trait. 32 Taken together, implicit attitudes and stereotypes generate discriminatory implicit biases, which have the capac- ity to generate behavior at odds with an individual’s consciously endorsed beliefs.33 Implicit bias can cut both ways, leading an individual to be biased in favor of members of her own social group or against members of a social group to which she does not belong.34 Implicit bias impacts how individuals perceive and react to the world in all areas, including the courtroom.35 Research indicates that implicit bias makes its way into jury deliberations and accurately predicts the as- sociations jurors make between a defendant’s guilt and her race. 36 Specifi- cally, jurors are more likely to associate guilt with a Black defendant than a White defendant.37 In one study, jury-eligible graduate and undergraduate students were asked to complete two tests requiring them to associate “guilty” or “not guilty” and “pleasant” and “unpleasant” with various faces. 38 The students’ choices revealed a higher correlation between “Black” and “guilty” as well as “Black” and unpleasant words, than “White” and “guilty” or “White” and unpleasant words. 39 Interestingly, the results also showed that participants who reported feeling more warmly toward Black people were more likely to associate them with guilt,40 dem- onstrating that implicit attitudes and explicit attitudes may not always align.41 Another part of the study involved researchers priming participants with images of dark or light skinned perpetrators, then asking them to evaluate crime scene photographs.42 The participants were then shown pieces of evidence and asked to determine how much each article tended to inculpate or exculpate the defendant.43 The study concluded that the stronger the association between “Black” and “guilty” as well “Black” and “unpleasant,” the more likely a participant was to find ambiguous evidence was inculpating. 44 In other words, implicit bias might make it more likely that when presented with ambiguous evidence, a juror may be more likely to find it probative of guilt with a Black defendant than a White defendant.45 Judges may also exhibit implicit bias in their decision-making.46 One study tested the responses of judges after asking them to make choices in hypothetical courtrooms where they were subliminally primed to identify the defendant as racially ambiguous, or were explicitly told the defendant was White or Black.47 The study revealed that the judge participants were more likely to group White faces with positive words and Black faces with negative words, and that this racial bias was more likely to be exhibited in cases where the race was ambiguous rather than explicit. 48 This study thus indicates that judges may be better able to avoid racial bias when they are expressly aware of the party’s race than when they are not.49 Thus implicit bias pervades the courtroom, and Black defendants may not have any safe- guards against racial bias. 50 More generally, research also shows that when it comes to punish- ment, individuals may be more inclined to associate Black defendants with culpability and retribution than White defendants.51 One study measured how much participants associated Black and White people with various words associated with retribution and leniency.52 The results indicated a greater association between Black faces and words indicating retribution and White faces with words indicating leniency than other possible combinations.53 Taken together, pervasive implicit bias creates a situation in which jurors are more likely to devalue the life of a Black defendant, find her guilty, or otherwise treat a Black party more unfavorably than a White party in a case.54 Indeed, implicit bias becomes systemic when racial bias becomes “unwittingly infused with, and even cognitively inseparable from, supposedly race-neutral legal theories. . .and jurisprudential approach[es] to well-considered constitutional doctrines.” 55 Given how pervasive im- plicit bias is due to the unconscious processes that generate it, it seems unlikely that the individuals in the jury box can be immune from it, nor can the judges conducting voir dire necessarily be an adequate safeguard. 56 Even if an individual is aware of her own implicit biases, the misalignment between expressly held views and implicitly held views indicates that she may not be able to reason her way out of experiencing their effect. 57 It is therefore unlikely we can rid jury verdicts of the pervasive effects of racial bias. I now turn to ways in which we may mitigate this reality. II. CURRENT STATE OF COMMON AND STATUTORY LAW

#### Modern juries are as biased as the days of Jim Crow – it’s almost impossible to prove juror discrimination

Frampton 18 [Thomas W. Frampton, Climenko Fellow and Lecturer on Law at Harvard Law School, 2018, “The Jim Crow Jury,” Vanderbilt Law Review, https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1041&context=vlr]/Kankee

III. THE FUTURE OF THE JIM CROW JURY The Fourteenth Amendment's guarantee of "equal protection of the laws," the Supreme Court explained in Batson, guarantees a defendant the right "to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria." 209 Time and again, the Court has affirmed that "permitting racial prejudice in the jury system damages 'both the fact and the perception' of the jury's role as 'a vital check against the wrongful exercise of power by the State.' "210 But the data presented here show that, far from being "at war with our basic concepts of a democratic society and a representative government," 2 1 1 racial prejudice has always infected America's criminal jury system. In this Part, I want to situate our current legal framework's permissive approach toward racial bias in the jury system within the much broader arc of U.S. jury-discrimination law. Despite recent pronouncements to the contrary, our "maturing legal system" simply is not "understand[ing] and . .. implement[ing] the lessons of history."212 To the contrary, the Court's two most recent encounters with racial prejudice and the jury (Foster v. Chatman213 and Pefia-Rodriguez v. Colorado2 14) fit comfortably within the Court's long tradition of halting gestures toward countering racial bias, despite delivering legal victories to the individual nonwhite defendants seeking relief. But if the past century's efforts have failed to abolish the Jim Crow jury, where do we% go next? In one sense, the project seems daunting: so long as racism, permeates American life, the long view teaches, it will be impossible to extirpate it from our flawed and imperfect jury system. And yet, the history and data presented in Parts I and II suggest the necessity of reforms-including an abolition of nonunanimous verdicts and perhaps the adoption of affirmative race-conscious measures to ensure the racial representativeness of juries-that could erode the Jim Crow jury's enduring hold on the operation of American criminal justice. While legal frameworks have changed radically since the 1890s, what is most striking about the editorials in the Daily Crusaderis not how distant the past appears, but rather how incisively nineteenth- century activists identified doctrinal shortcomings that still plague our jury-discrimination law. Consider, for example, two of the most frequently advanced critiques of Batson and its progeny. First, under existing law, a prosecutor's race-neutral justification for striking a juror may be "silly or superstitious"; the Court does not even require "a reason that makes sense," provided the reason is race-neutral. 215 Predictably, only the "unapologetically bigoted or painfully unimaginative" seem to be ensnared in Batson's net.2 16 Second, by shunning a "statistically based approach to exclusionary peremptory challenges" in favor of "scrutiny of individual actions," the Court has rendered itself ill equipped "to confront the pervasive effects of racism in any meaningful way." 2 1 7 Racial justice activists waging the initial fight against "the Jim Crow jury" advanced both of these same critiques 120 years ago. Then, as now, legal claims alleging jury discrimination occasionally prevailed, but only when "unapologetically bigoted or painfully unimaginative" officials effectively conceded the issue. 2 18 Then, as now, courts demonstrated indifference to widespread patterns of racial exclusion, crediting instead the perfunctory race-neutral justifications offered by state jury commissioners and judges. On this view, Batson is not "failing"; it is succeeding at doing what U.S. law has consistently done for the past century.219 Indeed, in certain ways, we are less clear-eyed in countering racial bias in the jury system today than we were at the dawn of the Jim Crow jury. Although it is almost entirely forgotten now- overlooked even by scholars of jury discrimination 220-it remains a federal misdemeanor (punishable by a $5,000 fine) for "an officer or other person charged with any duty in the selection . .. of jurors [to] exclude[ ]" a potential juror "on account of race, color, or previous condition of servitude." 221 The offense first became law with the Civil Rights Act of 1875.222 Four years later, at least nine Virginia judges were indicted under the statute for excluding black jurors from their courtrooms. 2 2 3 On the same day that the Court decided Strauder (invalidating West Virginia's jury-discrimination law under the Fourteenth Amendment), it rejected a habeas petition filed by one of these Virginia judges in Ex Parte Virginia.224 But since then there have been no reported criminal prosecutions under Section 4 of the Act. As the data reported in Part II illustrates, however, there is almost certainly a crime wave occurring throughout America's courtrooms today (though federal authorities are loathe to treat it as such). 225 Another way in which our jury-discrimination law seems to have regressed is in how the courts understand the role of race within jury deliberations. In Strauder, the Court had little trouble recognizing that the reliability of a jury's verdict was necessarily suspect when black jurors were systematically excluded. Such "jury packing" was harmful because "[i]t is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy."22 6 But the majority view in Batson and its progeny has insisted that race and gender are not just normatively improper categories upon which to base juror selection, but also are "flatly irrational predictors of juror perspective." 2 2 7 While initially proceeding from the more modest position that an individual's race is "unrelated to his fitness as a juror,"2 2 8 the Court has gone on to reason that race-conscious peremptory challenges must reflect an attorney's "open hostility" toward or irrational "hidden and unarticulated fear" of the juror's race. 229 Accordingly, the Court refused to give Batson retroactive effect, because there was no good reason to think "the new rule ha[d] such a fundamental impact on the integrity of factfinding as to compel retroactive application." 2 3 0 And when extending Batson to include gender-based peremptory challenges, the Court rejected the "quasi- empirical claim" that gender might predict jurors' views toward the relevant issues, crediting instead "the majority of studies [that] suggest gender plays no identifiable role in jurors' attitudes."23 1 (Ironically Batson's critics on the Court have "openly embrace[d] the idea .. . that attorneys may rationally infer that members of discrete groups bring unique perspectives to the jury." 2 32 ) Recognizing that racial composition of juries matters when it comes to jury deliberations and trial outcomes does not guarantee stronger anti-discrimination protections-the Court's immediate post- Strauder jurisprudence illustrates as much-but such candor is a necessary first step. First, as several scholars have noted, acknowledging that "jury demographics matter" and that "different [more diverse] juries will reach different results on the same evidence" militates in favor of a more robust Sixth Amendment fair cross-section jurisprudence. 2 3 3 Present enforcement of this Sixth Amendment guarantee is "anemic" at best, 2 3 4 but if verdicts are, "at least in part, socially rather than scientifically determined" and "experientially constructed judgments rather than findings of immutable historical fact," 2 3 5 the harm of unrepresentative juries-even those composed of otherwise "impartial" jurors-is necessarily acute. 236 Second, , this insight also provides the empirical grounding for some of the more ambitious race-conscious proposals to counter today's Jim Crow jury; if race has nothing to do with the behavior of real-world jurors or.trial outcomes, it is hard to imagine the Court recognizing a "compelling interest" advanced by any race-conscious reform. 237 To be clear, many of these proposals (discussed below) will face an uphill fight regardless, but demonstrating the real-world impact of unrepresentative juries on defendants is a prerequisite for establishing the legitimacy and viability of any such reform measures. 238 Whatever strategies to counter the Jim Crow jury one embraces, they must represent bolder changes than those announced by the Court in recent years. In Foster v. Chatman, the Court reviewed a Georgia court's denial of habeas relief to Timothy Foster, a black man sentenced to death three decades earlier by an all-white jury.239 Foster alleged that race discrimination tainted the selection of his petit jury, and by a 6-2 vote, the Court agreed that prosecutors were motivated in substantial part by race when removing two black potential jurors. 240 But the Court's opinion did little to solve Batson's inadequacy, as it turned in significant part on the uncommonly compelling evidence supporting Foster's habeas petition. Through a series of Georgia Open Records Act requests, Foster had obtained prosecutors' notes from the jury selection process. 24 1 These documents, which revealed prosecutors' color-coded system for flagging black jurors, were "as close to a 'smoking gun' as one is likely to find in a Batson challenge." 242 In reversing the judgment of the state habeas court, the Court "reassure[d] the public that a blatant violation of Batson will not be ignored," but did nothing to expand, clarify, or tweak the much-criticized Batson framework. 24 3 Peiha-Rodriguez v. Colorado broke new ground by recognizing a defendant's constitutional right to adduce evidence that racial animus tainted jury deliberations in his or her case. 2 4 4 But at first blush, the opinion also appears crafted to aid only the narrowest class of defendants. 245 Relying on the Sixth Amendment's "impartial jury" guarantee, the Court held by a 5-3 vote that Colorado's no-impeachment rule, which ordinarily prohibits jurors from impeaching their previous verdicts, must yield where there is compelling evidence that racial animus was a motivating factor in one or more jurors' deliberations. 2 46 In refreshingly frank terms, the Court acknowledged that racial bias in the jury system is "a familiar and recurring evil" that "implicates unique historical, constitutional, and institutional concerns." 247 But perhaps because of the pervasiveness of such evil, 2 4 8 the Court quickly cabined its holding, requiring proof of "clear statement[s] that indicate[] . . . racial stereotypes or animus,"249 "the most grave and serious statements of racial bias,"250 or evidence of "blatant racial prejudice." 25 1 In other words, the Court erected precisely the sort of high evidentiary standard that, as a practical matter, is required to prevail on a Batson claim, and that has been required of nonwhite defendants challenging racial bias in the jury system since the earliest days of the Jim Crow jury. Only in this sense can the Peia-Rodriguezopinion be characterized as the work of "a maturing legal system ... understand[ing] and . .. implement[ing] the lessons of history." 252 That said, Pefia-Rodriguez's acknowledgement that racial bias in the jury system implicates unique constitutional concerns may bolster more ambitious efforts to confront the Jim Crow jury. Consider the Court's discussion of why Colorado's no-impeachment rule, despite its long and venerable pedigree, must contain a Sixth Amendment exception for evidence of racial bias in particular: All forms of improper bias pose challenges to the trial process. But there is a sound basis to treat racial bias with added precaution. A constitutional rule that racial bias in the justice system must be addressed-including, in some instances, after the verdict has been entered-is necessary to prevent systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right. 253 Such "disparate treatment" for racial bias claims, the dissent correctly noted, is almost unheard of in the Sixth Amendment context. 254 Peha- Rodriguez certainly expands upon the Court's recent Sixth Amendment jurisprudence (including recent cases rejecting a Sixth Amendment exception to the no-impeachment rule for evidence of nonracial juror bias) 2 5 5 and "suggest[s] that the Sixth Amendment recognizes some sort of hierarchy of partiality or bias." 256 At minimum, the Court appears to have recognized that the Sixth Amendment's guarantees give rise to a compelling interest in countering the perception of a jury system tainted by racial bias. So what would a more robust effort to confront the Jim Crow jury look like? In the 1990s, there was a flurry of academic interest in (and some actual experiments with) countering racial underrepresentation in the criminal jury system.257 The more ambitious proposals to improve the racial representativeness of criminal juries included the use of racial quotas, 2 5 8 "affirmative selection" measures, 259 and "jural districting" regimes (akin to electoral districts that group "communities of interest"). 260 But given the overall trend in the Court's equal protection jurisprudence-that is, its application of strict scrutiny to all state-initiated racial classifications, "benign" or otherwise-many worried that these measures may be constitutionally infirm. 261 These concerns are certainly no less germane two decades later, but given the deep, historical roots of racial bias and the American jury system (and the growing evidence of how racial composition of the jury still shapes determinations of guilt and innocence), such dramatic experiments remain essential. Importantly, explicit race-conscious efforts to build more representative jury panels are not wholly foreign to American criminal justice. As Professor Jack Chin and Kendra Clark have highlighted, 262 the Uniform Code of Military Justice ("UCMJ") allows the convening authority, when assembling the jury panel for a court-martial, to take race and gender into account "when seeking in good faith to make the panel more representative of the accused's race or gender." 2 6 3 Article 25 of the UCMJ also authorizes jury quotas, of a sort: "Any enlisted member [may insist that he] not be tried by a general or special court-martial the membership of which does riot include enlisted members in a number comprising at least one-third of the total membership of the court . ."264 Perhaps analogous innovations should be imported into civilian courts. 265 If maximizing the appearance of racial fairness in criminal jury proceedings is a compelling government interest (as suggested in Peha-Rodriguez), and the demographic composition of the jury has been inextricably tied to racial fairness for the past 120 years (as suggested in Parts I and II), similar measures in civilian courts could pass constitutional muster as "reasonably necessary" to promote at least the perception of fairness in contemporary criminal adjudication. 266 Recognizing the continuity between the Jim Crow jury of the 1890s and the Jim Crow jury of today brings one final point into focus. In 1972, in a pair of fractured 4-1-4 opinions, the Court held that the Sixth and Fourteenth Amendments do not mandate unanimity in state jury trials. 267 While the cases (Apodaca v. Oregon and Johnson u. Louisiana) were not primarily briefed or argued on Equal Protection groundS268-instead turning on the interaction of the Sixth Amendment and the Fourteenth Amendment's Due Process Clause-the Johnson dissenters recognized that nonunanimity might exacerbate racial bias in the jury system: The guarantee against systematic discrimination in the selection of criminal court juries is a fundamental of the Fourteenth Amendment. That has been the insistent message of this Court in a line of decisions [involving race discrimination] extending over nearly a century. The clear purpose of these decisions has been to ensure universal participation of the citizenry in the administration of criminal justice. Yet today's judgment approves the elimination of the one rule that can ensure that such participation will be meaningful-the rule requiring the assent of all jurors before a verdict of conviction or acquittal can be returned. Under today's judgment, nine jurors can simply ignore the views of their fellow panel members of a different race or class. 2 6 9 Citing Strauder, the dissenters continued that only unanimity "can serve to minimize the potential bigotry of those who might convict on inadequate evidence, or acquit when evidence of guilt was clear." 270 And, importantly, "community confidence" in the jury system was threatened when "a defendant who is conspicuously identified with a particular group can be acquitted or convicted by a jury split along group lines." 27 1 The plurality opinion downplayed these concerns ("[minority groups] will be present during all deliberations, and their views will be heard") 272 , but the history and statistics provided in Part II vindicate the dissenters' critique. Even if nonunanimous criminal juries remain permissible under the Sixth and Fourteenth Amendments-and there is a strong argument against this, given the Court's subsequent incorporation doctrine jurisprudence 27 3-they can no longer withstand Equal Protection scrutiny. The closest parallel in this regard is Hunter v. Underwood, in which the Court in 1985 unanimously invalidated a provision of the Alabama Constitution disenfranchising felons and those convicted of misdemeanor "crime[s] . . . involving moral turpitude."2 74 The Alabama measure was enacted during Alabama's Constitutional Convention of 1901, three years after Louisiana's nonunanimous jury provision was approved. As the Court noted in Hunter, the gathering "was part of a movement that swept the post- Reconstruction South to disenfranchise blacks." 2 75 The Court allowed that additional motivations probably influenced the adoption of Alabama's challenged suffrage measure-many convention delegates were eager to strip the franchise from poor white Alabamans, too-but nevertheless recognized that "discrimination against blacks . . . was a motivating factor for the provision." 276 In reaching this conclusion, the Court was unbothered by the argument that "there was little or no debate at the Constitutional Convention of 1901 concerning this [disenfranchisement] section and little or no evidence concerning its passage." 27 7 Applying the Equal Protection framework established in Village of Arlington Heights v. Metropolitan Housing Development Corp.,278 the Court held that the provision violated the Fourteenth Amendment: "[I]ts original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect." 2 7 9 (The present-day disparate impact on black Alabamans had been conceded. 280) The parallels are striking. As with Alabama's disenfranchisement provision, Louisiana's nonunanimous jury provision was first adopted at a convention where "zeal for white supremacy ran rampant." 28 1 As in Hunter, the official record from the convention is sparse, as other concerns dominated the debate. But, in such circumstances, the Court has instructed that "[t]he historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes" and "[t]he specific sequence of events leading up to the challenged decision" are "subjects of proper inquiry in determining whether racially discriminatory intent existed." 282 The story of the fight against the Jim Crow jury fills that gap. 2 83 The "historical background of the decision," coupled with "[t]he specific sequence of events leading up to the challenged decision," make clear that racial bias motivated Louisiana's decision to abandon unanimity. Disparate impact is also now established: whether viewed from the perspective of the juror or the defendant, 284 nonunanimity continues to have a racially disparate impact today. Such overt vestiges of Jim Crow should be struck down. CONCLUSION Or Louisiana voters may act on their own. In May 2018, the Louisiana legislature endorsed a constitutional amendment-subject to voter approval-that would abolish nonunanimous verdicts for offenses committed on or after January 1, 2019.285 The proposal will be on the November 2018 ballot. 28 6 Although the vast majority of Louisiana's sixty-four district attorneys opposed the proposal, the politically powerful Louisiana District Attorneys Association remained neutral; the organization does not take a public stance on important matters unless its membership is unanimous. 287 Although initially "seen as a long shot," 288 the unexpected passage of the proposal emerged from years of agitation and organizing by activists, scholars, legal workers, defendants, and the formerly incarcerated. Notably, momentum for the bill grew amidst a political climate-in both Louisiana and across the United States-in which the operation of U.S. criminal law has once again become a focus for racial justice advocates. In 2016, Louisiana witnessed its largest mass protests in decades following the police killing of black Baton Rouge resident Alton Sterling; 289 in 2017, pushed by a broad coalition including racial justice groups, the state passed a series of criminal- justice reforms that have dislodged Louisiana from its perennial status as the United States' (and the world's) "prison capital." 290 Unsurprisingly, race played a salient role in the legislative debate surrounding the constitutional amendment, too: a pivotal moment came when a prominent white opponent of the measure, to the outrage of supporters, blithely conceded that nonunanimity was a "vestige( ] of slavery.... [I]t is what it is."291 The proposal eventually garnered bipartisan backing, but it would have fallen short of the two-thirds vote needed to advance to the November ballot if not for the unanimous support of the state's Legislative Black Caucus.2 92 This Article has sought to provide historical context for this moment, not only for the existence of nonunanimous verdicts in Louisiana, but also for the manifold ways in which race enters into our jury system and the efforts taken outside of the courtroom to reform the institution. Activists today, like those a century before them, are emphasizing that the criminal law plays a central role in perpetuating and deepening racial subordination. And the jury box, just as it was in the late nineteenth century, has become a site of social contestation.' Whether Louisiana voters approve or reject the constitutional amendment, it would be a mistake to view the measure simply as a referendum on an unusual quirk of one state's criminal procedure. Rather, it represents the resumption of a political struggle that would be altogether legible to Louis Martinet, Homer Plessy, and the other activists of the Comit6 des Citoyens a century ago. In April 2017, New Orleans contractors wearing face masks and bulletproof vests removed a massive stone obelisk celebrating the White League's violent 1874 insurrection against Louisiana's Reconstruction government. 293 In the following weeks, three other Confederate monuments came down, as well, leaving behind empty pedestals at prominent locations throughout the city.2 9 4 The monuments' removal was not just the work of enlightened municipal officials, 295 but rather the culmination of decades of activism, 2 9 6 and represents a demonstration of grassroots "collective will to address entrenched systemic oppression." 297 But other, less tangible relics from the same era remain.

#### Trials allow jury nullification, allowing the KKK to commit hate crimes without punishment

Jackson 11 [Reggie Jackson, journalist and graduate of Concordia University, 2-13-2021, "Jury Nullification: More violent insurrections are expected if Trump is acquitted for his acts of sedition", Milwaukee Independent, https://www.milwaukeeindependent.com/reggie-jackson/jury-nullification-new-waves-political-violence-expected-trump-acquitted-acts-sedition/]/Kankee

As people around the country go on with their daily lives an injustice with no precedent will happen soon on Capitol Hill. A sitting president who incited a mob which attacked the U.S. Congress will get a free pass for his seditious acts. There is a principal in law called jury nullification. It is widely condemned by attorneys but has been in play for most of the past century and a half. Juries have time and time again nullified the evidence of someone’s guilty or innocence and freed people who should have been convicted and conversely sent men and women to prison despite obvious evidence of their innocence. A classic example of this principle playing out was the acquittal in Mississippi of the men who kidnapped and murdered 14-year-old Emmett Till on August 28, 1955. Their acquittal was a foregone conclusion the day were charged. Everyone knew that an all-white, all-male jury of their peers (literally) would never in a million years hold them accountable regardless of the evidence presented to them. This was what many referred to as Negro Justice. The principal was in play across the country when Blacks were on trial, if they even made it that far by escaping lynch mobs. Likewise, those handful of Whites who had brutalized Blacks knew their “peers” would let them off the hook. The closing statements in the trial of Roy Bryant and J.W. Milam in a Sumter, Mississippi court tells you everything you need to know. The prosecutor wanted a conviction and the defense demanded an acquittal. We all knew who had more sway in that segregated courtroom. “They murdered that boy, and to hide their dastardly act, they tied barbed wire to his neck and to a heavy gin fan and dumped him into the river for the turtles and the fish.” – Gerald Chatham, Prosecutor “Your ancestors will turn over in their grave, and I’m sure every last Anglo-Saxon one of you has the courage to free these men.” – Sidney Carlton, Defense Attorney According to Hugh Whitaker, Sheriff-elect Dogan told jurors to wait a while before coming out to make “it look good.” They deliberated for 68 minutes and came back with a not guilty verdict. One juror later said: “We wouldn’t have taken so long if we hadn’t stopped to drink (soda) pop.” The men walked free and a year later were paid $1,500 each to give an interview to Look Magazine, confessing to exactly what they had done to Till. Double jeopardy protected them from a second trial and the federal government was not in the habit yet of filing civil rights charges against White murderers in the South at that time. Jury nullification meant they ignored the testimony and was not swayed one bit by the gruesome nature of the crime. We are seeing the same thing play out in the highest level of the government and no one can do anything to stop it. This government is broken. When men and women sworn to uphold the law, can time and time again ignore the law, what value does it have. These are the same people who ran on so-called law and order platforms when elected to Congress. The hypocrisy is palatable. Some will be surprised by Trump’s acquittal. They must have their heads buried somewhere. It is so obvious that we will be witness to a gross miscarriage of justice. How do you willingly allow this to happen and sleep at night. I have heard some refer to these Republican supplicants of Donald Trump as evil. They are not. They are simply keeping a long tradition alive. Jury nullification is alive and well.

### Contention 8: Crime

#### Crime is low now

Vera 6-20 [Vera Institute of Justice, 6-20-2025, "Crime Is Down in 2025. Trump Doesn’t Deserve Credit.", https://www.vera.org/news/crime-is-down-in-2025-trump-doesnt-deserve-credit]/Kankee

For the past year, Donald Trump has been saying that “homicides are skyrocketing” and the country is “breaking down” with violence even as the data told a much different story. Now, as crime keeps declining, even Trump is finally changing his tune. Data and analysis from the FBI, Council on Criminal Justice, and Major Cities Chiefs Association all show that, overall, crime went down significantly in 2024, with violent crime largely returning to pre-pandemic levels. The good news defies expectations: homicide rates in Baltimore, Detroit, and St. Louis declined even beyond pre-pandemic levels to historically low 2014 rates. Now, early data suggests that the crime drop is continuing under Trump’s second term. It is still too early in the year to talk with confidence about crime trends in 2025, but at least one researcher projects that 2025 is on track to follow 2024 in terms of continued declines in homicides and violent crime. Until recently, the Trump administration avoided talking about progress on safety, using the image of a country under “invasion” and permeated with “lawlessness” to justify a brutal mass detention and deportation agenda along with “law-and-order” policies that will reduce police accountability, increase executions, and lengthen prison sentences. But on June 5, President Trump spoke at a roundtable with the Fraternal Order of Police and said, “We've removed thousands of violent criminal, illegal aliens from our communities as part of the largest deportation effort in American history. And just a few months into office, the national murder rate has plummeted by 28 percent.” Conservative media has pushed this story as well. Just as the White House did with fentanyl seizures, which also began declining before Trump took office, he is trying to claim that the crime decline demonstrates his policies are working. As such, it’s crucial to set the record straight on Trump and crime. Why Trump isn’t to thank for the crime decline Despite Trump’s claim that “the previous administration allowed lawlessness to permeate our country,” the crime decline long predated his second term. After three decades of mostly continuous decline, crime spiked in 2020 amid the COVID-19 pandemic. But after a narrative of out-of-control crime firmly took hold, especially during the 2022 midterms, crime rates began subsiding rapidly in 2023. Looking at crime rates across the country and across categories of crime, it is clear that the decline in 2025 is a continuation of a downward trend that began in 2023. Trump’s public safety policies do not reflect what we know about public safety. His war on immigrants and funding terminations to evidence-based violence-prevention strategies are both more likely to make the country more dangerous than less. It is also far too early to see any changes from many of the administration’s actions related to crime—like its executive order on policing or changes in federal prosecutions. Who deserves credit for the crime decline

#### Plea bargaining reduces crimes – increased guilty conviction rates and better info gathering

Berg and Kim 18 [Nathan Berg, researcher at the University of Otago, and Jeong-Yoo Kim, researcher at the Department of Economics, Kyung Hee University, 2018, Plea bargaining with multiple defendants and its deterrence effect” International Review of Law and Economics https://sci-hub.se/https://www.sciencedirect.com/science/article/abs/pii/S0144818818301108]/Kankee

Economic rationales contribute in important ways to debates over plea bargaining. Presumably, the first economic analysis of plea bargaining is Landes (1971), arguing that plea bargaining can save time and other variable costs associated with going to trial. In Landes’s model, the prosecutor’s problem is specified as maximiza- tion of the number of convictions subject to a budget constraint. Landes’ analysis shows that plea bargaining can improve efficiency, especially when trial convictions are costly. Informational issues and strategic thinking inherent in criminal cases are not addressed in Landes’ analysis, however. Grossman and Katz’s (1983) pioneering work provides what is likely the first game-theoretic model of plea bargaining, addressing one important informational issue by providing conditions under which guilty defendants reveal their types (guilty or innocent). Grossman and Katz identify two benefits of plea bargaining—an insurance effect and a screening effect. They assert that a risk- averse defendant and a prosecutor prefer the sure conviction of a guilty defendant under plea bargaining over the risk of litigating in court. They also show that plea bargaining serves as a screening mechanism, which confers the potential advantage of improved accuracy of sentencing. Grossman and Katz characterize both a pooling equilibrium and a separating equilibrium. In the pooling equilibrium, the prosecutor makes a plea offer that is rationally accepted by both guilty and innocent defendants. In a separat- ing equilibrium, however, the prosecutor makes an offer that is accepted by a guilty defendant but rejected by an innocent one. Thus, the typical “adverse selection” (or “lemons” problem) occurs in which defendants who accept plea offers have higher average culpability or are more likely to be guilty. Most economic analyses of plea bargaining, however, focus on settings with only one defendant despite there being numer- ous examples of real-world criminal cases in which multiple co-defendants would appear to play an important role in deter- mining sentencing outcomes. One such example is the case of price fixing and related collusive activities among multiple firms. Indeed, there are some exceptions such as Kobayashi (1992) and Kim (2009) that consider the situation of multiple co-defendants who are known to be connected with the same crime. However, nei- ther of those papers addressed the dynamic effect of plea bargaining on crime deterrence in a multiple-defendant setting.1 This lacuna in the extant literature is rather surprising given that one of the main criticisms against plea bargaining is that it weakens crime deter- rence by offering defendants shorter sentences. Reinganum (1993) and Miceli (1996) analyze the dynamical issue in a model with a single defendant, examining how plea bargaining influences the incentive to commit crimes. In this paper, we consider a dynamic model of plea bargaining between a prosecutor and multiple co- defendants. In our model, defendants are not ex ante known to be guilty. The guilt or innocence of defendants is endogenously deter- mined as the result of their criminal decisions. To investigate the effect of plea bargaining on the incentive to commit a crime, we first consider a model in which the prosecutor is unsure about whether the defendants are guilty or innocent. Because guilt is uncertain from the prosecutor’s view, a socially benevolent prosecutor is assumed to pursue the objective of minimizing judicial errors, spec- ified as a weighted sum of type-I and type-II errors (i.e., not simply maximizing penalties as in some previous models). Then, based on the analysis, we will examine the effect of plea bargaining on the incentive to commit crimes. The objective that prosecutors in our model use—to minimize a weighted sum of losses from the two types of judicial errors—can be interpreted as consistent with guidelines codifying appropriate prosecutorial behavior across a broad range of real-world judicial systems. For example, prosecutors’ duty in the US criminal justice system is to “seek justice” rather than merely convictions.2 Sim- ilarly, Article 1 of Korea’s Code for Prosecutors (as instructed by the Korean Ministry of Justice) guides prosecutors to represent the public interest to minimize judicial errors—as do other countries’ judicial codes—contrary to the widespread perception that prose- cutors are incentivized solely to pursue the objective of maximizing penalties. It is well known in the case of a single defendant that the pros- ecutor offers the defendant’s certainty equivalent (i.e., the offer that gives the defendant the same disutility he expects by going to trial). In the case of multiple defendants, however, calculating multiple certainty equivalent offers is less straightforward because they depend on whether the other defendant accepts his respec- tive offer or not. Unlike models with a single defendant, our model with multiple co-defendants allows the prosecutor to make plea offers contingent on the defendant’s promise to both plead guilty and testify against the other co-defendant. Therefore, a certainty equivalent offer to one defendant must be contingent on whether the other defendant accepts his offer or not. We characterize all possible separating-equilibrium offers that are accepted only by guilty defendants and all pooling offers that are accepted by both guilty and innocent defendants.3 In both types of equilibria, plea offers must be fair in the sense that the more culpable defendant (i.e., the one who deserves a longer sentence) receives a harsher penalty, unless both defendants are equally culpable. Our model’s result that any plea bargaining equilibrium with multiple co-defendants must necessarily respect at least this rather weak notion of fairness stands in sharp contrast to Kobayashi’s (1992) model in which unfair equilibria are possible (i.e. in which the more culpable defendant may receive a less severe penalty).4 These contrasting predictions regarding the fairness of equilibrium plea bargaining in our model and Kobayashi’s (1992) are the result of different equilibrium concepts. Unfair equilibria are impossible in our model as long as the spirit of Nash equilib- rium is respected by implicitly requiring all agents’ beliefs to be consistent with their equilibrium strategies. In a separating equilibrium, the plea bargain offers are asym- metric in that only the less culpable defendants are offered a plea discount. In a pooling equilibrium, both defendants are offered plea discounts. Intuitively, longer (i.e., more severe) plea offers in the pooling equilibrium, as they approach the duration for a guilty defendant without plea bargaining, increase the loss from type- I errors when a defendant is actually innocent (excessively harsh sentencing for the innocent defendants) and decrease the loss from type-II errors (insufficiently harsh sentencing for the guilty defen- dants). The optimal pooling equilibrium in our model is determined by the plea offer that balances these two effects (i.e., equating the marginal benefit of reducing type-II error with the marginal cost of increasing type-I error for each defendant). The prosecutor’s choice between the separating or pooling equilibrium depends on the rel- ative importance of type-I and type-II errors. If type-I errors are sufficiently more important in the prosecutor’s objective function then optimal plea offers are characterizable as those that convey larger aggregate rewards offered to, and accepted by, both types of defendants, which leads to the pooling equilibrium. In the other direction, the separating equilibrium is selected whenever type-II errors receive greater relative weight in the prosecutor’s objective function. The result that only one defendant receives a plea discount in a separating equilibrium holds even when two codefendants are equally culpable. If the prosecutor gives plea discounts to both defendants, type-II errors become much higher than when he gives a plea discount to only one defendant, making the other accept an undiscounted offer. The former case (allowing discounts to both defendants) is equivalent to the case that the prosecutor makes plea bargaining with only one defendant twice. This shows an impor- tant difference between plea bargaining with a single defendant and with multiple defendants. It is worthwhile further comparing our result with that of Kobayashi (1992). Kobayashi considers a complete-information game of plea bargaining with two co-defendants. In his model, it is known that both defendants are guilty. Therefore, the objec- tive of Kobayashi’s prosecutor is to maximize the sum of the two defendants’ expected penalties (or, equivalently, minimize the sum of expected discounts, i.e., the aggregate reward, relative to the expected punishment without plea bargaining). Kobayashi obtains the counterintuitive result that a more culpable defendant may receive a more lenient penalty, which is intuitively unfair. Such unfair outcomes occur in his model when, for example, a more culpable Defendant 1 believes that the less culpable Defendant 2 is very unlikely to accept the offer made to Defendant 2, while Defendant 2 believes that Defendant 1 is highly likely to accept his respective offer. In this case, because of the role of the other defendant’s exogenously given belief in the best-response func- tion, Defendant 1 may rationally choose to be more likely to reject the offer than Defendant 2. Thus, the prosecutor is forced to make a more attractive offer to the more culpable Defendant 1 to induce him to accept his respective offer, implying that the offer to Defendant 1 can—in theory—be lower than the offer to less culpable Defendant 2 in equilibrium. This unsettling possibility of the less culpable defendant receiving a more severe punishment follows from Kobayashi’s assumption that each defendant’s belief regarding the other’s acceptance decision is exogenously given. However, once we require that all players’ beliefs satisfy the con- dition of being consistent with defendants’ equilibrium strategies, then Kobayashi’s unfair plea bargains cannot occur in any equilib- rium in our model. Another difference between Kobayashi’s model and ours is the meaning of “more culpable.” We define a defendant as being more culpable if he deserves a longer sentence than the other. In con- trast, Kobayashi defines a defendant as more culpable if he has a higher probability of conviction and his acceptance of the plea offer increases the probability of conviction by more than acceptance of the plea offer by the other defendant does. In our model, accep- tance of the plea offer by the more culpable defendant does not necessarily imply a larger increase in the probability that the other defendant is convicted. Both defendants’ conviction probabilities are increased equally no matter which co-defendant accepts the plea offer. In other words, both defendants have the same informa- tion regardless of which co-defendant is more culpable. Because the more culpable defendant’s sentence conditional on going to court is expected to be greater, this more culpable defendant ben- efits more from judicial errors. Consequently, the prosecutor must offer larger plea-bargaining discounts to a more culpable defendant (who is less willing to accept plea offers), in order to induce him to accept it. Since larger discounts (i.e., reductions in sentencing) are costly from the prosecutor’s point of view, the prosecutor chooses to offer a plea discount only to the less culpable defendant. Hence, equilibrium offers must be fair. Despite the advantage of static efficiency achieved by reduc- ing judicial errors through plea bargaining, there remain important concerns about the possibility of dynamic inefficiency insofar as reduced sentencing may increase the incentive to commit crimes. One of the strongest criticisms against plea bargaining, which by many accounts would appear to rest upon a theoretically obvi- ous mechanism, avers that plea bargaining can lead to softer sentencing, thereby weakening the deterrent effect of expected punishment and consequently increasing crime rates. Although this mechanism may seem obvious (i.e., that potential criminals would, as defendants, face lower expected sentences under plea bargain- ing and therefore have a greater likelihood of committing a crime), the plea bargaining mechanism does indeed have a crime-deterrent effect. In a separating equilibrium, the benefit of increased informa- tion revealed by the plea bargaining institution more than offsets the cost of weakened deterrence (e.g., reductions in the mean duration of sentences), which (in any separating equilibrium) we show is degenerate at zero; thus, the plea bargaining institution, in our model’s separating equilibrium, leads unambiguously to lower crime rates. Intuitively, this is because plea bargaining allows the prosecutor to collect incriminating evidence against co-defendants based on their testimonies. In a pooling equilibrium as well, plea bargaining provides stronger deterrence than without plea bar- gaining. A similar intuition can be applied to a pooling equilibrium. The prosecutor can make harsher plea offers acceptable by using informational enhancement as a threat strategy. The deterrent effect of plea bargaining was analyzed earlier by Reinganum (1993) and Miceli (1996) but only for a single defen- dant. Miceli’s model is similar to ours in that it focuses on a screening mechanism. Miceli (1996) considers a two-stage game in which a legislature first determines criminal punishments and then, once crimes have been committed as a best response to the statutory punishments, actual punishments are determined by prosecutors and judges in the subsequent stage of the game with plea-bargaining or going to trial. Miceli shows that if the legislature raises the magnitude of punishment too high, then the deterrent effect may counterintuitively be weakened due to the response of prosecutors who believe that severe statutory punishments do not fit the crime. Reinganum (1993) considers a two-stage signal- ing game based on Reinganum (1988). Our model extends Miceli’s analysis to the case of two co-defendants although our model has several important differences. Our finding that plea bargaining with multiple co-defendants unambiguously deters crime sheds new light on debates over the informational and social efficiency of real-world leniency pro- grams. One of the important policy questions in recent decades concerns how to revise leniency programs that grant amnesty (e.g., to firms that previously engaged in illegal antitrust activity) to promote improvements in social efficiency. Because many illegal antitrust activities such as price-fixing involve more than a sin- gle firm, our model of plea bargaining with multiple co-defendants can provide novel insight relevant to the design of optimal leniency programs. The article is organized as follows. In Section 2, we specify the basic setup for our model of plea bargaining with multiple co- defendants under incomplete information. In Section 3, taking the plea offers as given, we analyze the defendants’ decisions about whether to accept pleas offers. In Section 4, we characterize the separating equilibrium offers and pooling equilibrium offers by the prosecutor. In Section 5, we discuss some modifications of our plea bargaining model. In Section 6, we consider an extension that brings in defendants’ decisions about whether to commit a crime by adding an earlier stage of the game before plea bargaining begins. Section 7 contains concluding remarks and further caveats. Proofs are relegated to the Appendix. 2. Model

#### Plea bargain are key to informants key to obliterate organized crime – history proves

Natapoff 22 [Alexandra Natapoff, Lee S. Kreindler Professor of Law at Harvard Law School, member of the American Law Institute, and Guggenheim Fellow with a BA in philosophy from Yale University and a JD from Stanford Law School, 2022, “Snitching Criminal Informants and the Erosion of American Justice Second Edition,” NYU Press, https://arizona-ua.primo.exlibrisgroup.com/permalink/01UA\_INST/2eo519/alma991050104313703843]/Kankee

I. FBI Informants and Organized Crime Without informants, we’re nothing. — Clarence Kelley, FBI Director (1973–1978)5 The FBI is the primary general law enforcement agency for the U.S. government. In its 2008 budgetary request, the agency stated that it maintains over fifteen thousand “confidential human sources.”6 The hall- mark of a typical FBI confidential human source (CHS) or confidential informant (CI) is a person identified and cultivated by a particular FBI “handler.” Approximately 20 percent of CHSs are “long-term,” meaning that they have been working for the FBI for five years or more. Some informants are members of organizations, either criminal or legitimate; the job is to provide the FBI with ongoing information about that entity and its other members. Some informants take the opportunity to exit a criminal organization by becoming a witness against it. Informants are rewarded in various standard ways, including with money, lenience for past crimes, and the ability to continue committing criminal offenses.7 The FBI uses informants in all sorts of cases, including gang investi- gations, financial crimes, and espionage. But many of its highest-profile informant successes have come in connection with its multidecade efforts to break up La Cosa Nostra, the Italian mafia. Mafia assassin Aladena Fratianno, a.k.a. “Jimmy the Weasel,” became an informant and spent the 1980s in witness protection: he helped convict numerous mafia members.8 And in 2018, eighty-four- year- old Francis P. Salemme was convicted of the 1993 murder of a federal witness. Salemme, better known as “Cadillac Frank” and the fearsome former head of the New England La Cosa Nostra family, had himself been in witness protection for years until the remains of the dead witness were discovered. Multiple mob informants testified against him, including Stephen “The Rifleman” Flemmi himself, who by this time was serving a life sentence for ten murders. The Salemme prosecution was described as a last vestige of the mafia’s once-formidable power. As one lawyer put it, “everybody’s been burned to a crisp here by informants.”9 Other informant-driven successes disclosed by the FBI include: a three-year grand jury investigation of organized crime that led to six convictions; the investigation of three violent gangs in a city in the Northeast that led to thirty-five cases involving fifty-four gang members; and a two- year undercover operation that led to the indictment of four Houston City Council members.10 But the FBI’s use of high-ranking criminal informants has generated both costs and critics over the years. For example, Salvatore “Sammy the Bull” Gravano was one of the FBI’s most infamous, productive, and prob- lematic informants. A mafia hit man who confessed to nineteen murders, his 1992 testimony helped the FBI obtain nearly forty convictions, most notably that of John Gotti. The government then relocated Gravano to Arizona in the witness protection program. There he rejoined organized crime and, in 2001, pled guilty to running a multimillion-dollar ecstasy drug ring. In 2003, he was charged with ordering the killing of Detective Peter Calabro, but charges were dismissed when the government’s sole witness died.11

#### Plea bargaining is key to accomplice testimony which breaks down terror rings through successful prosecution

**UNODC 09** [United Nations Office on Drugs and Crime, “Handbook on Criminal Justice Responses to Terrorism”, 2009. CRIMINAL JUSTICE HANDBOOK SERIES, https://www.unodc.org/documents/terrorism/Handbook\_on\_Criminal\_Justice\_Responses\_to\_Terrorism\_en.pdf]/Kankee

When attempting to break up criminal and terrorist conspiracies and prevent terrorist crimes, the police often **need to rely** on the testimonies of co-defendants and accomplices willing to cooperate and provide evidence against their former associates." Although some may argue that there is insufficient evidence about the effectiveness of that particular approach," the use of criminal informants and accomplices is usually considered **essential** to the **successful** detection and **prosecution** of terrorism and organized crime." As a result, various international agreements and conventions actively promote these methods.' National laws are sometimes also necessary to authorize these practices and to determine how and when evidence obtained through such sources can be used against the accused. Because of the importance of "accomplice testimony" in cases involving terrorism, **plea bargaining** and offers of immunity or leniency often **play a crucial role** in the gathering of evidence and the successful prosecution of these cases. Therefore, in practice, witness protection measures, as a means of eliciting cooperation from criminal informants, are intertwined with other measures such as plea bargaining, immunity from prosecution and reduced sentences.

#### Plea deals maximize the certainty of punishment

**Howe 05** [Scott W. Howe, law professor, former Public Defender for D.C., Deputy Director of the Texas Death Penalty Resource Center, and co-author of California Criminal Law textbooks, 2005, “The Value of Plea Bargaining”, Oklahoma Law Review, https://digitalcommons.law.ou.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1240&context=olr]/Kankee

Prosecutors and judges work to ensure that plea bargaining, relative to trials, does not shortchange the public interest in punishment. Circumstances vary from one jurisdiction to another regarding the nature of their political accountability.  However, in almost all states, District Attorneys are elected, as are trial judges in the vast majority of states.  Even in states 26 in which prosecutors or judges are appointed, elected officials generally appoint ambitious lawyers who hope to be reappointed or to be appointed or elected to another position in the future.  They generally give due regard to 27 28 public concern about leniency in plea bargaining.  Apart from their political motivations, they must also sympathize with the view, regularly reinforced by crime victims, that criminals should receive their deserved punishment. Because of these motivations, prosecutors and judges will weigh what they perceive as the deserved punishment against the benefits they see in a 29 30 disposition by plea.  Officials measure deserved punishments differently; the perceived benefits of a guilty plea vary from one case to the next, and jurisdictions vary regarding perceptions of the need to promote guilty pleas generally.  Nonetheless, prosecutors and judges prefer higher sentences to lower sentences, up to the sentence that they believe the defendant actually deserves. Prosecutors and judges willingly trade some deserved punishment in individual cases to maximize the punishments they can secure.  They must make this trade-off because they have limited resources.  The trade-off works 31 because convictions by jury trial require far more of their resources than bargained guilty pleas and because both parties in a criminal case have incentives to avoid the uncertainties of litigation.  32 Prosecutors and judges could try always to seek the maximum deserved punishment, but most defendants would demand a jury trial, and, assuming no changes in the governing constraints, the system would quickly become inadequate.  Courts would necessarily dismiss cases in which legitimate charges had been filed due to the inability to prosecute them.  Furthermore, prosecutors would decline to bring charges in many legitimate cases.  Given these circumstances, prosecutors and judges maximize punishment by extending some leniency for guilty pleas.  They obtain a certain conviction with some punishment in the case at hand and a large time savings that can be used to prosecute other cases.33 Plea bargains bring about an enormous **punishment-maximizing effect**. Suppose that we are in a jurisdiction in which the prosecutor bargains not only over charges and sentencing recommendations but actual sentences, with the judge merely holding veto power.  Assume that a prosecutor has six armed 34 robbery cases to prosecute, among many others.  She has spoken to the six defense lawyers and concluded that each case carries a ten percent chance of acquittal, but that the deserved and probable sentence for each defendant after a jury-trial conviction is fifteen years of imprisonment.  The maximum possible sentence is twenty years, and no mandatory-minimum sentencing requirement applies.  She concludes that each case will require six hours of court time for a jury trial and one hour of court time for a guilty-plea hearing.  In a six-hour period, she could try one case and, hopefully, secure 35 a conviction, which would probably result in a fifteen-year sentence.  The other five defendants would not be prosecuted.  Alternatively, in that same period, she could proceed with six guilty plea hearings and obtain certain convictions.  Suppose that the prosecutor knows that each defendant would accept a plea bargain if it carried only five years of imprisonment.  Which option better serves the public interest in punishing crime?  Obviously, six pleas at five years apiece is better than a ninety percent possibility of a single fifteen-year sentence.  The goal of maximizing punishments compellingly favors bargaining.36 The punishment-maximizing effect of bargained pleas over trials is much greater in reality than even this hypothetical reveals.  The average jury trial requires substantially more than six hours and also involves several pre-trial hearings and much preparation time by the prosecutor.  Likewise, the average guilty plea hearing requires well under an hour and minimal preparation. With the very conservative assumptions in the hypothetical, plea bargains still produced twice as much total punishment as any possible punishment that would be produced by the trial.  The punishment differential would increase exponentially if we used more realistic assumptions. This hypothetical also shows that bargaining will usually maximize punishment vis-à-vis jury trials even if the prosecutor does not pursue the highest possible sentence she could have obtained without scuttling the plea. All of the defendants in the hypothetical might easily have accepted ten-year or even twelve-year bargains, and the prosecutor would likely have had incentives to seek those higher sentences. 37  However, the punishmentmaximizing power of plea bargaining is so great that even unnecessary and fairly extreme leniency by the prosecutor will not subvert the punishmentmaximizing effect of deals.  Bargaining will still produce more punishment than trials. Variances among defendants in the distribution of leniency will also not affect the conclusion that pleas produce **more punishment than trials**.  Suppose that, instead of offering each defendant a five-year deal, the prosecutor offered two of them nine years, two others five years, and the final two only one year, and each accepted.  This distribution of leniency appears irrational under the posited circumstances.  However, the results of the plea option still seem more rational than the results of the trial option, where all of the punishment would fall on a single defendant.  Moreover, the better choice for purposes of maximizing deserved punishment remains the plea bargains. Given these observations, it is clear that the shadow-of-trial efficiency theory has no practical bearing on whether pleas, as opposed to jury trials, maximize deserved punishment.  Surely, prosecutors often weigh the probable outcome of the potential trial in deciding how much leniency to extend in a plea deal.  They also surely consider factors related to adjudication costs, particularly how much of their time the case would require.  However, the 38 accuracy of these judgments is irrelevant as a practical matter to whether bargaining, compared to trials, provides undue leniency.  If only two guilty pleas could be traded for one jury-trial conviction, the accuracy of discounting efforts would matter, but not where the trade-off is far higher than six.  The prosecutor in our hypothetical could arrive at bargain decisions by rolling dice, and bargaining would almost certainly still maximize punishments far more than a policy of no bargaining.39 Within the constraints of our current system, shadow-of-trial efficiency theory turns out to be an inappropriate measure even for maximizing deserved punishments among plea-bargained cases.  The theory posits that expected trial and post-trial sentencing outcomes, accurately discounted to reflect uncertainty and adjudication costs, define efficient plea bargaining.  But why 40 should the societal goal be to secure no more than the accurately discounted trial outcome?  To maximize deserved punishments, we would **prefer the highest deserved punishment** the prosecutor could obtain on a plea, regardless of whether the defendant seems sensible in accepting the bargain.  Suppose that the prosecutor in our hypothetical could secure plea bargains of fourteen years imprisonment from each defendant.  The bargains might be inefficient in the sense that the defendants misjudged their chances of acquittal or their probable post-trial sentences.  However, if the societal goal is to maximize deserved punishment, their blunder brings about positive results. The shadow-of-trial efficiency theory misleads us in evaluating plea bargaining.  The theory implies that plea bargaining is socially valuable only to the extent that it reflects accurately discounted trial outcomes.  However, Professors Schulhofer and Bibas have shown why plea bargaining generally does not produce such outcomes.  Their critiques also reveal that it probably 41 42 never will, regardless of reform efforts.  One could easily conclude from this analysis that plea bargaining should be ended. 43 44  Professor Schulhofer has made this very argument.  Even those who have used the shadow-of-trial 45 efficiency theory to defend bargaining have posited that there are “social losses” to inefficient bargains.  However, because this efficiency standard 46 actually does not correspond to the social gains and losses associated with plea bargaining, we should not judge the validity of plea bargaining from our failure to achieve it.

### Contention 9: Circumvention

#### Plea bargaining is inevitable and the neg is circumvented via open pleas, worsening sentences

**Bellin 23** [Jeffrey Bellin, Stanford Law graduate and former federal prosecutor, clerked for Judge Merrick Garland, elected member of the American Law Institute, 2023, “Plea Bargaining's Uncertainty Problem”, William & Mary Law School Scholarship Repository, https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=3163&context=facpubs]/Kankee

Stories like these make it unsurprising that “there is no part of the criminal process more pilloried than the plea bargain.”15 Still, as Dan Epps notes, “scholars have struggled to pinpoint why exactly plea bargaining is problematic.”16 As a result, commentators have, so far, united only behind their distaste for the phenomenon, rather than specific reforms.17 The complexity begins with a recognition of the trial penalty’s inevitability. Defendants plead guilty when they perceive a benefit to doing so. And if defendants like Troy McAlister receive a benefit, those who are convicted after trial suffer a trial penalty by comparison. The only way to eliminate this dynamic would be to prohibit guilty pleas. Yet as George Fisher has documented, plea bargaining triumphed in America because it is an inevitable outgrowth of an adversary system characterized by independent prosecutors, crowded dockets, and severe penal laws.18 Sporadic attempts to  abolish plea bargaining have been short-lived, and other countries where plea bargaining is less prevalent are moving towards, not away from, the American model.19 Further complicating the picture, the most immediate impact of abolishing plea bargaining could be to increase the severity of a notoriously punitive system.20 The best evidence of this comes from Alaska, a jurisdiction that forbade plea bargaining in 1975. During the short time the ban was enforced, guilty pleas continued at almost the same rate (without concessions from the prosecution) and “[s]entences became more severe.”21 As in Alaska, real-world efforts to eliminate plea bargains typically stem from a desire to increase (not decrease) sentencing severity.22 New York’s infamous Rockefeller Drug Laws paired severe mandatory sentences with strict limits on plea bargains.23 The 1982 “Victim’s Bill of Rights” enacted by California voters similarly prohibited prosecutors from “[p]lea bargaining in any case in which the indictment or information charges any serious felony.”24 As in Troy McAlister’s case, these prohibitions are typically  ignored.25 But these futile efforts to block plea deals like the lenient one McAlister received illustrate both the practical difficulty of abolishing the practice and the dangers to criminal defendants of doing so.26 Confronted with these complexities, reformers often retreat to generic solutions. The most common is reducing sentence lengths. Prodding judges to impose shorter sentences,27 legislators to eliminate mandatory minimums,28 and prosecutors to charge fewer and less serious offenses29 all have the effect of blunting plea bargaining’s sharp edges.30 But improving plea bargaining is a coincidental side effect of these laudable reforms. Fewer cases and shorter sentences **mitigate** every **coercive aspect** of the criminal justice system. It is the equivalent of shutting off the water to fix a leak. It works, but it masks an inability to diagnose the problem. This Article attempts to isolate the problem with American plea bargaining. Specifically, it strives to identify something about plea bargaining that is both objectionable and distinct from background problems of American criminal law enforcement. The second part of this formula is critical. Critics often denounce plea bargaining for flaws it does not create. For example, the most common critique, illustrated in the opening paragraph, condemns plea bargaining because X defendant was offered five years, went to trial, and received twenty. But this ignores that the long sentence driving  the injustice in these examples is a product of the background law—a stark baseline that could become a more (not less) likely outcome in plea bargaining’s absence.

#### Bans are circumvented via open guilty pleas, decreasing plaintiff leverage by offering a plea without a guarantee of lower charges

**Canon 22** [Dan Canon, civil rights lawyer and a law professor at the University of Louisville in Kentucky, 2022, “Pleading Out: How Plea Bargaining Creates a Permanent Criminal Class,” Basic Books, ISBN-139781541674684]/Kankee

BEFORE WE TALK ABOUT REALISTIC SOLUTIONS, IT MAY BE helpful to clarify what I’m not arguing in this book. First, I’m not suggesting that no one be allowed to plead guilty. As you know by now, there’s a big difference between simply pleading guilty and plea bargaining. Pleading guilty, without the expectation of a let’s-get-it-over-with-quick bonus, often makes sense. It can come as a shock to anyone accused of a crime when their lawyer tells them they should plead “not guilty” at their first court appearance, even when they are clearly guilty. You can tell a naive, privileged client from an experienced criminal; the former will always protest their lawyer’s advice: “I am guilty! I really did it! Isn’t that dishonest?” But in most jurisdictions, pleading not guilty is the norm at the first court appearance. We have to explain to them that we’re just delaying the inevitable in order to get the best deal we can for them. Many first timers don’t understand that, either. They ask “Why would the charges change?” There’s usually not such a great answer for that one. Nor is there a great answer to the question of “Why waste all this time and energy if someone is actually guilty?” To date, none of the jurisdictions within the United States that have experimented with bans on plea bargaining have seen an end to guilty pleas altogether. Instead, a large portion of cases still end up getting resolved via open pleas, as we saw in Alaska and El Paso. That means the prosecutor says, “These are the charges,” and they really are the charges, which is good for the integrity of the criminal justice system. The prosecutor does not say,  “If you don’t plead guilty now, we’ll put these extra charges on you,” or “If you don’t take five years, we’re going to ask a jury for life.” The defendant pleads guilty, and the defense lawyer then prepares an argument about why the accused should receive a lesser punishment—five years instead of ten, one instead of five, probation instead of prison time at all, depending on the range set by the sentencing laws. The prosecutor may argue for a stiffer penalty, or they may not. The victim, if any, may also have input. The judge, or a jury, makes the final call. And this decision, because it doesn’t come with the waiver of rights included in the price for a “contract” with the state, is appealable. In other words, if an accused doesn’t like the final sentence  imposed by a judge or jury, they can ask a higher court to review it, thus removing, at least somewhat, the problem of oversight inherent in the “plea- bargain-as-contract” model. Second, it **isn’t realistic to** advocate a total **ban** on plea bargaining in the United States. Where such bans have been attempted, they have always been patchy and inconsistent, lasting only as long as the district attorney or judge who imposed the ban manages to stay in office (and sometimes not even that long, as we saw in the Bronx). There is something about the culture of US criminal justice, or perhaps something in the DNA of lawyers worldwide, that cries out for some autonomy, some bargaining capability, some “sort[ing] it all out sensibly, wigs off,” as Judge Pickles put it. Even with a total ban on  plea bargaining, history shows that under-the-radar haggling would find a way to creep back in.

#### Bargain abolition fails and drives bargaining underground – economic theory proves

**Covey 16** [Russell D. Covey, Professor at Georgia State University College of Law with a J.D. from Yale Law School, an M.A. from Princeton University, and an A.B. from Amherst College, 2016, “Plea Bargaining and Price Theory, George Washington Law Review, https://www.gwlr.org/wp-content/uploads/2016/08/84-Geo.-Wash.-L.-Rev.-920.pdf]/Kankee

A. Prohibition and Its Discontents Plea bargaining’s staunchest critics argue that the only fix to the unacceptable pressure that plea bargaining imposes on innocent defendants to plead guilty is the outright abolition of plea bargaining. 227 Under the abolitionist (or as this Article refers to it, the “prohibition- ist”) view, even if plea bargaining perfectly reflected trial outcome probabilities (which it does not), plea bargaining would still be unjust and unacceptable. 228 Although there may be proceduralist and systemic reasons to prohibit plea bargaining, 229 from the perspective of plea pricing, the prohibitionists’ case is at best uncertain. 230 The prohibitionists contend that plea bargaining harms the innocent by inducing them to plead guilty to crimes they did not commit. 231 The mechanism of inducement is the plea discount/trial penalty. Abolish plea bargaining and the trial penalty necessarily disappears. 232 Although it is by definition true that the prohibition of plea bargaining would eradicate the “trial penalty,” as noted above, plea discounts are an inherent part of the true economic value of the decision to forfeit the right to trial. 233 It is as economically irrational to view a plea discount as inherently unjust as it is to decry the fact that stock options have positive value even when the underlying stock trades below the option exercise price. Innocent defendants need some other compensation in exchange for abolishing the plea discount. From the perspective of **price theory**, prohibition appears problematic. Economists generally disfavor prohibitions on trade. 234 Prohibition prevents mutually beneficial exchanges of goods, disrupts normal market functioning, and almost invariably leads to the creation of parallel black market structures. 235 Black markets, in turn, are difficult to regulate or control and create additional negative externalities that impose unwanted costs on the economy. 236 What little empirical evidence there is regarding attempts to abolish plea bargaining suggests that prohibition in the plea bargaining context is no different than elsewhere.237 In Philadelphia, for instance, the number of guilty pleas is far lower than in most comparable jurisdictions. 238 However, guilty pleas are largely replaced by bench trials that some allege function, in essence, like slow guilty pleas. 239 Alaska’s experiment with a plea-bargaining ban led, over time, to the replacement of sentence bargaining with charge bargaining, 240 suggesting that attempts to abolish formal bargaining will likely result in the emergence of alternative, informal, forms of bargaining. 241 In short, prohibition of plea bargaining is as difficult to enforce as any other prohibition in the face of strong demand, and only channels demand into black markets. Prohibition is not, in any event, a realistic option. Few lawyers actually believe that our criminal justice system could survive without substantial reliance on plea bargaining. B. Plea Market Regulation

#### Link turn – trial systems worsen mass incarceration by causing everyone to suffer the trial penalty

**Johnson 22** [Thea Johnson, associate professor of law at Rutgers Law School, 06-01-2022, Lying at Plea Bargaining,” Georgia State University Law Review, [https://readingroom.law.gsu.edu/cgi/viewcontent.cgi?article=3139&context=gsulr]/Kankee](https://readingroom.law.gsu.edu/cgi/viewcontent.cgi?article=3139&context=gsulr%5d/Kankee)

Legal scholars have also made this argument. In their piece, A Welfarist Perspective on Lies, Ariel Porat and Omri Yadlin reason that certain lies are valuable and therefore should be permitted because they promote social goals.195 For instance, where a prospective employee lies to a company about his religion because the company intends to discriminate against him if it knows his true (as in accurate) religion, a welfarist perspective would allow the employee to lie.196 This is a version of the **lesser-evil** argument; to lie is bad, unless the lie achieves the social value of avoiding what is both illegal and immoral discrimination. Julia Simon-Kerr points out that this consequentialist justification is why many legal actors lie.197 For instance, if the stakeholders believe the system will not produce just results, they may feel permitted to lie.198 Indeed, the pro-flexibility reformer will argue that transparency on this issue will actually ramp up the harshness of the law. If legislatures are alerted to the fact that prosecutors sometimes skirt sex offender registration laws through the plea process, one—politically appetizing—solution might be to legislatively ban such plea bargaining, forcing nearly everyone arrested for a felony sex offense to be registered as a sex offender. Or judges, if forced to be transparent about all the horse-trading that occurs in their courtroom, may become totally inflexible on plea bargaining in general, leading to poor outcomes for defendants across the board. The pro-flexibility advocate might also note that although more transparency and less flexibility may lead to more trials, trials are not necessarily a good thing for defendants or even prosecutors. Trials  subject both sides to the whims of jurors, who may be influenced by bias201 or unable to understand complicated legal matters. And trials also expose defendants to mandatory minimums and mandatory collateral consequences—the very reasons that they resort to lying in the first place. In short, lying is meant to mitigate the effects of a cruel system; transparency would only make that cruelty less escapable. For this reason, the pro-flexibility reformer argues that the solution to the problem is to view plea bargaining as something akin to civil settlement, where the parties decide what is best for the two sides and negotiate accordingly, even if such negotiations result in agreements that are not entirely accurate. In this way, a different sort of transparency is achieved; one in which the reality of the current system is recognized, but the parties are given free rein to work around the  system where needed. This still leaves the possibility of reform around the edges—for instance, through discovery reform—but keeps intact the fundamental vehicle for achieving rough justice, the unfettered plea bargain.

## Negative

### Contention 1: Informants and False Testimony

#### SCOTUS admitted that informant use is ONLY justified in trial cases due to the power of juries to check informant unreliability. Squo trial rarity means that constitutional rights are unprotected and people are convicted on lackluster evidence from known liars

Natapoff 22 [Alexandra Natapoff, Lee S. Kreindler Professor of Law at Harvard Law School, member of the American Law Institute, and Guggenheim Fellow with a BA in philosophy from Yale University and a JD from Stanford Law School, 2022, “Snitching Criminal Informants and the Erosion of American Justice Second Edition,” NYU Press, https://arizona-ua.primo.exlibrisgroup.com/permalink/01UA\_INST/2eo519/alma991050104313703843]/Kankee

I. Juries The Leniart case was unusual in that the defendant actually went to trial. Fewer than 5 percent of all convictions in the United States are the result of a jury trial, which means that juries do not decide cases all that often. But the jury remains one of the system’s most important structural checks on informant reliability. The threat of a trial in which a snitch might have to testify in open court is an incentive for law enforcement to ensure that its informants are accurate. Once at trial, the informant must convince a jury of ordinary people that he or she is telling the truth. The jury will typically learn that the informant is receiving a benefit for their testimony and may hear about previous instances in which the informant testified in exchange for lenience. In some jurisdictions, the court will also instruct the jury that the informant’s testimony should be carefully scrutinized for potential unreliability. Trials also perform an important public transparency function: it is only when a defendant decides to go trial that the public will learn about the informants that the government uses to make its case. In 1966, in Hoffa v. United States, the Supreme Court upheld the con- stitutionality of using and rewarding criminal informants. The Court approved the practice in large part because it believed that the jury trial provides a good check against the risks of compensated criminal wit- nesses notwithstanding their strong incentives to lie. The Court relied on what it called “[t]he established safeguards of the Anglo-American legal system [that] leave the veracity of a witness to be tested by cross- examination[] and the credibility of his testimony to be determined by a properly instructed jury.”3 The Supreme Court was partially right: sometimes jurors can be an effective check against lying informants. One prominent observer, Judge Stephen Trott, himself a former federal prosecutor, concludes that “[o]rdinary decent people are predisposed to dislike, distrust, and frequently despise criminals who ‘sell out’ and become prosecution wit- nesses. Jurors suspect their motives from the moment they hear about them in a case, and they frequently disregard their testimony altogether as highly untrustworthy and unreliable, openly expressing disgust with the prosecution for making deals with such ‘scum.’”4 Juror distrust, for example, cost the government its massive 1981 racketeering case against the Hell’s Angels motorcycle gang. In that case, jurors felt that the government’s key witnesses—former Hell’s Angels members, one of whom was paid $30,000—were “despicable and be- neath contempt.”5 That same kind of distrust led to Todd Ruffin’s acquit- tal by a Connecticut jury for the charge of selling drugs to an informant. “They just didn’t believe a word [the informant] said,” said the prosecutor, who spoke with jurors after the trial. “He has a terrible record, so they felt he was inherently untruthful.”6

#### Prosecutors exploit plea bargains to hide unreliable informants and police coverups, convicting innocents. Unlike trials, there are no protections against bad evidence

Natapoff 22 [Alexandra Natapoff, Lee S. Kreindler Professor of Law at Harvard Law School, member of the American Law Institute, and Guggenheim Fellow with a BA in philosophy from Yale University and a JD from Stanford Law School, 2022, “Snitching Criminal Informants and the Erosion of American Justice Second Edition,” NYU Press, https://arizona-ua.primo.exlibrisgroup.com/permalink/01UA\_INST/2eo519/alma991050104313703843]/Kankee

IV. When the Innocent Plead Guilty Most American defendants do not litigate or challenge the evidence of their guilt. Rather, they plead guilty. This practical reality reduces the salience of accuracy. Plea bargaining turns evidence and accuracy into commodities that are traded and negotiated along with many other inputs into the bargaining process. As a result, many innocent defen- dants conclude that it is in their best overall interests to plead guilty to crimes they did not actually commit. Twenty percent of the wrongful convictions listed in the National Registry of Exonerations are the result of a plea. In misdemeanor cases, hundreds of thousands of innocent people routinely plead guilty in order to get out of jail so they can go home and care for their children, keep their jobs, or avoid eviction.41 For the vast majority of defendants who must negotiate under these conditions, a lying informant can alter the calculus about whether to go to trial. The mere threat of an informant witness can make it more likely that an innocent defendant will take a plea rather than risk conviction and the substantially higher sentences that flow from losing at trial. In 2008, for example, fourteen men in Cleveland, Ohio, were found by a federal judge to have pled guilty to false charges levied by a DEA infor- mant. The first defendant in the case, a mother of three, insisted on her innocence, went to trial, and was wrongfully convicted. She received a sentence of ten years. The remaining fourteen men then pled guilty in exchange for lower sentences.42 In Hearne, Texas, several innocent defendants pled guilty after being accused by informant Derrick Me- gress, even though Megress was later shown to be lying. Similarly, two innocent people in Tracy City, Tennessee, pled guilty after Tina Prater alleged that she had bought drugs from them, even though she hadn’t.43 This kind of tragic calculus occurs throughout the penal system, al- though the nature of plea bargaining and the appellate process make it impossible to know how often it happens. Innocent defendants plead guilty for a number of reasons. They may think that they will lose at trial and that their punishment will be heavier than the one offered in a plea. The federal sentencing guidelines expressly encourage this sort of calculation by imposing longer sentences, the “trial penalty,” on de- fendants who do not take a plea.44 Defendants may also plead guilty because they are being held in jail on bail that they cannot afford to pay and a plea provides the immediate freedom of probation or a sentence of time served. Or they may plead guilty because their lawyers tell them to or because they are ignorant of their rights and other options. They may even plead guilty because they think they are guilty of an offense when they are not. Professors Samuel Gross and Barbara O’Brien conclude that it is al- most impossible to determine how many innocent defendants plead guilty, because false convictions are “invisible at their inception.” Most defendants who plead guilty do not appeal, and even if they do it is diffi- cult to overturn a guilty plea, which means that “[t]he exonerations that we know about are overwhelmingly for convictions at trial.”45 Some- times, however, wrongful pleas do make it to the public record. Writing in 2008, Gross and O’Brien described some infamous examples: We do know about a substantial number of exonerations of innocent de- fendants who pled guilty and received comparatively light sentences—in one particularly disturbing factual context. In the past decade, several systemic programs of police perjury have been uncovered, which ulti- mately led to exonerations of at least 135 innocent defendants who had been framed for illegal possession of drugs or guns in Los Angeles, in Dallas, and in Tulia, Texas. . . . Most of these innocent drug and gun de- fendants pled guilty, and had been released by the time they were exoner- ated two to four years later.46 Each of these three “particularly disturbing” examples involved crimi- nal informants and/or undercover narcotics agents operating in the mode of an informant. In the Los Angeles Rampart scandal, officers used informants to set up innocent targets. In Dallas, police used informants to plant fake drugs on suspects. In Tulia, Texas, a single undercover narcotics officer fabricated drug evidence against dozens of African American targets. In sum, while we do not know how many innocent defendants plead guilty, we know that it happens on a regular basis and that informants are a dangerous aspect of the problem. When a criminal informant fin- gers an innocent person, the pressures of the criminal system may drive that person to plead guilty rather than face worse consequences. This is especially true for defendants with prior criminal records, who are less likely to be presumed innocent by law enforcement officials and jurors. It is also especially true for defendants with overworked, underpaid public defense counsel who lack the resources to fully investigate and litigate the case.47 Moreover, in order to avoid trial and protect the identity of the informant, prosecutors may offer reduced charges, probation, or lower sentences to persuade a defendant not to contest the case. The tragedy remains invisible because the informant’s misinformation is never tested or revealed. Because the vast majority of cases are resolved through guilty pleas rather than trials, the possibilities for this sort of miscarriage of jus- tice are both widespread and nearly impossible to discover after the fact. V. The Important but Limited Role of Procedural Protections Legislators increasingly recognize the unreliability of criminal infor- mants and the inadequacy of existing procedural protections. Numerous jurisdictions have considered and implemented a variety of legisla- tive reforms aimed at reducing the likelihood of wrongful convictions. These reforms are discussed in depth in chapter 8; they include such things as corroboration requirements, reliability hearings, and stronger discovery and disclosure requirements when the government seeks to use informants as witnesses. Better procedural protections improve the chances that the defense will be able to uncover an informant’s lies, and as such they are impor- tant tools in protecting against wrongful convictions. But such proce- dures are inherently limited because they do not address the underlying phenomena that drive the use of unreliable informants. First, many such procedures are applicable only at trial and therefore do not directly af- fect plea bargains, namely, the source of the vast majority of criminal convictions. They also do not affect the process of using informants in investigations or to obtain warrants, techniques that lead to thousands of bad searches and arrests every year. At best, they indirectly shift po- lice and prosecutorial incentives to rely on unreliable informants in shaping basic decisions about investigations, arrests, and charging. More fundamentally, however, procedural protections do not alter the basic structure of the informant market. They do not reduce infor- mants’ underlying incentives to lie in the first place; nor do they regu- late the vast discretion that law enforcement wields in negotiating the informant deal. For all these reasons, procedural reforms are only one aspect—albeit an important one—of the larger challenges posed by un- reliable informants. 5 Secret Justice

#### Plea bargaining decreases police and prosecutorial accountability given the hiddenness of facts and secret deals

Natapoff 22 [Alexandra Natapoff, Lee S. Kreindler Professor of Law at Harvard Law School, member of the American Law Institute, and Guggenheim Fellow with a BA in philosophy from Yale University and a JD from Stanford Law School, 2022, “Snitching Criminal Informants and the Erosion of American Justice Second Edition,” NYU Press, https://arizona-ua.primo.exlibrisgroup.com/permalink/01UA\_INST/2eo519/alma991050104313703843]/Kankee

II. Plea Bargaining Approximately 95 percent of all criminal convictions in the United States are the result of a guilty plea.21 This means that trials and liti- gation are rare, while negotiated deals are overwhelmingly the norm. This fact has implications for the transparency of the criminal system. While trials and hearings are public, plea bargaining is private. Litigated facts become part of the public record, while negotiated facts remain off the record, known only to the bargaining parties. The trend toward plea bargaining has thus been accompanied by a trend toward the depublicization of the criminal system. Information gathered by the government—and the investigative methods used to get it—are increas- ingly difficult for the public to learn about. Public information about the kinds of crimes that are actually committed and by whom is like- wise disappearing, replaced by information about the outcomes of deals struck between the government and defendants. As criminal liability is increasingly resolved privately through deals, the public loses sight of the way the system really works. As federal judge Stephanos Bibas once wrote, inside players such as prosecutors, defense attorneys, and judges have quite a bit of information about the way the system operates, but the public experiences the criminal process as “opaque, tangled, insu- lated, and impervious to outside scrutiny and change.”22 The informant deal is an extreme version of the guilty plea, a kind of hyper-deregulated, extra-secretive bargain. An informant deal resem- bles a plea in that it resolves the informant’s potential criminal liability, at least temporarily, in exchange for information. It is also like a plea bargain in that the resolution of liability is negotiated and takes place in private between the law enforcement official and the defendant or perhaps a defense attorney.

#### Plea bargains destroy public jurisprudence and transparency that safeguard accountability and open democracy

Natapoff 22 [Alexandra Natapoff, Lee S. Kreindler Professor of Law at Harvard Law School, member of the American Law Institute, and Guggenheim Fellow with a BA in philosophy from Yale University and a JD from Stanford Law School, 2022, “Snitching Criminal Informants and the Erosion of American Justice Second Edition,” NYU Press, https://arizona-ua.primo.exlibrisgroup.com/permalink/01UA\_INST/2eo519/alma991050104313703843]/Kankee

IV. Public Transparency and Executive Accountability The culture of secrecy surrounding informant use is in tension with some fundamental aspects of American criminal justice. Our penal sys- tem promises transparency and public access to information in ways that are important not only to the adjudication of specific cases but to the democratic process itself. As Professor Gary Marx wrote in his sem- inal book Undercover: Police Surveillance in America, “[s]ecret police behavior and surveillance go to the heart of the kind of society we are or might become.”37 From the Sixth Amendment right to a public trial to the First Amendment rights of free speech and press, many aspects of our criminal system demand that cases and processes be made public so that voters, legislators, and the media can view the workings of the executive branch. The Supreme Court explains this commitment to transparency as a form of governmental accountability. The idea that criminal processes, records, and results should be public, or what the Court has referred to as the “right to gather information,”38 is part of a larger democratic commitment to public accountability and responsiveness. In discussing “the therapeutic value of open justice,” the Court quoted the philosopher Jeremy Bentham: Without publicity, all other checks are insufficient: in comparison of pub- licity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in real- ity, as checks only in appearance.39 Information access is also connected to political and intellectual free- dom. In establishing the public’s right to observe criminal proceedings, the Court has said: “The First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the pub- lic may draw.”40 Because transparency and public access to information are so impor- tant, they cannot be dispensed with lightly. If the government wants to keep information secret, it must justify that secrecy against a pre- sumption of openness and the value of maintaining a public and open justice system. As the Supreme Court has written: “The presumption of openness may be overcome only by an overriding interest based on find- ings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.”41 For example, in a 1985 decision, then–Judge (now former Justice) Anthony Kennedy unsealed an informant’s file because the government and the informant had failed to justify the need for secrecy.42 In that case, informant William Hetrick had pled guilty to drug and tax evasion charges. The media sought access to Hetrick’s request for a sentence re- duction in connection with his testimony against celebrity automobile executive John DeLorean. At the request of both Hetrick and the gov- ernment, the district court sealed the proceedings. The court of appeals ordered that they be unsealed. Kennedy explained as follows: We begin with the presumption that the public and the press have a right of access to criminal proceedings and documents filed therein. . . . The primary justifications for access to criminal proceedings [have been] first that criminal trials historically have been open to the press and to the public, and, second, that access to criminal trials plays a significant role in the functioning of the judicial process and the governmental sys- tem. . . . The interest which overrides the presumption of open proce- dures must be specified with particularity, and there must be findings that the closure remedy is narrowly confined to protect that interest. . . . The penal structure is the least visible, least understood, least effective part of the justice system; and each such failure is consequent from the others. Public examination, study, and comment is essential if the corrections process is to improve.43 The meaning of such reasoning is that the need for informant secrecy should not be assumed; rather, it must be evaluated each time on the specific facts of each case. Even though “information relating to cooper- ating witnesses and criminal investigations should be kept confidential in some cases,”44 the countervailing importance of public access must be accounted for every time. When in doubt, transparency is supposed to win. Blanket acceptance of informant anonymity, undocumented deals, or sealed case files contradicts this fundamental idea. Another important feature of the Supreme Court’s publicity jurispru- dence is the critical role of the defendant in producing public information. Even as the Court recognizes the public’s need to understand the way the system works, it assumes that the adversarial process produces enough information to satisfy that need.45 As the Court puts it: “In an adversary system of criminal justice, the public interest in the administration of justice is protected by the participants in the litigation.”46 Essentially, the public gets to watch only those trials that the parties actually decide to conduct. By permitting public access to record information produced by actual cases, the Court’s idea is that the public will obtain a sufficiently full and accurate picture of the way the criminal system works to satisfy underlying First Amendment free-speech and information-gathering values. In this sense, defendants function as vital proxies for the broader public interest in access to government information. When it comes to informant use, however, this model breaks down because snitching practices undermine the Court’s assumption that par- ties to criminal litigation will produce a robust public record. As plea bargaining and informant use curtail defendant access to information about law enforcement practices, so, too, is public information reduced. To put it another way: one of the reasons why the public lacks access to and understanding of the criminal process is that defendants who plead guilty—i.e., most defendants—lack tools to access governmental infor- mation about their own cases. Cases like Ruiz further handicap defen- dants’ ability to obtain informant-related discovery, in conjunction with police and prosecutorial informant practices that evade documentation and review, rendering the entire criminal process less public. The move toward informant secrecy affects not only public access to information but also other branches of government. When defendants lack access to informant-related data, courts lose the ability to review that information. The culture of nondisclosure affects legislative access as well. For example, in the 2004 congressional report titled “Everything Secret Degenerates: The FBI’s Use of Murderers as Informants,” the U.S. House of Representatives Committee on Government Reform documented its inquiry into the FBI’s mishandling of its mafia informants throughout the 1970s and 1980s. During that investigation, the FBI and the U.S. De- partment of Justice used numerous mechanisms to withhold information from the committee, to cover up wrongdoing by government officials and their informants, and generally to stonewall the investigative pro- cess. “Throughout the committee’s investigation,” the report complained, “it encountered an institutional reluctance to accept oversight. Executive privilege was claimed over certain documents, redactions were used in such a way that it was difficult to understand the significance of informa- tion, and some categories of documents that should have been turned over to Congress were withheld.”47 The committee concluded that one of the central harms associated with FBI informant practices was the agen- cy’s resistance to public transparency and legislative oversight. V. Informants in the Digital Age Modern information technology and the internet raise new and dra- matic challenges for the ancient practice of using informants. Courts are increasingly moving toward digitized dockets and public records made accessible over the internet. While such records were always technically available to the public, the ability to access them easily, remotely, and for free raises new issues about confidentiality and safety.48 At the same time, the deployment of informants through social media makes pos- sible an enormous set of new privacy invasions, even as those social media platforms have become sites for invidious new forms of witness intimidation.49 Back in 2004, the website Whosarat.com generated a national con- troversy over the tension between witness intimidation and the com- peting need for public transparency. In retrospect, Whosarat.com looks tame in comparison to today’s social media environment: the site collected and posted some public court records and information about individuals who were allegedly cooperating with the govern- ment. Whosarat triggered so much anxiety at the time that the New York Times ran an editorial on the dilemma created by this “one odious website”: We believe that transparency is essential to a fair judicial system and it would be a mistake to overreact to one odious Web site by pulling down plea agreements from the Internet wholesale. But Whosarat.com should serve notice that a different level of caution may be necessary in the wired age. In selective cases, where the life of the witness may be in jeopardy, courts should consider not putting the documents online.50 Today, anyone can post a “snitch list” on Facebook or Twitter, and the internet is awash with information about alleged cooperators. Sometimes the lists and documents are fake, sometimes the informa- tion is real.51 With the easy sharing of case information on social media, it is increasingly difficult for the legal system to meaningfully control or protect its own records; this difficulty is in addition to the omnipresent risk that court and law enforcement data might be hacked.52 Put differ- ently, in much the same way that we individuals are losing our ability to maintain our privacy and protect our information against new surveil- lance technologies, so are courts. These difficulties have not stopped the court system from trying. In November 2006, the U.S. Judicial Conference sent a memorandum to the entire federal bench, recommending “that judges consider sealing documents or hearing transcripts . . . in cases that involve sensitive in- formation or in cases in which incorrect inferences may be made.”53 In its report on public access to electronic case files, the Judicial Confer- ence recommended against making criminal court records electroni- cally available to the public primarily because of the risk of exposing informants. Specifically, the conference reasoned as follows: Routine public remote electronic access to documents in criminal case files would allow defendants and others easy access to information regarding the cooperation and other activities of defendants. Specifi- cally, an individual could access documents filed in conjunction with a motion by the government for downward departure for substantial assistance and learn details of a defendant’s involvement in the gov- ernment’s case. Such information could then be very easily used to intimidate, harass and possibly harm victims, defendants and their families.54 A decade later, a committee of the Judicial Conference again rec- ommended greater use of sealing to shield all plea agreements and sentencing information from the public. Defense attorneys worried that universal sealing would perversely make every defendant look like a snitch: sealing “will multiply the number of inmates at risk exponen- tially without protecting anyone,” said one chief federal public defender. The Reporters Committee for Freedom of the Press pointed out that “depriving the public of this information in all cases will prevent the pub- lic from ever knowing the reasons that a criminal defendant received the sentence he or she received. That is completely antithetical to the idea of a transparent criminal justice system.”55 The challenge is bigger than any case-specific inquiry into whether it might be dangerous to reveal an informant’s name or whether a par- ticular investigation might be compromised by such revelations. Rather, the legal system is grappling with disruptive changes in technology and informational access in the face of our nation’s historic commitment to the public adjudication of crime. In the name of witness protection, courts are moving toward wholesale policies of hiding cases, dockets, and practices, even in the face of increasing technological access. This trend stands in stark contrast with Justice Kennedy’s classic constitu- tional analysis, in which he explained that the judicial presumption of openness must be outweighed by specific reasons for closure on a case- by-case basis. Today, the potential threat to some witnesses is seen by many courts as a reason to overcome the presumption of openness for all criminal records. Taken together, in all of these many ways, the official practice of using informants undermines public transparency throughout the criminal system. By resolving liability in secret, it insulates investigative and pros- ecutorial techniques from judicial and legislative scrutiny. This reduced public access affects numerous other constituencies, making it more dif- ficult for the press, crime victims, families, and policy analysts to obtain information about the workings of the justice system or about specific criminal cases. Informant use has thus become a powerful and destruc- tive informational policy in its own right, reducing public transparency and obscuring the real impact of criminal practices on individuals, com- munities, and other institutions. 6 The Community Cost I

#### Lying informants, induced by bad evidentiary standards in plea bargains, are the leading cause of innocent people being killed by being convicted for crimes they didn’t commit

Natapoff 22 [Alexandra Natapoff, Lee S. Kreindler Professor of Law at Harvard Law School, member of the American Law Institute, and Guggenheim Fellow with a BA in philosophy from Yale University and a JD from Stanford Law School, 2022, “Snitching Criminal Informants and the Erosion of American Justice Second Edition,” NYU Press, https://arizona-ua.primo.exlibrisgroup.com/permalink/01UA\_INST/2eo519/alma991050104313703843]/Kankee

4 Beyond Unreliable In the 25 years I have been in this business, I have worked with hundreds of informants. I believe that exactly one of them was completely truthful, and there is no way to be 100% sure about him. — John Madinger, senior special IRS agent and former nar- cotics agent1 All too often, the U.S. criminal system convicts the innocent. The now- steady stream of exonerations is stark evidence that, even in the most serious cases, innocent defendants may still plead guilty or be convicted at trial despite the existence of some of the most elaborate procedural protections in the world.2 The sources of this disaster are complex: an overwhelmed public defender system, long sentences, high trial convic- tion rates, and systemic pressures that steer defendants into guilty pleas are just some of the reasons why innocent defendants may dread their day in court. Criminal informants are an important piece of the wrongful convic- tion puzzle. This is not merely because they often lie. After all, any wit- ness is potentially unreliable. It is rather because informants have such predictable and powerful inducements to lie, because law enforcement relies heavily on their information, and because the system is not well designed to check that information. As a result, unreliable informant information permeates the process in ways that predictably lead to bad results such as wrongful arrests, bad search warrants, and fabricated evi- dence as well as the ultimate failure: wrongful conviction. I. Lying Informants The groundbreaking book Actual Innocence estimated in 2000 that 21 percent of wrongful capital convictions are influenced by criminal informant testimony.3 Four years later, a study by Northwestern Univer- sity Law School’s Center on Wrongful Convictions traced 45.9 percent of documented wrongful capital convictions to false informant testimony, making “snitches the leading cause of wrongful convictions in U.S. capi- tal cases.”4 Another report that same year estimated that 20 percent of all California wrongful convictions, capital or otherwise, resulted from false snitch testimony.5 Today, the Innocence Project concludes that nearly 20 percent of all DNA exoneration cases involve a lying jailhouse snitch.6 According to the National Registry of Exonerations, approxi- mately 15 percent of all wrongful murder convictions involve a jailhouse informant, and 23 percent of wrongful capital convictions are due to jail- house snitches.7 More generally, law professor Samuel Gross’s study on exonerations reports that nearly 50 percent of wrongful murder convic- tions involved perjury by someone such as a “jailhouse snitch or another witness who stood to gain from the false testimony.”8 The informant tendency to lie is old and infamous. It led federal judge Stephen S. Trott, himself a former prosecutor, to warn that “[in- formants’] willingness to do anything includes not only truthfully spilling the beans on friends and relatives, but also lying, committing perjury, manufacturing evidence, soliciting others to corroborate their lies with more lies, and double-crossing anyone with whom they come into contact, including—and especially—the prosecutor. A drug addict can sell out his mother to get a deal, and burglars, robbers, murderers and thieves are not far behind.”9 Or as the Fifth Circuit Court of Appeals once noted, “[i]t is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence.”10 Because snitching has become so pervasive, the threat of perjured testimony goes beyond the problem of the individual bad witness. In 2006, for example, a federal jury wrongfully convicted Ann Colomb and her three sons for allegedly running one of the largest crack co- caine operations in Louisiana. The Colomb family served four months in prison awaiting sentencing before all charges were dismissed. Their wrongful convictions were based on fabricated testimony obtained from a ring of jailhouse informants who bought and sold informa- tion about the Colomb family inside the local federal prison. The ring worked by selling prisoners files of documents and photographs that would permit them to fabricate testimony in order to reduce their own sentences. The government planned to use thirty-one such informants against the Colombs. The scheme was revealed when a disgruntled prisoner, Quinn Alex, gave $2,200 to another prisoner in order to get a file. When the file never came through, Alex wrote an angry letter to the prosecutor demanding that the other prisoner be charged with theft. The presiding judge, U.S. district judge Tucker Melancon, told a journalist afterward: “It was like revolving-door inmate testimony. The allegation was that there was in the federal justice system a network of folks trying to get relief from long sentences by ginning up information on folks being tried in drug cases. I’d heard about it before. But it all culminated in the Colomb trial.” Judge Melancon ordered the U.S. Department of Justice to investigate.11 While all compensated criminal informants pose the risk of fabrica- tion, jailhouse snitches are particularly pernicious. In a jaw-dropping 1989 interview with 60 Minutes, jailhouse snitch and admitted perjurer Leslie Vernon White described how he was able to obtain informa- tion about other prisoners and fabricate their confessions, while him- self in prison, and trade those fabrications for reduced sentences. The White scandal led to a grand jury investigation into the use of jail- house snitches in Los Angeles, which concluded not only that jailhouse snitches routinely lied but also that police and prosecutors knowingly relied on and exploited unreliable informants.12 For example, the grand jury found evidence that police and prosecutors would purposely place suspects in the “informant tank” at the jail, surrounded by snitches working with the government, “in the hope that one or more of the informants would ‘come up with information’ to strengthen the case against the inmate.”13 Twenty-five years later and fifty miles south of L.A., Orange County was rocked by a massive jailhouse informant scandal. For years, the sheriff ’s department ran a secret jailhouse informant program, violating defendants’ constitutional rights, paying violent gang members, main- taining a secret database, and lying to courts about it. The scheme un- raveled when an intrepid public defender named Scott Sanders spent over a year fighting to get the secret documents that would ultimately reveal the government’s misconduct.14 The jailhouse snitch problem is a concentrated version of a more gen- eral danger associated with criminal informant use, which is the threat to innocent suspects who happen to be incarcerated, who have criminal records, or who are otherwise associated with a criminal milieu such as illegal drug use. Innocent people with criminal associations are more susceptible to informant targeting and conviction because law enforce- ment and jurors alike are predisposed to believe in their guilt. Incarcer- ated or recidivist suspects are thus particularly vulnerable to wrongful conviction based on unreliable snitch information because it is harder for them to defend against informant lies.15 Of course, sometimes informants, even unreliable ones, tell the truth. In other words, the problem is not that criminal informants always lie. Rather, as we saw in the previous chapter, it can be extremely hard to tell when they do and when they don’t. And unlike other kinds of witnesses, informants are deeply self-interested in their false stories. Their ability to convince the government that their information is true and valuable may mean the difference between their own freedom and incarceration or even life and death.16 II. Law Enforcement Dependence on Informants

#### Informants destroy due process – informant dependency, confirmation bias, collaborating false testimony, and coverups

Natapoff 22 [Alexandra Natapoff, Lee S. Kreindler Professor of Law at Harvard Law School, member of the American Law Institute, and Guggenheim Fellow with a BA in philosophy from Yale University and a JD from Stanford Law School, 2022, “Snitching Criminal Informants and the Erosion of American Justice Second Edition,” NYU Press, https://arizona-ua.primo.exlibrisgroup.com/permalink/01UA\_INST/2eo519/alma991050104313703843]/Kankee

II. Law Enforcement Dependence on Informants Despite their known unreliability, law enforcement relies on informants, often heavily. This is not only because police and prosecutors need infor- mation to make cases but also because law enforcement success is often measured in terms of numbers of arrests and prosecutions, thereby put- ting pressure on police and prosecutors to use the cheapest and fastest methods rather than the most reliable. This is particularly true in drug enforcement, where the government has become profoundly reliant on informants in conducting investigations, selecting targets, making arrests, and obtaining convictions.17 Because law enforcement officials need to create cases, they have incentives to believe informants when they offer information that ap- pears valuable. These incentives grow stronger once informants become trusted, cases are initiated, and the official becomes dependent on the informant for the success of the case. This dependence can become so great that it creates a sort of per- verse romance—“falling in love with your rat.” A prosecutor explains the phenomenon: You are not supposed to, of course. . . . But you spend time with this guy, you get to know him and his family. You like him. . . . [T]he reality is that the cooperator’s information often becomes your mind set. . . . It’s a phenomenon and the danger is that because you feel all warm and fuzzy about your cooperator, you come to believe that you do not have to spend much time or energy investigating the case and you don’t. Once you be- come chummy with your cooperator, there is a real danger that you lose your objectivity.18 Another prosecutor describes how reliance on a cooperator affects numerous crucial decisions down the line. Once the government believes an informant, it is a certainty that the information obtained from the cooperator will become part of the base of information utilized to evaluate future would- be cooperators. Moreover, the information will affect future questioning of witnesses and defendants; it will alter how investigators view the signif- icance of witnesses and particular pieces of evidence; and it may taint the way the case is perceived by the prosecutors and agents. In other words, false information skews the ongoing investigation. The false information may prove critical to issues that have far greater import than whether to accept as true the proffer of another would-be cooperator. Rather, it might impact decisions regarding charges to be filed against other defen- dants, it might affect decisions related to an appropriate plea for a given defendant, and it might even influence whether the government decides to seek the death penalty.19 Studies show that police and prosecutors, like everyone else, tend to interpret information in ways that support their previous decisions and resist interpretations that suggest they got it wrong the first time around. Psychologists refer to this phenomenon as “confirmation” or “expectancy” bias, “belief perseverance,” or “tunnel vision.” Law professor Daniel Medwed explains how cognitive tunnel vision causes law enforce- ment officials to stick to their original theories about who is guilty even in the face of contradictory evidence. Tunnel vision can also lead law enforcement to selectively identify and seek out evidence that confirms their first impressions.20 As a result, once law enforcement officials accept informant information, it becomes important for the government to preserve the credibility of that information and that informant, even when other evidence suggests that they may be unreliable.21 These psychological dynamics have troubling legal implications. The Due Process Clause of the U.S. Constitution requires prosecutors to dis- cover and disclose to defendants impeachment material about govern- ment witnesses, namely, evidence suggesting that the witness might be lying.22 The adversarial process depends on this disclosure to ensure that defendants can meaningfully ferret out informant lies. But police and prosecutors lack incentives to seek out such material, not only because it could literally destroy their cases but also because they have vested interests in believing their informants. Moreover, police in possession of impeachment material may be reluctant to share it with prosecutors, knowing that it will have to be disclosed to the defense. This means that the usual protections against unreliable witnesses—prosecutorial ethics and discovery— may be unavailable precisely because prosecutors them- selves have limited means and incentives to discover the truth. Sometimes police and prosecutors are taken in by their own infor- mants. For example, prosecutors believed Marion Albert Pruett’s 1982 testimony against a prisoner accused of killing Pruett’s cellmate and put Pruett into the federal witness protection program. Pruett subsequently committed a string of bank robberies and murdered two convenience store clerks and eventually confessed that he had killed his cellmate himself.23 Sometimes government officials lack information about the risks that their source is lying. The Baltimore prosecutor in Tony Williams’s 2003 murder trial was unaware that the state’s key witness, a jailhouse snitch, was also on the Baltimore police payroll as an informant.24 Sometimes police withhold information about their informants not only from prosecutors but also from their own police supervisors. In 2009, the St. Louis Police Department initiated an investigation into its own officers to determine whether rank-and-file police were lying about their informants. Two officers, for example, had claimed to have gotten tips from informers who turned out to be dead or in jail at the time. The police union got a temporary restraining order on behalf of the officers against their own supervisors, arguing that disclosing informants’ iden- tities to police supervisors “would jeopardize informers’ lives, [police] officers’ careers and public safety.” A judge eventually sided with the department and permitted the investigation to proceed.25 Sometimes prosecutorial ignorance is intentional. Tom Goldstein was wrongfully convicted of murder in 1980, spending twenty-four years in prison on the basis of testimony from jailhouse snitch Edward Fink. Although he lied about it at trial, Fink had received lenience for numerous offenses by working as an informant for the local police de- partment for many years. However, because the Los Angeles County prosecutors’ office lacked procedures to keep track of informants and their deals, the prosecutor on Goldstein’s case did not know Fink’s his- tory in that office and therefore never disclosed the information to the defense.26 In its 1990 investigation of informant abuses, the Los Angeles grand jury concluded that the Los Angeles District Attorney’s Office had intentionally decided not to keep track of its informants and their unreliability. The reasons for this decision were twofold: because “the defense might discover information” if it were documented, and be- cause “the Sheriff’s Department might be deemed to be violating defen- dants’ rights to counsel” if full information about informant practices was revealed.27 In other words, under pressure to make cases and to shield law enforcement from scrutiny, the prosecutors’ office purposely refrained from learning about and documenting its own use of unreli- able snitches. In other situations, officials may ignore or even affirmatively encour- age informant mendacity, concealing informant lies from the defense as well as the court in order to obtain convictions. For example, prosecu- tors lied for twenty years about their key informant witness, beginning with Delma Bank’s 1980 murder trial all the way through his appeal and state habeas petition. Informant Robert Farr had set up Banks in ex- change for cash and lenience, a fact that the government continuously denied.28 Similarly, James Walker spent nineteen years in prison for a 1971 murder he did not commit, on the basis of allegations of a criminal informant, John Snider. Although they had proof that Snider was lying, police and prosecutors covered up his lies and withheld evidence re- garding Snider from the court and from the defense.29 In another case, the Ninth Circuit threw out the death penalty sentence imposed on Lacey Sivak because prosecutors withheld evidence that the informants in the case were getting deals and because prosecutors knew that the informants were lying on the stand.30 Sometimes informant use reflects deep institutional dysfunction of which unreliability is just one aspect. Throughout the 1990s, Detroit homicide police ran an illegal snitching operation on the ninth floor of the police department. Informants received sentencing reductions in addition to food, drugs, access to sex, and special privileges from de- tectives in exchange for making statements against dozens of prisoners who were eventually convicted of murder. Detectives actively instructed informants to fabricate testimony. One informant reported that “detec- tives supplied him and other informants with prewritten statements to memorize before the preliminary hearings of the accused men. In those statements, informants would say that the accused person confessed to their crime in a way that ‘filled in’ the details detectives were missing to connect the suspect to their crime.”31 The snitch ring was an ill-kept secret. Indeed, one Detroit prosecutor at the time complained about the practice to his supervisors, writing that “promises of leniency are made to these snitches without approval—or prior knowledge—which exceeds police authority and violates our poli- cies.” The prosecutor also knew about the fabrications: “I have been told,” he wrote, “that snitches do lie about overhearing confessions and fabri- cate admissions in order to obtain police favors or obtain the deals they promised.”32 The practice nevertheless continued, resulting in dozens of convictions and, decades later, numerous exonerations. These examples of official wrongdoing are not meant to impugn the vast majority of police and prosecutors who do not engage in such con- duct. But they do illustrate the dangers and temptations with which police and prosecutors must contend. Informant witnesses represent a kind of perfect storm: deeply unreliable sources managed by officials with strong incentives to accept and defend their information. In these ways, the interdependence of law enforcement and its informant wit- nesses can threaten the entire fact-finding process. III. The Corroboration Trap Sometimes a single informant provides the central or only evidence in a case. Such scenarios are so obviously risky that a number of states now require corroboration for informant testimony. But corroboration is not foolproof. Sometimes informants are used to bolster other, equally unre- liable forensic evidence, which makes that evidence look stronger than it actually is. And because informants often collude, sometimes mul- tiple informants will provide corroboration for each other’s fabrications, making all their false stories look more plausible than they actually are. In each of these cases, informant evidence is corroborated but neverthe- less still unreliable. In 2004, Texas executed Cameron Todd Willingham for allegedly murdering his three children. Willingham maintained his innocence throughout, turning down plea offers that would have saved his life. His conviction and execution are now widely believed to have been wrong- ful, based on discredited junk arson science. But Willingham was not convicted solely on faulty forensics. Weeks after Willingham’s high- profile arrest, jailhouse informant Johnny Webb came forward and al- leged that Willingham had confessed to him in the jail. Between the arson claims and the jailhouse snitch, all doubt about Willingham’s guilt evaporated, even to his own lawyers. Years later, Webb—who was diag- nosed as bipolar—recanted his testimony, admitting that the prosecu- tor had offered him an undisclosed deal in exchange for his testimony against Willingham.33 Other cases similarly demonstrate how jailhouse informant testimony can bolster bad forensics. In Florida, at least three men were wrongfully convicted based on the testimony of a fraudulent “dog sniff ” expert who offered junk science evidence of the men’s alleged guilt. In all three tri- als the government relied on jailhouse snitch testimony to reinforce the faulty dog sniff evidence. The three men were eventually exonerated.34 And even though bite mark evidence has been thoroughly discredited, David Spence was convicted based on bite mark evidence and the testi- mony of six jailhouse informants, two of whom later recanted. Spence was executed in Texas in 1997.35 Put differently, bad informants can be used to corroborate bad fo- rensics. The problem arises in part because informant testimony is not independent evidence: informants may come forward entrepreneurially to provide information about high-profile cases in the media or about other people in the jail, while police and prosecutors encourage and invite this entrepreneurship. In this way, the very existence of a high- profile case or defendant can affirmatively generate informant evidence. That evidence, in turn, is most valuable to the government when the underlying case is already weak, which means that the informant testi- mony is even more likely to distort the outcome and lead to wrongful conviction. Corroboration is also misleading when multiple informants offer the same story. In a typical criminal case, the existence of multiple sources for the same evidence tends to render that evidence more reli- able, in part on the assumption that each piece of evidence has been independently generated. But informants are known to proactively col- laborate and collude in order to render their stories more plausible and thus more valuable to the government. As one federal court of appeals explained, “because they are aware of the low value of their credibility, criminal[] [informants] will even go so far as to create corroboration for their lies by recruiting others into the plot.”36 For example, in Ann Colomb’s wrongful conviction described above, the Louisiana pros- ecutor planned to use thirty-one informants from the federal prison, all of whom were part of a for-profit snitch ring in which each infor- mant corroborated the same story. A comparable informant collusion scheme operated for many years in the Atlanta jail. Prisoners bought and sold “packages of information” to each other to be offered to the government in exchange for leniency. Prices for information ran as high as $250,000, in a market that a federal judge excoriated as “abomi- nable.”37 In the 1989 Los Angeles grand jury investigation, informants likewise reported that they shared information and tactics with each other and collectively developed fabricated stories by repeatedly run- ning those stories past law enforcement officials until they got the desired response.38 One experienced Los Angeles snitch even wrote a “manual . . . instructing other jailhouse snitches how to fabricate confessions.”39 As a result of these dynamics, the existence of multiple informants presenting the same or similar evidence can itself, ironically, be a po- tential indicator of unreliability. The California legislature has formally recognized the high risk of jailhouse informant collusion by barring the use of the uncorroborated testimony of an in-custody informant. The law specifically forbids the use of another jailhouse informant to serve as corroboration unless the government can prove that the testifying informant has not communicated with other informants.40 IV. When the Innocent Plead Guilty

#### Informants circumvent constitutional rights against police improper investigations and mass surveillance since they’re not part of the government

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II. Using Informants as Investigative Tools For the government, the central benefit of using informants is to obtain information. The U.S. Constitution places significant limits on the gov- ernment’s ability to obtain and use incriminating information. Under the Fourth Amendment, for example, the government cannot engage in unreasonable searches and seizures; the government must get a warrant for certain kinds of searches; and the government needs a certain amount of evidence—“reasonable suspicion” or “probable cause”—before police can stop or arrest or otherwise deprive individuals of their liberty. The Fifth Amendment privilege against self-incrimination, famously embodied in Miranda warnings, protects suspects against being pres- sured to provide self-incriminating information. The Sixth Amendment right to counsel means that, once a defendant has been charged with a crime, the government cannot question him or her without the pres- ence of defense counsel.41 Federal and state law further regulates the government’s ability to obtain records or to deploy in private places bugs, wiretaps, video cameras, and other types of surveillance.42 These rules, particularly those in the Bill of Rights, famously protect individuals against official coercion and invasions of privacy. But the government’s ability to use informants is a powerful and often easy way to circumvent many of these restrictions. Because constitutional re- straints generally apply only to official actors, a private individual acting as an informant can obtain information that the government could not easily obtain on its own. Criminal informants are thus potent investiga- tive tools, not only because they can be effective information gatherers but also because they are exempt from many of the rules that otherwise constrain official investigative techniques. In 1966, the Supreme Court decided that the governmental use of compensated criminal informants is constitutionally permissible. That case—Hoffa v. United States—upheld the government decision to use and reward Edward Partin, a corrupt union official, to infiltrate the inner circle of Teamsters president Jimmy Hoffa and to eavesdrop on Hoffa’s conversations with his associates and his attorney. The government recruited Partin out of a Louisiana jail, where he was facing multiple serious state and federal charges including manslaughter, kidnapping, embezzlement, and perjury. Because Hoffa let Partin into his private hotel room unaware that Partin was working for the government, the Court held that Hoffa had assumed the risk that the informant would share the information he learned and therefore that Hoffa’s right to pri- vacy under the Fourth Amendment was not violated. As the Court put it, “The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak.”43 The Court also decided that the government’s use of Partin to obtain Hoffa’s incriminating statements did not trigger Hoffa’s Fifth Amend- ment’s protection again self-incrimination, because Hoffa was not of- ficially compelled to speak. In Illinois v. Perkins, the Court went further, holding that an incarcerated suspect questioned by a jailhouse infor- mant at the government’s instigation did not have the right to be given Miranda warnings or to obtain counsel, even though he would have if the exact same questioning had been conducted openly by police. The Court reasoned that, because the defendant did not know the snitch was acting as a government agent, he was not being coerced to confess in an impermissible way.44 After Hoffa, the Supreme Court approved the extension of informant use through technology. In United States v. White, the Court held that the warrantless use of a “wired” informant—i.e., an informant wearing a transmitter permitting police to hear the conversation—did not violate the defendant’s Fourth Amendment privacy rights, even though one of the transmissions took place in his home. In dissent, Justice Douglas worried that the Court had missed the significance of the new tech- nological advances. “Electronic surveillance,” he wrote, “is the greatest leveler of human privacy ever known. . . . [M]ust everyone [now] live in fear that every word he speaks may be transmitted or recorded and later repeated to the entire world?” Also in dissent, Justice Harlan opined that “the practice of third-party bugging, must, I think, be considered such as to undermine that confidence and sense of security in dealing with one another that is characteristic of individual relationships between citizens in a free society.”45 The convergence of informant use and new technologies has opened the door to even more intrusive and powerful forms of surveillance. Federal law imposes significant restrictions on official use of electronic surveillance, requiring police to obtain a court order before intercept- ing communications. A court may not approve a request for electronic surveillance unless it makes numerous findings, including a finding that that there is probable cause that a crime is being committed and that “normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too danger- ous.”46 But the federal electronic surveillance statute, typically referred to as “Title III,” contains an exception for one-party consent: if an in- formant is party to the communication and consents to the recording, there is no need for court authorization. In other words, while the gov- ernment must get a court order before it can wiretap a phone or place a camera in a private place such as a home or hotel room, it does not need a warrant to wire an informant to record communications or videotape in those same private spaces.47 For example, in United States v. Nerber, the U.S. Ninth Circuit Court of Appeals held that the government could place a video camera in a hotel room with the consent of the informants who were inside, although once the informants left the room, it was no longer permissible to videotape the occupants absent a warrant.48 Thirty-eight states follow Title III by authorizing one-party consent to electronic surveillance. A few states, however, have held that informant electronic surveillance in a person’s home or other private places re- quires more regulation. The West Virginia Supreme Court has held that, in contrast to federal constitutional and statutory law, the West Virginia Constitution prohibits wired informants from videotaping or recording transactions in an individual’s home without a warrant.49 Similarly, the supreme courts of Montana, Vermont, Massachusetts, Alaska, and Penn- sylvania have all held, under their respective state constitutions, that wired informant surveillance in a person’s home requires a warrant.50 III. Defendant Rights against Official Informant Use

#### Informants destroys justice system credibility

Natapoff 22 [Alexandra Natapoff, Lee S. Kreindler Professor of Law at Harvard Law School, member of the American Law Institute, and Guggenheim Fellow with a BA in philosophy from Yale University and a JD from Stanford Law School, 2022, “Snitching Criminal Informants and the Erosion of American Justice Second Edition,” NYU Press, https://arizona-ua.primo.exlibrisgroup.com/permalink/01UA\_INST/2eo519/alma991050104313703843]/Kankee

H. Systemic Integrity and Trust The final set of implications associated with informant use has to do with the perceived legitimacy of the criminal system itself. Law enforce- ment depends on the trust, acceptance, and cooperation of the people and communities that it polices. Without that trust and acceptance, the entire system breaks down.112 Informant use erodes public trust in the criminal system in numerous ways that are explored throughout this book. For example, the fact that more culpable defendants routinely receive lesser sentences undermines the public sense of the system’s fairness and evenhandedness. The de- terrent effect of the law is eroded by the fact that, as one court put it, “[n]ever has it been more true than it is now that a criminal charged with a serious crime understands that a fast and easy way out of trouble with the law is . . . to cut a deal at someone else’s expense.”113 That violent and destructive people may be permitted to remain at large in exchange for information is frightening to the people who must live with the con- sequences. The secrecy surrounding informant use exacerbates all these problems, obscuring the real costs and benefits of informant use and driving a wedge between the law enforcement officials who use infor- mants and members of the public who are supposed to be the ultimate beneficiaries of the practice.114 Finally, the tragedy of Princess Hansen’s death reveals another kind of destructiveness: the fourteen-year-old’s jaded understanding that jus- tice is for sale and that if she cooperated with criminals she would be paid—in precisely the same way that police pay criminals for their coop- eration. A car wash attendant in Los Angeles likewise once explained to me that, in his old neighborhood (which he declined to identify), “three will set you free.” The adage referred to the widespread understanding that if you were charged with a felony but gave the government informa- tion about three other people, they would let you go. In all these ways, informant use inflicts significant wounds on the integrity of the criminal process, even as it contributes to the law en- forcement project in unique ways. The remainder of this book explores this conundrum. 2. Informant Law

#### Coercion in plea bargaining encourages falsely snitching on innocents to get a better deal for yourself

Dervan et al. 23 [Lucian E. Dervan, professor of Law and Director of Criminal Justice Studies at the Belmont University College of Law, Vanessa A. Edkins, Psychology Professor Emerita at the Florida Institute of Technology, and Thea Johnson, Professor of Law at Rutgers Law School 2023, “Victims of Coercive Plea Bargaining: Defendants Who Give False Testimony for False Pleas,” American University Law Review, https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=2361&context=aulr]/Kankee

CONCLUSION Coercive plea bargaining is a threat to the legitimacy of the criminal justice system because it encourages defendants to falsely condemn themselves and, sometimes, even other innocent people. Bargained justice calls into question the fairness and accuracy of plea resolutions. When defendants falsely plead guilty to crimes they did not commit, there are a number of potential victims. The defendant, of course, is victimized by a system that coerces innocent people to plead guilty. But when the system gets it wrong, it also risks retraumatizing the victims of the true perpetrator and creating new victims who are injured when the actual wrongdoer is free to harm again. Finally, defendants often plead guilty to seemingly favorable plea deals in exchange for testimony against others. As research demonstrates, even innocent people who falsely plead guilty are susceptible to condemning other innocents to secure the best plea deal. Those additional innocent parties also become victims of coercive bargaining. By linking the research on coercive bargaining to these potential categories of victims, this Article, the first of two in this series, unearths a further need for plea reform. The reforms outlined here are the beginning of a process that limits coercive bargaining and its victims

#### Err neg – coercion in legal choices violates rights that cannot be bargained. Rights cannot be ignored on the basis of judicial efficiency, because those rights ensure democracy

Rich 10 [Michael L. Rich, Assistant Professor of Law at the Capital University Law School with a B.A. from the University of Delaware and a J.D. from Stanford Law School, 2010, “Coerced Informants and Thirteenth Amendment Limitations on the Police-Informant Relationship,” Santa Clara Law Review, https://heinonline.org/HOL/P?h=hein.journals/saclr50&i=697]/Kankee

A. Law Enforcement Concerns Police and prosecutors generally, and particularly those who work in areas, like narcotics, that are highly dependent on informants, will have the most forceful concerns about recognizing a constitutional prohibition on the use of coerced informants.27 7 Much of this criticism likely will have a practical bent: if effective law enforcement requires the use of informants, then a constitutional limitation on the use of informants presumably will hamstring the investigation and prosecution of these crimes. The most direct and principled response to these concerns is simply that they are irrelevant. Many constitutional provisions make police work more difficult, but such difficulties are oftentimes intentional, and even when merely incidental do not justify ignoring the Constitution's plain language. As the Supreme Court has recognized in the Fourth Amendment context, "the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment."2 7 Similar reasoning applies here: Congress drafted and passed, and the States ratified, a sweeping ban on slavery and involuntary servitude on the belief that these conditions are offensive to a free society and interfere with the natural rights of the citizenry.2 79 This ban cannot be ignored simply because it is inconvenient. That being said, on the few occasions that coerced informants have raised Thirteenth Amendment arguments, courts have dismissed them with little analysis, suggesting that perceived practical concerns may prevent their serious consideration.2 8 ° Also, despite its occasional sweeping declarations to the contrary, the Court does weigh practical considerations when considering the scope of some constitutional protections, such as the due process clause,2 8 ' or remedies for constitutional violations, such as the exclusion of evidence obtained in violation of the Fourth Amendment.2 2 Thus, a robust argument for the application of the Thirteenth Amendment in the informant context requires a response to likely law enforcement concerns. First and foremost, the Thirteenth Amendment leaves police and prosecutors with options other than threatening criminal prosecution: they may encourage cooperation with inducements other than leniency, offer leniency in exchange for the provision of previously-obtained information, or compel active cooperation from convicts. 83 All of these alternatives are subject to criticism, however, because they are potentially less efficient or efficacious ways of obtaining cooperation than threatening a potential informant with prison time.2 u Moreover, an informant who only provides previously obtained information is less useful, because the police cannot use the informant to investigate specific individuals or crimes, and to obtain physical evidence that can be used to secure a conviction or convince another defendant to cooperate. Finally, a convicted criminal will be an ineffective active informant unless the informant's conviction and the terms of her sentence can be protected from public disclosure; otherwise, the informant would easily be discovered, criminals would refuse to interact with her, and she may be in physical danger.2 5 In large part, these concerns only underscore why the use of coerced informants violates the Thirteenth Amendment. The Amendment prohibits using the threat of criminal sanctions to compel labor precisely because the threat is so powerful that it prevents the laborer from choosing not to work or from rejecting oppressive or dangerous conditions. 86 Thus, when police direct a coerced informant's investigation, they can involve an informant like Rachel Hoffman in more dangerous criminal activity than the informant has the training or ability to handle, and the informant cannot refuse.2" 7 It is this lack of a real choice that renders the condition of servitude offensive to a free society.28 8 The safety and efficacy concerns that require that an informant's identity be kept secret are different, however, because they are independent of the underlying rationale for the Thirteenth Amendment. Nevertheless, the interests that counsel in favor of secrecy are counterbalanced by constitutional arguments in favor of requiring that criminal records remain public.25 9 While the ultimate resolution of these opposing concerns is beyond the scope of this article, experience shows that it is impracticable to protect the identity of convicts who become active informants. The Federal Judicial Conference recommends that access to sealed documents, such as plea agreements involving cooperation, be prohibited. 2 0 Additionally, informant plea agreements and sentencing records are routinely sealed to protect informants and policing efforts.291 B. Defense Concerns Criticism by those on the defense side of the aisle is likely to involve two issues: first, that forbidding cooperation in exchange for leniency interferes with a defendant's autonomy; and second, that forbidding the use of coerced informants will result in defendants receiving more prison time. The first concern is merely a reiteration of the argument that an individual's agreement to become a coerced informant exempts the arrangement from the Thirteenth Amendment scrutiny, but from a defense perspective. As explained previously, the Thirteenth Amendment cannot be waived by an individual because it protects societal interests in addition to individual rights, and thus the use of coerced informants cannot be defended on the ground that informants themselves have a right to choose to enter into a condition of involuntary servitude.2 92 Second, forbidding the use of coerced informants is likely to result in at least a temporary lengthening of sentences and increased rate of incarceration. It is unlikely, given the importance of informants to law enforcement, that a more formalized process that involves conviction, sentencing, and a motion for leniency will prevent those with the most to offer from negotiating arrangements with police and prosecutors. But individuals who have less to offer will not receive leniency and will be subject to prosecution and punishment for their crimes. For the reasons explained infra, the more accurate correlation between the committed and the sentences received that would result would be a net positive from a larger societal standpoint.293 Additionally, forcing negotiations between defendants and the state to take place in the context of a formal proceeding will put defense counsel in a position to better protect their clients' interests. First, many coerced informants agree to cooperate with the police or prosecutors without the advice of counsel, who could explain to their clients the charges at issue, the sentences that they might receive, and their chances of success at trial.2 94 A prohibition on agreements that exchange leniency for active cooperation prior to a conviction will guarantee that the informant will have access to counsel, thus allowing informants to negotiate a fairer arrangement based on their actual criminal liability and a realistic assessment of the sentence they would likely receive. Moreover, the participation of defense counsel and the involvement of the court can guarantee that the obligations of both the informant and the government are clearly defined, set forth in their entirety, and enforceable. 295 Also, because any agreement will most likely be folded into a plea bargain, the defendant will be entitled to the procedural protections that attach thereto, including a colloquy with the judge to ensure that the defendant's plea is knowing, intelligent, and voluntary. 296 Finally, these procedural protections and the involvement of counsel will minimize the risk that the police will be able to coerce an innocent individual into becoming an active informant through unsubstantiated threats of criminal charges. 297 VI. THE THIRTEENTH AMENDMENT IN A LARGER POLICY CONTEXT

#### Rigorous studies prove even innocent plea bargainers will lie to convict others in order to get a better deal – the prosecutors incentivize mass deception, even by the innocent, to secure the convictions of other innocents. Reject all informants solve crime arguments; experiments prove even the innocent will condemn other innocents via false testimony

Dervan et al. 23 [Lucian E. Dervan, professor of Law and Director of Criminal Justice Studies at the Belmont University College of Law, Vanessa A. Edkins, Psychology Professor Emerita at the Florida Institute of Technology, and Thea Johnson, Professor of Law at Rutgers Law School 2023, “Victims of Coercive Plea Bargaining: Defendants Who Give False Testimony for False Pleas,” American University Law Review, [https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=2361&context=aulr]/Kankee](https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=2361&context=aulr%5d/Kankee)

II. FALSE TESTIMONY IN RETURN FOR FALSE BARGAINS In May 1979, Eva Gail Patterson was raped and murdered in her home in Hattiesburg, Mississippi.145 Ms. Patterson’s four-year-old son witnessed the attack and later described the perpetrator to police as a single “bad boy.”146 The first suspect identified in the case was Larry Ruffin, a teenager at the time.147 While Mr. Ruffin had a prior record for stealing some beer and was on leave from a halfway house for that offense at the time of the attack on Ms. Patterson, it is unclear why he was targeted by police, as there were no witnesses or evidence linking him to the crime.148 Nevertheless, police brought Mr. Ruffin in for questioning and, according to a federal lawsuit later filed in the matter, beat and coerced him into confessing to the heinous crime.149 As might be expected, Mr. Ruffin recanted his forced confession and proceeded to trial.150 Sixteen months later, as prosecutors prepared for Mr. Ruffin’s trial, police decided to interrogate Bobby Ray Dixon and Phillip Bivens.151 Mr. Dixon had been in the same halfway house around the same time as Mr. Ruffin.152 As before, coercive interrogation tactics, including “racially-charged threats and violence,” were used to coerce confessions from the men.153 Eventually, threatened with the death penalty if they failed to cooperate, Mr. Dixon and Mr. Bivens pleaded guilty to the rape and murder of Ms. Patterson and testified against Mr. Ruffin at his trial.154 Mr. Ruffin, based entirely on his confession and the testimony of Mr. Dixon and Mr. Bivens, was convicted and sentenced to life in prison.155 In 2010, DNA testing of semen from the victim’s body revealed that the actual assailant in the 1979 attack was Andrew Harris; Mr. Ruffin, Mr. Dixon, and Mr. Bivens were all excluded as sources of the sample.156 As a result of the new evidence, Mr. Ruffin, Mr. Dixon, and Mr. Bivens were all exonerated.157 However, the physical and mental injury resulting from years of incarceration for crimes they had not committed took a heavy toll. Mr. Ruffin never saw the day of his exoneration. He died in prison in 2002, still professing his innocence and not knowing that the truth would one day come to light.158 Mr. Dixon died in 2010, the same year as his exoneration.159 Mr. Bivens died in 2014.160 The three men did not even live long enough to receive compensation for their wrongful imprisonment.161 The state of Mississippi provided their estates $50,000 in 2015, the equivalent of $1,612 per year or $4.41 per day for their mistreatment.162 A multi- million-dollar settlement in a federal lawsuit would not come until 2016.163 It was not difficult for law enforcement to track down Andrew Harris, the actual attacker in the 1979 case, because he was already in prison for another rape.164 Mr. Harris had lived close to Ms. Patterson in 1979 when the initial crime occurred, but police had not identified him as a suspect.165 Instead, they focused on Mr. Ruffin and then closed the investigation after coercing false pleas from Mr. Bivens and Mr. Dixon.166 While authorities may have believed that the convictions of Mr. Ruffin, Mr. Bivens, and Mr. Harris had confirmed their theory of the case, the true perpetrator had actually been allowed to go free and victimize others.167 In the case of Mr. Harris, he went on to perpetrate at least one additional rape, though there were likely additional victims since he was able to remain free for a substantial period of time following the rape and killing of Ms. Patterson.168 As the judge noted when exonerating Mr. Dixon and Mr. Bivens, “‘[t]he common thread in this case is tragedy.’”169 Mr. Ruffin, Mr. Dixon, and Mr. Bivens were each victims of the plea bargaining system; a system that coerced innocent defendants to falsely plead guilty and a system that then incentivized innocent defendants to falsely testify at trial in return for the benefits of their bargains.170 Ms. Patterson also suffered an injustice at the hands of plea bargaining, because the false pleas and false testimony in her case meant that the actual perpetrator escaped justice for over thirty years.171 Importantly, the victims of Mr. Harris after 1979 were also victims of the plea bargaining system, because plea bargaining allowed prosecutors to coerce false pleas to support a faulty case. And with those false pleas in hand, the system was able to close the investigation while allowing the true perpetrator to go free and victimize again. But how likely is it that someone such as Mr. Dixon or Mr. Bivens might falsely plead guilty and then go on to falsely testify at trial against another innocent person they had never even met before?172 As noted in the previous Part, there are various forces, including sentencing differentials, advice of counsel, and pretrial detention, that can lead to false guilty pleas.173 The additional phenomenon of offering false testimony and the relationship between this behavior and plea bargaining raises further questions Significant research has been conducted during the last decade on offering false testimony at trial.174 In particular, there has been much focus on informants, including jailhouse informants and accomplice informants.175 In fact, these types of false testimony account for seventeen to twenty-one percent of all exonerations by DNA testing, and the research on this type of testimony raises serious concerns regarding reliability.176 Jailhouse informants are individuals who offer to testify about information learned from fellow inmates, often alleged confessions that provide strong evidence of culpability.177 In a 2007 article, Myrna Raeder discussed the danger of using information from jailhouse informants, noting that they “claim no insider knowledge of the crime; rather, their ticket to freedom or other rewards is based entirely on the alleged confessions made to them by defendants, which in an information-friendly world may be spun from whole cloth.”178 Joy, in his article examining jailhouse informants, chose to not even call these witnesses “informants.”179 Instead, he called them “snitches” because of the “high rate of unreliability of uncorroborated jailhouse informant testimony.”180 “The untrustworthiness of such witnesses is well documented,” Joy noted, “and even some prosecutors who use jailhouse informants refer to them as ‘snitches.’”181 One judge stated of jailhouse informants: The most dangerous informer of all is the jailhouse snitch who claims another prisoner has confessed to him. The snitch now stands ready to testify in return for some consideration in his own case. Sometimes these snitches tell the truth, but more often they invent testimony and stray details out of the air.182 While this type of testimony is different from that offered in Mr. Bivens’s and Mr. Dixon’s case, one must wonder whether it should be so viewed. As noted by the judge above, jailhouse informants’ testimony is questionable because the statements are offered in return for a benefit.183 The same can be said of the testimony of Mr. Bivens and Mr. Dixon, though in the context of a formal plea agreement.184 The term “accomplice informant” better describes the roles taken by Mr. Bivens and Mr. Dixon in their case. They were alleged to have participated in the crime and received a benefit for their assistance in testifying against those who did not choose to plead guilty.185 While the use of jailhouse informants comes with considerable skepticism today, the use of accomplice informants is a generally accepted practice in criminal proceedings, and these witnesses tend to carry significant weight with the jury.186 One court stated: No practice is more ingrained in our criminal justice system than the practice of the government calling a witness who is an accessory to the crime for which the defendant is charged and having that witness testify under a plea bargain that promises him a reduced sentence.187 But that same court went on to state: It is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence, but courts uniformly hold that such a witness may testify so long as the government’s bargain with him is fully ventilated so that the jury can evaluate his credibility.188 Nevertheless, while the use of accomplice informants is considered commonplace, there is growing concern regarding the reliability of these statements. Further, psychological research over the last decade has begun to more deeply explore the prevalence of false confessions and false implications of others in the context of accomplice informants and jailhouse informants.189 In one series of studies, participants were brought into a room in pairs.190 One individual was instructed to type on a computer, and the other individual was instructed to read out what was to be typed.191 The catch was that the typist was instructed not to hit the “TAB” button because that would cause the computer to crash.192 As these studies were psychological deception studies, the computer inevitably crashed even without the “TAB” key being struck to allow the experiment to test how likely someone might be to falsely confess or falsely implicate another in this situation.193 In one version of the study, after the computer crashed, the readers were told that they would not have to attend an additional typing session to make up for the lost data if they implicated the typist.194 The study revealed that eighty-seven percent of the readers were prepared to sign a statement falsely alleging that the typist had struck the “TAB” key to secure this benefit.195 In another version of the study, the researchers inserted a confederate as the typist and then had the confederate deny the allegations that they had struck the “TAB” key.196 In this scenario, the paradigm demonstrated that study participants were less willing to falsely implicate the typist when the typist denied engaging in the conduct.197 However, some readers were still willing to falsely implicate the typist and those numbers increased when an incentive was offered to make such a statement.198 In another study by Robertson and Winkelman, participants were given vignettes and asked to imagine themselves as an individual charged with a crime.199 The subjects were then asked if they would testify against another individual accused of murder.200 In one version of the study, participants were told they would have to testify that the other individual had admitted to the murder while in jail, but they were also told that this had not actually happened.201 In return for testifying, the participants were told that they would receive a sentencing benefit in their own case.202 They were, in essence, serving as the jailhouse informants described above.203 The study found that only seven percent of those informed that the defendant had not made the statement were willing to lie to receive the benefit.204 However, the incentives did “elicit false testimony in a significant minority of respondents.”205 Further, “the process of wearing down a witness by sequentially offering increasing levels of incentives is successful, nearly tripling the rate of false testimony.”206 Despite the growth in research on false informant testimony, psychological research had not, until recently, explored the specific relationship between false guilty pleas and false testimony by accomplice informants. However, new research provides additional information regarding this type of defendant decision-making. A pivotal moment in the expansion of research in this area was the 2016 decision of the Japanese Diet (national legislature) to allow plea bargaining for the first time.207 This new experiment with plea bargaining in a country with no history of the practice opened up opportunities for researchers to test some of the assumptions on which American plea bargaining has been built. When plea bargaining finally became lawful in Japan in 2018, the system that had been created was a limited one compared to the breadth of its American counterpart.208 This limited scope was due in part to concerns about false guilty pleas. The new plea bargaining system only permitted agreements for certain types of crimes involving group criminality, and even then, only in exchange for the accused providing information about a crime committed by a third party.209 The assumption underlying the structure was that while defendants might be willing to falsely implicate themselves in return for a bargain, people would not be willing to testify falsely against other innocents in a formal proceeding to secure the benefits of those bargains.210 In 2016, the Japan Foundation Center for Global Partnership provided researchers a grant to test whether this assumption was correct and whether the requirement of providing testimony would prevent false guilty pleas.211 The results of the study showed that the revised plea system still had significant negative effects on the reliability of guilty pleas.212 The new cheating paradigm study was once again built on a methodology originally used to study false confessions.213 This time, the study was run simultaneously in the United States, Japan, and South Korea.214 While only the results from the United States will be discussed for purposes of this piece, similar results were discovered in each country where data was available.215 As in the 2013 study, the methodology was employed “in a controlled laboratory setting, utilizing college students as participants.”216 Students were once again accused of academic misconduct and offered a plea deal.217 Despite having many similarities, the new study differed from the prior research in a number of important ways.218 For example, the new paradigm included an increased role for counsel and more consistent stigma consequences regardless of whether one took the deal or proceeded to trial.219 The new research also tested not only whether participants were willing to confess to their own alleged conduct, but whether the participants were also willing to indicate who instigated the cheating and whether the participants were willing to provide evidence against the other student at a formal hearing.220 The study began with participants agreeing to participate in what they believed was a psychological inquiry, who were divided into individual versus group problem-solving rooms.221 Each participant was led, along with another “student,” into a private room where the test procedures were explained.222 Unbeknownst to the study participant, the other “student” was a confederate working with the research team.223 When the individual problems were distributed, the research assistant stated: “Now I will hand out the individual problems, remember that you are to work alone.” In fact, in one half of the study the confederate encouraged the participant to cheat and work together. In half of the cases, the confederate asked the study participant for assistance in answering the questions, a clear violation of the instructions. First, the confederate asked the study participant: “What did you get for No. 2?” If the study participant did not respond with the answer, the confederate followed up by saying, “I think it is . . . .” If necessary, the confederate asked for assistance with additional problems: “Did you get . . . for No. 3?” Those study participants who acquiesced and offered assistance were placed in the “guilty condition,” because they “cheated” by violating the research assistant’s instructions. In the other half of the cases, the confederate sat quietly and did not ask the study participant for assistance. Absent unprompted attempts to cheat initiated by the participant, those in this scenario were placed in the “innocent condition,” because they did not “cheat” by violating the research assistant’s instructions. After completing the second set of logic problems, the research assistant, who did not know whether cheating occurred, collected the logic problems and asked that the students remain in the room while the problems were graded. Approximately five minutes later, the research assistant reentered the room and indicated there was a problem and asked to speak to the students individually.224 After the students were separated, the study participant was accused of academic misconduct and offered a bargain.225 The first option for the student was to admit the misconduct.226 The punishment for the offense was losing any promised compensation or credit for participating in the study.227 The student was also told that their academic advisor would be informed of the misconduct, thus creating a sense of stigma as a consequence.228 This result was created to mimic probation, where the defendant is able to resolve the matter without incarceration, but the stigma of the conviction remains. The second option for the student was to maintain their innocence and proceed to a trial.229 The “trial” was described as an academic review board.230 While the exact description of the academic review board varied in each location in which the study was conducted to conform with local custom and expectations, the general structure was the same.231 The review board’s structure was modeled after a jury trial system, in which a panel or jury of faculty and staff would hear evidence from both sides and determine whether misconduct had occurred.232 The student was told they had the opportunity to be represented by counsel, advocate for their position, and present evidence in their defense.233 Regarding punishment, the student was informed that if they were found to have engaged in misconduct by the review board, they would lose their compensation and their advisor would be informed.234 These were the same punishments as those attaching if a plea had been entered. To reflect the concept of a “trial penalty,” students were informed that one of two additional punishments would also be imposed.235 Half of the students were told the additional ramification was attendance at an ethics seminar, followed by a pass/fail test on the material.236 The other half of the students were told they would be required to attend the ethics seminar, pass the test, and complete ten hours of community service.237 The reason for the two varying punishments was to test whether increasing the punishment led to higher rates of pleas by either the guilty or innocent students.238 In each scenario, the seminar and/or community service was intended to represent a deprivation of liberties similar to a sentence of incarceration in the criminal justice system—a loss of time.239 Before a student decided whether to accept the plea offer, two additional pieces of information were shared with them. First, the student was presented with a document from a “student advocate.”240 The document stated that the student was entitled to representation, reiterated their right to “trial” before the review board, and provided contact information should the student decide to proceed to the review board and desire representation.241 While not as robust a form of representation as found in the above-described Henderson and Levett study, this ensured students knew their rights and recognized that representation was available to them. Even this modicum of representation surpasses what many receive in the actual criminal justice system.242 In a 2011 report by the National Association of Criminal Defense Lawyers (“NACDL”), case analysis of misdemeanor courts in Florida revealed that most defendants do not have any access to counsel before deciding how to proceed.243 Unsurprisingly, in the NACDL study, most people chose to plead guilty.244 Second, the student was told that the majority of people who appear before the review board in the past were convicted, though they were also informed that ten to twenty percent of students were found not responsible.245 This was an important element to add to the student’s decision-making because similar information is typically communicated to defendants in the actual criminal justice system.246 The conviction rate communicated to participants in this study was similar to or actually below the approximations of actual convictions in the criminal justice systems of the three countries where the study was conducted.247 For example, recent research indicates that less than one percent of defendants in the U.S. federal system are acquitted, which includes seventeen percent of those who preceded to trial.248 In Japan and Korea, the conviction rate at trial has historically exceeded ninety- nine percent.249 In the 2013 version of the cheating paradigm study, the participant was permitted at this point to decide whether to accept the deal or proceed to trial.250 In the new study methodology, there was an added requirement to reflect the supposition that Japan had created a more reliable plea bargaining system by requiring the defendant to agree to testify against someone else to receive the benefits of the bargain.251 To capture and test this aspect of the 2016 Japanese law, two versions of the study were conducted by the research teams.252 In the first study, the participant at this point was presented with a sheet of paper asking them to indicate who instigated the cheating.253 Participants signed the completed form, which indicated that it was a binding document.254 This aspect of the study was intended to test whether innocent participants would be willing to continue when they were required to do more than simply admit their own guilt.255 In the second study, the requirements of the Japanese plea bargaining law were followed more closely.256 The study script required the participant to identify the party to whom they provided assistance or from whom they received assistance.257 The participant was also asked to provide information to the academic review board regarding the cheating incident, thus recreating the Japanese legal requirement that defendants be willing to testify against another person.258 This aspect of the study was intended to test the willingness of innocent participants to not only falsely plead guilty, but also falsely testify against another person they knew to be innocent at a formal proceeding.259 In the United States, 204 individuals participated in the first experiment.260 Of that number, 51.9% pleaded guilty to cheating and 48.1% rejected the offer and elected to proceed to the academic review board.261 As found in other studies, guilt was a strong predictor of whether one would plead or proceed to the academic review board.262 While the study attempted to identify the impact of sentencing differentials on plea rates, there were no statistically significant differences in plea choice between those participants presented with the more lenient punishment before the review board and those presented with the harsher punishment before the review board.263 For students facing the harsh punishment, the plea rates were 73.1% for the “guilty” and 45.9% for the “innocent.”264 In the more lenient condition, the plea rates were 72.4% for the “guilty” and forty percent for the “innocent.”265 Both versions of the study strongly indicate that Japan’s attempt at creating a more reliable system may have succeeded in modestly reducing false pleas, but a significant innocence problem will persist. In the first version of the study, in which participants were required to indicate on a sheet of paper who instigated the cheating, seventy-three of ninety-four participants who pleaded guilty were willing to sign the “instigator” sheet.266 Of those who had engaged in the conduct, 81.3% correctly identified the confederate as the individual who instigated the cheating.267 Of those who had not engaged in the conduct and were “innocent,” 58.6% said the confederate had instigated the cheating.268 Importantly, these were individuals who knew no cheating had occurred, yet were willing to both falsely plead guilty to such an offense and say that another innocent was responsible for the behavior.269 In this study, therefore, it is probable that the plea bargain offered lead to misinformation that pointed to an innocent person.270 In the second version of the study, in which participants were required to implicate the other student and offer evidence at the review board, an additional 133 students participated.271 Again, the results from the study in the United States showed significant rates of guilty pleas and of innocent students pleading guilty.272 The overall plea rate was 67.8%.273 As in the first version of the study, more “guilty” participants accepted the offer than “innocent” participants.274 Nevertheless, 65.8% of the participants who had not engaged in cheating falsely pleaded guilty.275 Of those who had actually offered improper assistance to the confederate, 66.7% took the blame for the conduct on the “instigator” sheet.276 Every single participant who had not engaged in any cheating and decided to falsely plead guilty was also willing to provide information to secure the deal.277 Of those who falsely pleaded guilty, fifty-two percent stated that the confederate was the one who instigated the cheating.278 Further, eighty-eight percent were willing to testify before the review board that cheating occurred.279 The requirement that one implicate an innocent person in wrongdoing and even offer testimony against that innocent person in a formal proceeding caused a few people to pause, but only a very small few.280 For the vast majority of participants, once a decision had been made to falsely plead guilty for the benefits of the bargain, they were willing to say what was necessary to secure those benefits even if that meant standing before a jury and lying about what had occurred.281 And there was something more. Recall above that the plea rate in the second study was 67.8% overall and 65.8% for the “innocent” participants.282 This means that “guilt” was not a significant predictor of plea acceptance as it had been in the first version of this study and in other previous studies.283 While it is not clear yet why this occurred, it may be that the added requirement of cooperating and agreeing to testify before the review board added additional formality to the scenario.284 It is possible that this additional step made the entire process seem more daunting and, rather than reducing the prevalence of false pleas, increased them because of a greater desire to resolve the matter quickly.285 More research is necessary on this aspect of the study, but the study opens the possibility that Japan’s proposed solution to plea bargaining’s innocence problem may have actually exacerbated the problem.286 With this and the previously discussed psychological evidence in hand, the actions of Mr. Ruffin, Mr. Dixon, and Mr. Bivens become less puzzling and more understandable given how the mind works in such decision-making situations. As noted in the previous Part, people want to secure a favorable resolution and move forward.287 In fact, during debriefings conducted during the 2013 Edkins and Dervan psychological study, participants noted two common concerns that led them to falsely plead guilty—a desire to move forward and a desire to secure a punishment that minimized risk and did not require the loss of a future liberty interest.288 This is exactly what Mr. Bivens and Mr. Dixon did in their situation.289 They accepted a resolution that carried finality and certainty, along with a significant benefit.290 When required to testify against another person, someone Mr. Dixon and Mr. Bivens had never even met before trial, they did what eighty-eight percent of the “innocent” participants in the new study did and provided the information requested to secure their deals.291 We conclude this Part by returning to the title of this Article. It is clear that an innocent person who pleads guilty is a victim of the plea process, or, more broadly, of the criminal justice system. And yet, many debates about criminal justice see defendants and victims of crime as operating in totally different spaces; this is true for debates over plea bargaining, as well. Recent victim-centered plea reform movements focus on the victims of crime who are sometimes ignored or overlooked by the criminal system.292 Among these movements is a push to ensure that prosecutors communicate their case decision to the impacted victims.293 In a second Article that is part two of this project, we look at how victims of crime may be impacted by coercive plea practices.294 We focus on those victims who believe they have received justice, only to learn later that an innocent person pleaded guilty to the crime against them. We also focus in this second piece on those individuals who are victimized when the actual guilty party is able to go free and reoffend. All of this is to say that attention should be paid to the impact of coercive plea practices on victims of crime In this current Article, we want to frame the defendants we discuss as victims of coercive bargaining as well. We are certainly not the first to see defendants as victims. Indeed, there is a rich literature that challenges the notion that defendants and victims should be viewed as entirely separate entities.295 “Victim” is a term fraught with many problematic connotations.296 As Aya Gruber has noted, the term has typically “excluded marginalized men and women, often defendants themselves.”297 Instead, the “public face of ‘the’ victims’ rights movement [has] become that of a middle-class white woman.”298 Further, as Miriam S. Gohara argues in recent work, “‘victimization,’ as it is commonly understood in American legal culture, centers on individual offenses inflicted by readily identified perpetrators,” rather than “consideration[s] of structural oppression or contextual harm.”299 As such, Gohara explains that the term tends to focus us on retribution against an individual, rather than structural reform of a system.300 We acknowledge that “victim” is an imperfect word. And yet, for all its problems, the term gives us a collective way to understand that someone has been harmed. For this reason, we add here a case-specific call to consider innocent defendants who falsely plead guilty, and the people they may falsely condemn in the process, as a type of victim of the criminal justice system. We think this is important in explaining the type of harm they suffer and in making clear the urgency of the need for reform. III. REFORMING COERCIVE PLEA BARGAINING

#### Informants deals are plea bargains

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II. Plea Bargaining Approximately 95 percent of all criminal convictions in the United States are the result of a guilty plea.21 This means that trials and liti- gation are rare, while negotiated deals are overwhelmingly the norm. This fact has implications for the transparency of the criminal system. While trials and hearings are public, plea bargaining is private. Litigated facts become part of the public record, while negotiated facts remain off the record, known only to the bargaining parties. The trend toward plea bargaining has thus been accompanied by a trend toward the depublicization of the criminal system. Information gathered by the government—and the investigative methods used to get it—are increas- ingly difficult for the public to learn about. Public information about the kinds of crimes that are actually committed and by whom is like- wise disappearing, replaced by information about the outcomes of deals struck between the government and defendants. As criminal liability is increasingly resolved privately through deals, the public loses sight of the way the system really works. As federal judge Stephanos Bibas once wrote, inside players such as prosecutors, defense attorneys, and judges have quite a bit of information about the way the system operates, but the public experiences the criminal process as “opaque, tangled, insu- lated, and impervious to outside scrutiny and change.”22 The informant deal is an extreme version of the guilty plea, a kind of hyper-deregulated, extra-secretive bargain. An informant deal resem- bles a plea in that it resolves the informant’s potential criminal liability, at least temporarily, in exchange for information. It is also like a plea bargain in that the resolution of liability is negotiated and takes place in private between the law enforcement official and the defendant or perhaps a defense attorney. But informant deals are less regulated and more secretive than plea bargains for a number of reasons. Unlike a plea, the deal may never come to light at all. A typical informal agreement between a police of- ficer and a street suspect—in which the suspect avoids arrest and the officer obtains information—may never be written down or revealed to anyone else. Whatever crimes the suspect committed may remain unknown to the public, to prosecutors, and even to other members of the police department. Even if an informant is arrested, their potential liability may be han- dled in ways that evade regulation, documentation, or scrutiny. For ex- ample, in United States v. White, police officer Mike Weaver searched Shawn White’s car and found a glass pipe containing what appeared to be methamphetamines. Weaver offered White a deal. Before reading White his Miranda rights, Weaver stated that he wanted to ask defendant some questions and see how cooperative he would be that night. . . . Weaver explained that if he sent the glass pipe to the crime lab and the lab found methamphetamine residue, he could charge defendant with a felony of possessing metham- phetamine. Weaver said that the “deal” was that he could write the police report to reflect a charge of possessing drug paraphernalia, a misde- meanor, or possessing methamphetamine, a felony. Weaver advised that depending on defendant’s level of cooperation, defendant could decide to “take the whole 100 yards, or deal with the small stuff.” Weaver told defendant that he could help in a lot of ways, or he could “sit there like a lump on a log,” which was not in his best interest. Weaver told defendant that if he did not cooperate, Weaver would simply list charge after charge and take defendant to the county jail.23 White cooperated and, as promised, Officer Weaver wrote the report to reflect only the possession of paraphernalia. The writing of the police report in effect constituted a plea bargain, in which White’s actual crimi- nal conduct was never fully recorded. Prosecutors also alter criminal cases and charges to reflect a de- fendant’s cooperation. A prosecutor may decline to indict on the un- derstanding that the informant will start “working off ” her charges. Charges may be dropped or reduced, and facts pertaining to charges and sentencing—for example, the amount of drugs at stake—may be negotiated between the parties so that the record will reflect the agree- ment. In other words, the court and the public will eventually see only what the parties decide to reveal. Finally, and of great importance, the state can extract concessions in an informant deal that it could not otherwise get through a criminal sentence obtained via guilty plea. For example, informants can be re- quired to have sex, expose themselves to illegal drug use, or even risk their lives as part of a cooperation deal—requirements that no court could legally impose as part of a formal sentence. To be sure, informant deals vary immensely and take place along a spectrum of informality and secrecy. At the most formal and transpar- ent end, a represented defendant will sit down with his attorney and ne- gotiate a written agreement with the government, with relatively precise terms of cooperation in exchange for known benefits. Such deals are typical of white collar and political corruption cases.24 The plea agree- ments entered into by Enron CFO Andrew Fastow and by William “Rick” Singer in the college admissions scandal are a matter of public record, as are the contours of each man’s cooperation, making it possible for the public to figure out what crimes were forgiven and what benefits were exchanged.25 By contrast, at the most secretive end of the spectrum, no one but the police officer and suspect may ever know what crimes were committed and what information was obtained. Because the bulk of informant use takes place in street-level and drug enforcement, where investigations and deals tend toward the informal, informant use as a whole tends toward the secretive. In these ways, pervasive informant use exacerbates the trend toward the secret adjudication of crime and punishment. The greater the reli- ance on informant deals rather than traditional plea bargains and trials, the less the public learns about the crimes being committed and about how the criminal system resolves liability. III. Discovery

#### Leniency towards informants encourages crimes – it encourages crimes to fulfill arrest quotas, harms signaling effects of crime, and causes new crimes by active informants to go unpunished

Natapoff 22 [Alexandra Natapoff, Lee S. Kreindler Professor of Law at Harvard Law School, member of the American Law Institute, and Guggenheim Fellow with a BA in philosophy from Yale University and a JD from Stanford Law School, 2022, “Snitching Criminal Informants and the Erosion of American Justice Second Edition,” NYU Press, https://arizona-ua.primo.exlibrisgroup.com/permalink/01UA\_INST/2eo519/alma991050104313703843]/Kankee

B. Compromising the Purposes of Law Enforcement While using informants produces certain kinds of benefits, it also threat- ens some of the very purposes of the law enforcement endeavor. Most obviously, it inherently involves the toleration of crime. The practice of letting known criminal actors walk away in exchange for information, and even facilitating their criminality to enhance their informational value, flips the law enforcement endeavor on its head. Numerous judi- cial cases and press accounts reveal handlers who turned a blind eye when their informants committed murder, extortion, fraud, money laundering, bribery, theft, tax evasion, fencing stolen goods, illegal weapons possession, domestic violence, and child abuse.51 The Depart- ment of Justice reports that 10 percent of the FBI’s own informant files contain evidence that the informant was committing unauthorized crimes about which the government knew.52 Drug enforcement suffers from a particularly strong version of this problem. Police, for example, give thousands of dollars’ worth of cash and drugs to informants who suffer from substance use disorders, pur- portedly in the name of conducting the “war on drugs.” In 2008, Brook- lyn police officers were caught paying informants with drugs taken from dealers who were arrested after the informants pointed them out. One officer bragged about the practice on tape, explaining that officers would seize drugs but report a lesser amount, keeping the unreported drugs to give to informants later on.53 A decade later, a police whistleblower re- corded fellow police engaging in similar practices—including protecting and supporting drug dealers who served as their informants—in Mount Vernon, New York.54 Some informants commit new crimes under cover of their informant status. Tony Warren, for example, started working as a Secret Service informant in 2001 investigating a Nigerian check-fraud scheme, after which he started his own check-fraud scheme involving the theft of hundreds of thousands of dollars.55 Armando Garcia, already convicted once for cocaine importation, was earning some extra money by help- ing the FBI intercept 1,200 kilograms of cocaine headed for Florida in a submarine. Garcia used his relationships with the FBI and DEA to cloak his own unauthorized 25-kilogram cocaine deal.56 Sometimes the lines blur between authorized and unauthorized in- formant crimes. In 2004, police told Troy Smith that he needed to pro- duce six arrests in order to escape charges himself. In 2005, Smith sold methamphetamines to another informant. When Smith was charged as a dealer, he claimed that his handler had been pressuring him for a new arrest and that he was therefore authorized to sell the drugs in pursuit of his quota. The court did not permit Smith to call the police handler to the stand or to make the argument to the jury, and Smith was con- victed and sentenced to thirteen years.57 Similarly, when Ralph Abca- sis was charged with importing heroin, he asserted that his New York drug enforcement handlers knew about and had implicitly authorized the scheme, while the agents asserted that Abcasis had been terminated as an informant prior to the heroin bust.58 In such cases, whether new crimes have actually been authorized by the government is often a mat- ter for debate and speculation. Using informants alters other fundamental aspects of the crimi- nal process, for example, the principle that the worse the crime, the worse the punishment. This foundational rule is routinely flouted in the world of snitching. For example, in the drug prosecution of Ced- ric Robertson—Crips gang member, drug dealer, and paraplegic— prosecutors also charged his girlfriend, Lakisha Murphy, as well as four active gang members. Although the judge recognized that Murphy was not part of the gang or Robertson’s drug business but was only mar- ginally involved because she lived with and cared for her paraplegic partner, Murphy received a mandatory ten-year sentence. Because the four active gang members cooperated against Robertson, they received lower sentences than Murphy did, even though their crimes were far worse. Even the judge complained of the disparity, telling Murphy that “it seems unfortunate in this case that you’re doing more time than some of these guys did . . . and there’s nothing I can do about it.”59 Sometimes such disparities have racial dimensions. In 1999, mafia hit man John Martorano agreed to cooperate against his Boston mafia colleagues Whitey Bulger and Stephen Flemmi. In exchange, he re- ceived a twelve-year prison sentence for the twenty murders to which he admitted, in addition to extortion, money laundering, and rack- eteering charges. African American leaders in Boston complained that, even as federal prosecutors cut the deal with cold-blooded killer Martorano, they were considering seeking the death penalty against young Black local gang members accused of committing two murders. “It fosters distrust in our criminal justice system,” asserted one Mas- sachusetts state representative. “It mocks the fundamental principle that justice is blind and evenly applied.”60 More generally, studies have shown that federal Black and Latinx defendants who provide substan- tial assistance receive smaller sentencing reductions than do cooperat- ing white defendants.61 Such cases reflect the more general phenomenon that snitching skews the system’s evaluation of guilt and innocence. As law professor William Stuntz put it [D]efendants who have the most information to sell get the biggest dis- count. . . . Trading plea concessions for information means giving the big- gest breaks to the worst actors. . . . [W]orse, . . . [i]n order to make their threats credible, prosecutors must punish defendants who fail to give them the information they want. . . . In a system (like ours) that rewards snitches generously, some defendants will be punished very harshly— nominally for their crimes, but actually for not having the kind of infor- mation one gets only by working at high levels of criminal organizations.62 Or as federal district judge Roger Vinson once mourned, “the problem . . . is that the people who can offer the most help to the government are the most culpable.”63 This shell game of criminal liability weakens the force of the legisla- tive process. When legislatures craft criminal laws, they define the con- duct for which liability will attach and specify the range of punishment. The California robbery statute, for example, defines “robbery” as “the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear,” and the statute sets specific sentences ranging between two and nine years, depending on the nature of the underlying conduct.64 When legislatures define culpable conduct, and set the pun- ishment for a particular crime at a higher level than for other offenses, this is a grave societal statement that we collectively consider such con- duct to be worse.65 The ability of informants to escape punishment for more serious be- havior erodes the force of these highly specific legislative decisions. In- stead, punishment turns on the amorphous and sometimes momentary decisions of police and prosecutors regarding the usefulness and conve- nience of an informant, even when he or she may have committed acts that the legislature has decided deserve substantial punishment.66 In ef- fect, snitching is the universal loophole to every substantive criminal law. It is as if each code provision read: “Here is the crime. Here is the punishment. Unless you cooperate.” C. Who’s in Charge around Here?

#### Reliance on informants allows them to weaponize law enforcement to serve the informants’ own goals

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C. Who’s in Charge around Here? “You’re only as good as your informant,” explained the police officers to the sociologist.67 “Informers are running today’s drug investigations, not the agents,” complained a twelve-year veteran of the DEA, “[and] agents have become so dependent on informers that the agents are at their mercy.”68 Even prosecutors worry: “These [drug] cases are not very well investigated. . . . [O]ur cases are developed through cooperators and their recitation of the facts. . . . Often, in DEA, you have little or no follow up so when a cooperator comes and begins to give you informa- tion outside of the particular incident, you have no clue if what he says is true.” Another prosecutor revealed that “the biggest surprise is the amount of time you spend with criminals. You spend most of your time with cooperators. It’s bizarre.”69 Particularly in drug investigations, police and prosecutors rely heav- ily on informants to make basic decisions about cases: Who should be investigated? What should the charges be? Which accomplice should be the witness and which one should be the defendant? Because crimi- nal informants are often key sources of information, their choices about what to reveal or conceal become crucial ingredients in the official decision-making process. As a result, government actors are all too often at the mercy of their own informants. Heavy dependence on informants also displaces more independent decisional processes: according to one former DEA and customs agent, “reliance on informants has replaced good, solid police work like under- cover operations and surveillance.”70 Prosecutors in Yaroshefsky’s study described violent gang cases as “all based on cooperators . . . [and evi- dence] for which there is only one rat after another.”71 Another consequence of this interdependence is to concentrate police attention on poor neighborhoods of color from which drug informants tend to come. Relying on informants naturally focuses attention on the people closest to those informants, since snitches are unlikely to know people outside their own socioeconomic group or community. As dis- cussed in more detail in chapter 6, the use of snitches thus becomes a kind of focusing mechanism on a community, guaranteeing that law enforcement will disproportionately identify new targets there.72 Finally, police and prosecutors often inadvertently validate the inter- ests of their criminal informants. Law enforcement agents universally recognize the danger that informants may be cooperating in order to further their own aims: to eliminate competition, for example, or take revenge.73 When this happens, it means that the state has effectively placed its penal power at the disposal of criminal actors. This is deeply problematic because the integrity of law enforcement discretion turns heavily on how the system selects within a nearly unlimited pool of po- tential targets.74 Indeed, because the vast majority of potential cases will never be pursued, it is the quintessential role of police and prosecutors to choose which crimes will be addressed in ways that validate broad public values of fairness and efficiency.75 The more police and prosecu- tors rely on informants in selecting targets, the more the integrity of the system is compromised. D. Mishandling and Corruption

#### Informants cause “official lawlessness” – known murderers and rapists go off scot-free by lying in court, often convicting innocents, causing more crime

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D. Mishandling and Corruption According to the DEA, “Failure in the management of cooperating indi- viduals constitutes, perhaps, the most obvious single cause of serious integrity problems in the DEA and other law enforcement agencies.”76 Former DEA agent Fitzgerald tells of one inexperienced agent who gave his informant free rein to commit new crimes and who was so thoroughly at the informant’s mercy that the agent actually served as a lookout during a burglary.77 The Office of the Inspector General for the U.S. Department of Justice concluded in a 2016 audit that the DEA mishandled hundreds of its informants, including paying unreliable and deactivated sources millions of dollars without tracking, supervision, or documentation.78 The FBI’s use of mafia informants during the 1970s, 1980s, and 1990s has been called “one of the greatest failures in the history of federal law enforcement” by the U.S. House of Representatives Committee on Gov- ernment Reform. Over the course of those three decades, the FBI “made a decision to use murderers as informants. . . . Known killers were pro- tected from the consequences of their crimes and purposefully kept on the streets.”79 Perhaps the most infamous incident of the era took place in the FBI’s Boston office. For twenty years, Agent John Connolly and a handful of others managed a relationship with Irish mob hit men James “Whitey” Bulger and Stephen “The Rifleman” Flemmi, who provided the Boston FBI with valuable information about their rivals in the Italian mafia, La Cosa Nostra. As part of that relationship, Connolly protected Bulger and Flemmi from discovery and prosecution for their racketeer- ing activities, extortion, and the murder of at least nineteen people. Connolly lied to prosecutors and other FBI agents in order to protect his sources. In order to protect their informants, FBI agents also permitted four innocent men to be convicted of murder and to serve decades in prison, a violation of law for which, in 2007, the FBI was ordered to pay a judgment of $101 million.80 Connolly is currently serving a forty-year sentence. Flemmi, now eighty-eight years old, is serving a life sentence for ten murders. Bulger was a fugitive for sixteen years before he was caught in 2011; he was killed in prison in 2018. The saga was sufficiently infamous that Hollywood turned it into the 2015 film Black Mass. More commonly, informant-related misconduct takes place on a smaller scale. Police officers in Columbus, Ohio, were having sex with their informant Michelle Szuhay and wanted to help her get a job as a stripper. So police took Ohio resident Haley Dawson’s identity—in the form of her driver’s license and Social Security number—and gave it to Szuhay without Dawson’s knowledge. An arbitrator ruled that the offi- cers’ actions in taking Dawson’s identity and giving it to Szuhay were not illegal, although they constituted “a serious error in judgment.”81 Sometimes police use informants as a cheap and easy way to meet performance goals. Dallas police paid informants to plant fake drugs on immigrant workers, who were then arrested and sometimes deported before the scam was discovered. The busts were used to inflate the de- partment’s performance statistics.82 From the prosecutorial end, sometimes misconduct takes the form of misleading courts and defendants in order to obtain convictions. In prosecuting Blufford Hayes for murder, for example, a California pros- ecutor cut a deal to dismiss Andrew James’s pending felony charges in exchange for his testimony against Hayes. James also received immu- nity for his own possible involvement in the murder. The prosecutor then lied to the court, insisting that no deal had been made, and elicited James’s perjured testimony in front of the jury.83 Similarly, in the effort to obtain a conviction in a gruesome double murder, another California district attorney cut a deal with Norman Thomas, one of the murder defendants who had admitted to dismem- bering one of the victims. In exchange for Thomas’s testimony against his codefendant, the government dropped his murder charges and ar- ranged that Thomas would avoid a psychiatric exam that might have undermined his reliability as a witness. The prosecution concealed this deal from the defense attorney and the court. Thomas’s testimony was the sole evidence that the defendant personally committed the murder.84 Disturbing stories exist of law enforcement officials who exploit the secrecy and deregulation of informant use to deploy snitches for their own personal gain, for example, when Boston police detective David Jordan teamed up with an informant to steal $81,000 worth of cocaine from a drug dealer.85 In another scandal, Baltimore police officer Vic- tor Rivera and two other officers stole three kilograms of cocaine from a drug bust. They gave the cocaine to one of their informants to sell on the street, with whom they then split the tens of thousands of dollars in proceeds.86 But the far more common scenario is that of the agent or prosecutor who bends or breaks the rules on behalf of his source in pursuit of other criminals and cases. In these ways, otherwise well- meaning public officers end up breaking the law in their efforts to fight crime. Because using informants inherently demands the toleration of some levels of criminality, such official lawlessness is a predictable con- sequence of the practice. E. Crime Victims Although one of the central purposes of the criminal system is to pro- vide relief and vindication to crime victims, using informants requires constant compromises with that purpose. As one frustrated victim of Marvin Jeffery’s identity-theft scheme put it, “I do everything legally. I vote. My credit is clean. I try to do all the right stuff, follow all the rules. Then there’s this guy, driving around in a gold Escalade, laugh- ing it up, cashing my checks.”87 Karen Parker was the twelve-year-old girl molested by informant Paul Skalnik in Florida. Parker reported the sexual assault to the police, even passing a lie detector test, but Skalnik was too valuable as an informant and was never prosecuted. “No one ever said, ‘That’s wrong,’” said Parker years later. “The message I got was that what he did was O.K.—that it wasn’t serious, it wasn’t a crime.”88 Releasing dangerous informants inherently runs the risk that they will commit new crimes. Darryl Moore, for example, was a known hit man, drug dealer, robber, and rapist with a substance use disorder. His history of perjury was so extensive that his own mother indicated that she would not believe him under oath. Nevertheless, in exchange for his testimony in a murder case, Chicago prosecutors offered him a deal: weapons and drug charges against him would be dropped and he would be paid cash. Moore testified in the case, although he later stated that he fabricated his testimony. After being released and returning to his home neighborhood, he attacked an eleven-year-old girl with a gun and raped her.89 Odell Hallmon, the snitch who testified falsely four times against Curtis Flowers in Mississippi, avoided punishment in seven felony cases and was released multiple times. He subsequently killed three people.90 As trading liability for information has become increasingly common, it desensitizes decision makers to the profound compromises that such law enforcement practices entail. For example, it is a common drug en- forcement practice to excuse property crime or violent offenders who provide drug-related information. Because property and violent crimes have victims, the practice conveys the message to those victims that their personal suffering or need for vindication is less significant than drug enforcement goals. As discussed at length in chapter 6, this prob- lem has reached it zenith in poor urban communities in which the per- vasive use of criminal informants may actually be exacerbating crime and insecurity. F. Vulnerable Informants

#### Informants are dehumanized means to an end for law enforcement to solve the case at any cost. This manipulation causes the murder, deportation, overdose, government coerced rape, etc. of the informant other

Natapoff 22 [Alexandra Natapoff, Lee S. Kreindler Professor of Law at Harvard Law School, member of the American Law Institute, and Guggenheim Fellow with a BA in philosophy from Yale University and a JD from Stanford Law School, 2022, “Snitching Criminal Informants and the Erosion of American Justice Second Edition,” NYU Press, https://arizona-ua.primo.exlibrisgroup.com/permalink/01UA\_INST/2eo519/alma991050104313703843]/Kankee

F. Vulnerable Informants Bosco Enriquez was fifteen years old when Miami police recruited him into becoming an informant against local drug gangs. The teenager wore a wire and provided information in dozens of cases. As a result of his dangerous work for police, he acquired a substance use disorder. Police carelessly released his name in court documents, which led to brutal attacks against Enriquez and his family by angry gang members. His substance use disorder landed Enriquez in prison, where he was raped. In 2012, the U.S. government deported him to Nicaragua, where he had not been since he was four years old. “They betrayed me,” said the young man to a reporter. “I put my life on the line on seven or eight occasions. . . . [W]hat really makes me angry is that [the police] didn’t help me when I was thrown out of the country. I asked them, and they said there was nothing they could do.”91 Six years later and over a thousand miles away, New York law enforce- ment betrayed Henry, a high-school junior who agreed to inform on other members of his MS-13 gang in exchange for protection and a new life. After he cooperated, police turned Henry over to ICE. ICE used the information that Henry himself provided to police to deport the seventeen-year-old back to El Salvador, where, marked as a snitch, he was likely to be killed.92 Our penal system has little sympathy for people in the criminal sys- tem. People whose rights are violated or who are physically or psycho- logically harmed during the criminal process are often perceived to be getting what they deserve for having broken the law in the first place. This hostility is part of what legal scholar Sharon Dolovich calls “the dehumanized, essentialized, and unforgiving conception of the penal subject.”93 It is what Bryan Stevenson mourns as our institutional ten- dency to “reduce people to their worst acts and permanently label them ‘criminal,’ ‘murderer,’ ‘rapist,’ ‘thief,’ ‘drug dealer,’ ‘sex offender,’ ‘felon’— identities they cannot change regardless of the circumstances of their crimes or any improvements they might make in their lives.”94 In the informant context, this unsympathetic posture has translated into a high tolerance for the risks and harms that often accompany co- operation with the government, to the point of explicitly devaluing in- formant lives. As Judge Richard Posner of the federal Seventh Circuit Court of Appeals bluntly reasoned, confidential informants often agree to engage in risky undercover work in exchange for leniency, and we cannot think of any reason, especially any reason rooted in constitutional text or doctrine, for creating a cat- egorical prohibition against the informant’s incurring [costs such as] the usual risk of being beaten up or for that matter bumped off by a drug dealer with whom one is negotiating a purchase or sale of drugs in the hope of obtaining lenient treatment from the government.95 As an ethical matter, tolerating such violence against informants is reductive and dehumanizing, a way of writing off their value as people. As an intellectual matter, it reflects an uncritical acceptance of the infor- mant deal: specifically, the assumption that informants and the govern- ment bargain on an equal footing and that the risks informants incur are thus their own responsibility. This uncritical assumption overlooks the lopsided power dynamics of the way informants are often created in the first place. Informants can be the most defenseless players in the criminal justice drama—those without counsel or education, those with substance use disorders, young, frightened, alone, or otherwise suscep- tible to official pressure. As one sociologist puts it, the creation of an informant “is not a paradigm of simple bargaining between equals but, rather, a complex interaction between personnel of the criminal justice system and vulnerable people.”96 Indeed, part of the process of creating informants involves the purposeful manipulation of their vulnerability. As Agent Fitzgerald describes it, “The method selected for exerting the pressure [on the in- formant] varies and is limited only by the imagination, experience, and skill of the investigator.”97 Former narcotics agent Mallory is even more direct: It is a widely accepted fact that individuals are most vulnerable to becom- ing cooperative immediately following arrest. . . . [I] learned to “strike” while the “iron is hot.” Informants will often rethink their exposure and decide not to cooperate if given too much time to contemplate their deci- sion. However, a night or two in jail can work for the investigator to help the informant decide to cooperate.98 As noted above, one of a suspect’s most important resources is de- fense counsel, not only to advise them about how valuable cooperation might be but also to dispel the panic that many suspects feel when con- fronted with the possibility of prosecution or incarceration. Accord- ingly, well-represented, educated, well-resourced informants are in a better position to make rational judgments about whether and to what extent to cooperate or whether to invoke the adversarial process and fight the charges against them. Vulnerable suspects such as drug users, juveniles, people with mental disabilities, or those for whom prison is especially life-threatening are more likely to agree to cooperate even if the benefits are uncertain or small or the risks very high. They may also be more likely to provide false evidence under pressure to produce information. Because police and prosecutors have wide leeway in negotiating in- formant deals, there are few limits to the concessions that can be ex- tracted from informants. Many highly extractive arrangements are perfectly legal. Amy Gepfert, for example, agreed to pose as a prostitute and engage in oral sex with another suspect in order to avoid cocaine charges.99 Similarly, the FBI used Helen Miller—a sex worker dependent on heroin and a fugitive from Canadian drug charges—as an informant to investigate Darrel Simpson by having sex with him for five months. The court held that neither the FBI’s use of deceptive sexual intimacy against Simpson, nor the pressure on Miller to have sex in order to es- cape criminal charges herself, nor Miller’s continued illegal drug and sex work activities while serving as an informant constituted outrageous government conduct.100 Some arrangements are illegal but happen anyway. Police all over the country have been fired for pressuring their informants into having sex with them.101 Since the first edition of this book was published, the problem of in- formant vulnerability has received far greater public attention. In 2012, journalist and MacArthur “Genius” Fellow Sarah Stillman published a widely read article in the New Yorker titled “The Throwaways,” in which she chronicled story after story about the government’s use of young informants and the violence inflicted on them. Three years later, 60 Min- utes aired a segment about young people who were killed while work- ing as informants. The story focused on North Dakota college student Andrew Sadek, whom police pressured into becoming a drug informant and who was found dead months later. Numerous colleges have now been exposed and criticized for permitting campus police to pressure students into becoming informants, including the University of Mas- sachusetts Amherst, University of Mississippi, University of Wisconsin, and the U.S. Air Force Academy.102 Transgender people can be especially susceptible to the pressure to cooperate. Because they face heightened danger of violence in jails and prisons, they may go to great lengths to avoid even brief periods of in- carceration. Shelly Hilliard, the transgender teenager whose murder was described in the introduction, agreed to cooperate to avoid incarcera- tion even though she faced only a minor marijuana charge.103 Immigrants are vulnerable too: they can experience unique pressures to cooperate in order to obtain a visa or to avoid deportation. ProPublica, the Intercept, and other journalistic outlets have chronicled how ICE and the FBI use the promise of a visa—sometimes called the “immigration relief dangle”—in conjunction with the threat of deportation to pressure immigrants into providing information about others in their communi- ties, often at great risk to those informants. Muslim immigrants in par- ticular have been targeted by the FBI; the agency sometimes interferes in the immigration process in order to obtain cooperation, even though the practice violates FBI regulations.104 For people with mental health issues, cooperation can be especially risky. Montana police pressured twenty-one-year-old Colton Peterson into becoming an informant even though they were aware of his suicidal tendencies; he killed himself the next day.105 Individuals with mental disabilities can also be coerced or swayed into providing information that may not be accurate. For example, Derrick Megress, the informant in Hearne, Texas, who fingered numerous innocent residents, suffered from mental disabilities.106 One of the central challenges of informant use is the pervasive risk and harm it inflicts on people with substance use disorders. Police rou- tinely give cash to informants, knowing that they will use the money for drugs, or require people with a substance use disorder to engage in risky drug transactions. When UMass Amherst police pressured Logan into becoming an informant, instead of reporting his heroin addiction to the university and to his parents as required, they pushed him into further drug exposure while preventing him from getting medical help. Logan died of an overdose. Legislatures are starting to respond to these kinds of tragedies by considering new rules governing the use of vulner- able informants. These legislative efforts are discussed in more detail in chapter 8. To be sure, not all criminal informants are vulnerable in these ways. Mafia hit men, international drug dealers, and high-level political op- eratives with well-paid defense attorneys have a wealth of resources at their disposal in negotiating with the government. Indeed, some of the worst debacles described in this book are the result of the government’s inability to check or control such informants. But for the typical person confronted by police without counsel or other protections, or for the indigent suspect sitting in a jail cell, the government can be a formidable opponent indeed. Such suspects may agree to become informants out of fear, ignorance, and their perception that they have no choice. G. Witness Intimidation and the Spread of Violence In 2004, fourteen-year-old Jahkema “Princess” Hansen witnessed a murder in her Washington, D.C., neighborhood. She refused to talk to police and instead asked the killer and his associate Franklin Thompson to compensate her for her silence. “For real, little sis, you better not be snitching,” Thompson told her, according to a bystander. Hours later, Thompson shot and killed Princess.107 Witness intimidation is connected to informant use in a variety of ways. Criminal informants are routinely subject to threats or harm. To a lesser degree, civilian witnesses may also experience threats, or the fear of retaliation, when they agree to cooperate in a criminal case. While most civilian witnesses and criminal informants inhabit different worlds, the violence associated with criminal snitching has spilled over into the realm of civilian witnessing. A 2009 investigation by the Philadelphia In- quirer, for example, blamed “an epidemic” of witness intimidation, and the city’s failure to address it, for Philadelphia’s high dismissal rates in violent crime cases.108 Police and prosecutors in numerous cities have stated that it is difficult to get witnesses to serious crimes to come for- ward. In a 2016 survey, most federal criminal legal officials stated that they were aware of threats or harms to cooperating defendants in one or more cases. The survey identified hundreds of cases in which coopera- tors or witnesses were threatened or harmed.109 Various aspects of the criminal system are responses to this form of informant-related violence, from witness protection programs to solitary confinement provisions for cooperating prisoners. Witness intimidation, however, is just one of the ways in which using informants creates and spreads violence. The widespread culture of snitching promotes violence against informants themselves; it tolerates violence against victims of crimes perpetrated by informants; and it exacerbates violence against innocent bystanders who must live cheek- by-jowl with the violent methods used by gangs to police themselves against betrayal from the inside. For example, sixteen-year-old Martha Puebla was killed by Los Angeles gang members because police misin- formed Jose Ledesma, a murder suspect, that Puebla had identified him and was cooperating with the police. In fact, Puebla had told the police that she had not seen Ledesma, but police forged Puebla’s signature on a fake photo array and showed it to Ledesma in order to pressure him to confess. Instead of confessing, Ledesma ordered Puebla’s murder.110 Indeed, nearly every informant story contained in this book consti- tutes an example of informant-related violence, from Darryl Moore’s attack on his eleven-year-old victim to the death of ninety-two-year- old Kathryn Johnston at the hands of Atlanta police operating on a bad informant tip. One sociological study concludes that “snitching is a pervasive element of inner-city street life that poses dangers for street criminals and law-abiding residents alike.”111 Increases in violence are thus a particularly devastating cost of informant policies. H. Systemic Integrity and Trust

#### Informants are hallmarks of authoritarianism, undermine democracy, and convict innocents – comparative politics proves

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V. Informant Use in Comparative Perspective The United States permits law enforcement to use criminal informants more freely than do many other countries. These differences highlight some fundamental policy choices adopted by American law enforcement and courts. One is the tolerance of high levels of informant unreliability. Another is the notion—central to the practice of plea bargaining—that it is permissible to trade away criminal liability in exchange for infor- mation. Another is reflected in the governmental acceptance of, and even engagement in, ongoing criminal activity. These are controversial precepts that many other nations have resisted or declined to accept altogether.95 As law professor Jacqueline Ross explains with respect to Europe in particular, “The United States and European nations con- ceptualize, legitimate, and control undercover policing in substantially dissimilar ways.”96 For some countries, the unreliability associated with informants has made them a highly disfavored tool. In 1997, for example, the govern- ment of Ontario, Canada, appointed a commission to review the wrong- ful murder conviction of Guy Paul Morin. After hearings that lasted over five months and called 120 witnesses, the Kaufman Commission con- cluded that Morin’s wrongful conviction was due in large part to the tes- timony of two jailhouse informants who fabricated evidence that Morin had confessed to the murder. The commission also found that “the sys- temic evidence emanating from Canada, Great Britain, Australia and the United States demonstrated that the dangers associated with jail- house informants were not unique to the Morin case. Indeed, a number of miscarriages of justice throughout the world are likely explained, at least in part, by the false self-serving evidence given by such informants.” The commission issued dozens of recommendations for reform, includ- ing limiting the use and reward of informants, increased disclosure, and improved police and prosecutorial training.97 As a result of the commis- sion’s recommendations, the Canadian attorney general established new policies limiting jailhouse informant use.98 For other countries, the covert practices associated with informant use are considered legally and morally problematic. Methods such as the “bust-and-buy” sting and informant lenience deals, while standard in the United States and United Kingdom,99 have been resisted by other European countries, often on the principle that the government should neither engage in criminal conduct nor tolerate it. Well into the 1970s, “[t]hroughout most of continental Europe, . . . virtually all these [un- dercover] techniques were viewed, even by police officials, as unneces- sary, unacceptable, and often illegal.” Today, many European countries engage in some form of these tactics, but to a lesser degree than does American law enforcement.100 In the Netherlands, for example, the Dutch began adopting American-style undercover tactics in the 1970s. In the 1990s, the gov- ernment was rocked by scandal when it was revealed that police and highly paid criminal informants were actively running drug operations, importing tons of drugs into the country, some of which were released onto the streets. The resulting Parliamentary Inquiry from 1995 to 1996 led to significant restrictions on law enforcement authority to use crimi- nal informants and to engage in U.S.-style undercover operations.101 Central to the Dutch public debate over informant use has been the contrast with American practices. According to Police Commissioner René Karstens, Dutch and American law enforcement take fundamen- tally different approaches to questions of informant legality and the need for regulation: “[T]he philosophies on infiltration [by informants] were rather divergent. Where we [Dutch] feel that certain limitations are needed on infiltration as a method, the Americans are inclined to let the end justify the means. With them anything goes.”102 In Italy, criminal informant use is broadly constrained by the “con- cern that undercover operations might corrode the rule of law by en- abling police to engage in ‘crime.’” If they have not obtained explicit authorization, Italian law enforcement officials may be prosecuted for crimes they commit or permit in pursuit of criminal targets and inves- tigations. In order to permit some undercover investigations, Italian law thus contains a series of narrow exceptions that relieve police of criminal liability for specific acts such as the simulated drug buy or postponing arrests and seizures for investigative purposes—acts that would other- wise be deemed illegal police conduct.103 Under U.S. law, by contrast, such decisions are committed to law enforcement discretion without threat of criminal liability or even judicial review. Similarly, the legal culture in Germany includes a prohibition against the official toleration of lawbreaking. In 1992, under pressure to permit greater use of undercover tactics, Germany passed reforms designed to legitimize a limited form of undercover policing. Those reforms per- mit the use of undercover informants only in connection with serious crimes and only when it is extremely difficult for police to obtain evi- dence by other means. The reforms were accompanied by great contro- versy: as one German official commented, “undercover investigations should always be considered a tactic of last resort.”104 Such social and legal distaste for informant use stands in stark con- trast to the former Soviet Union, where the use of informants was con- sidered not so much a “necessary evil” as a “fundamental means of pursuing both ordinary criminals and individuals who might prove a political threat to the regime.” There, a lack of legal safeguards and the official premium placed on the state’s interest made informant recruit- ment and use widespread.105 Snitching has been a prominent feature of authoritarianism in other countries. The former East German government was infamous for con- ducting pervasive surveillance of its own citizens through informants working for the state secret police, known as the “Stasi.” Indeed, the use of informants in that context came to be seen as a paradigmatic aspect of authoritarianism precisely because it reflected such offensive disrespect for citizen privacy and autonomy.106 The use of informants has also been associated with the Israeli occupation of Palestinian territories and the British occupation of Northern Ireland.107 The ongoing evolution of informant use around the world reflects broader developments in international law enforcement. Collaborative international drug enforcement efforts, for example, have had a signifi- cant impact on the law and practices of European nations. Drug policy expert Ethan Nadelmann describes the “Americanization of European drug enforcement” as the gradual adoption of DEA-style methods of drug investigation by countries such as Germany, the Netherlands, Aus- tria, Belgium, France, Spain, and Italy.108 Such methods have introduced more reliance on undercover criminal informants, more trading of li- ability, and more tolerance of ongoing crime than European criminal systems have historically accepted. In the antiterrorism arena in particular, there have been calls for the harmonization of legal standards to permit more international collabo- ration. Professor Ross has pointed out the significant challenges that such cooperation entails: Nations would need to renegotiate the tense political compromises legiti- mating undercover operations (which are everywhere controversial, but for different reasons). And they would need to revise the practices and procedures not just of undercover investigations, but of their domestic policing regime, including in areas that at first glance appear unrelated. Champions of closer cooperation who call on countries to overcome in- sularity in the interest of collective struggles against international crime and terrorism do not appear to appreciate the scale and depth of the requisite transformation of domestic policing regimes or the difficulty of reshaping the political compromises currently legitimating undercover operations.109 VI. American Informant Law The laws of informant use embody a nation’s stance toward weighty issues: Are guilt and punishment negotiable? What are the appropri- ate limits on police and prosecutorial authority? How much protection should be afforded to individual privacy? Each nation’s “informant law” reflects the confluence of legislative, judicial, and executive authority, as well as these kinds of important public values. The United States is nota- ble for the ways in which the legislative and judicial branches have ceded authority on this issue to executive law enforcement. As the sociolo- gist Gary Marx pointed out years ago, “Unlike some Western European countries or Japan, legislatures in the United States have indirectly sup- ported undercover practices by their consistent failure to set standards and goals for police performance. Legislatures, like the courts, generally prefer to leave such matters to police, thus enacting a kind of legiti- macy by default.”110 The U.S. philosophy of informant law thus stands at the far end of the international spectrum, privileging law enforcement authority, discretion, and secrecy over the dangers and intrusions posed by criminal informant use. The overall picture of American informant law is one of tremendous official authority and discretion to use, reward, and pressure criminal informants with few legal limits. The constraints that do exist tend to focus on the government’s informational obligations rather than sub- stantive limits on the government’s choices, and even those informa- tional obligations are tied to litigation and trials that occur infrequently. The end result of this laissez-faire, unregulated approach is that the American informant market is centrally shaped by the individual de- cisions of police and prosecutors, with few external controls and little judicial oversight or legislative or public scrutiny.111 72 3 Juries and Experts

#### Informant usage cause a culture of secrecy and police unaccountability that incentivizes bad investigative behavior

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5 Secret Justice Every thing secret degenerates, even the administration of justice; nothing is safe that does not show it can bear discus- sion and publicity. — Lord Acton (1861)1 Informant practices are inherently secretive: snitches often need their identities protected for safety, while the effectiveness of informant- driven investigations turns on their clandestine nature. But the secretive effects of using informants go far beyond protecting ongoing investi- gations or concealing particular informants’ identities. Snitching has altered the ways in which U.S. criminal investigations are conducted and recorded; it affects public record keeping by police and prosecutors, discovery practices, and what gets written down during plea negotia- tions. It has also shaped the informational rules prescribed by Supreme Court doctrine, internal judicial branch information policies, and even information-sharing between the U.S. Department of Justice and Congress. In other words, the pressure to conceal informant practices broadly affects the criminal system’s culture of record keeping, adver- sarial information-sharing, public policy, and disclosure, making the entire process less transparent and less accountable. Sometimes informant practices make it harder for the public to ac- cess documents and processes that have traditionally been publicly available. For example, a 2006 investigation by the Associated Press re- vealed the existence of widespread sealing and “secret dockets” in the federal court system for Washington, D.C. Nearly five thousand crimi- nal cases remained sealed long after the case was over, and for hundreds of those cases, the system falsely indicated that there was “no such case” if the case number was entered into the system. Most of the cases in- volved cooperating government witnesses.2 In 2016, the Federal Judicial Center conducted a survey of federal lawyers and judges on the extent of threats to cooperators. In response to the survey, a committee of the U.S. Judicial Conference recommended additional widespread sealing, specifically the creation of a “sealed supplement” to every federal crimi- nal case to shield all sentencing and cooperation information from the public.3 Several federal judicial districts have already eliminated public website access to docket entries and to plea agreements in criminal cases. The purpose of the protocols is to make it impossible to discern without physically coming to the courthouse whether a defendant is cooperating. They also prevent the public from seeing whether court documents are sealed in the first place—considered a red flag that suggests cooperation.4 Informant use also naturally decreases transparency due to its infor- mality. Highly regulated formal spaces tend to be better documented, informal spaces less so. Because informant law gives police and prosecu- tors so much informal discretion and leeway in the creation, manage- ment, and rewarding of informants, that informality inherently demands less documentation, public record keeping, and external accountability. These are a few of the ways in which using informants curtails public access to information about how we adjudicate guilt and impose pun- ishment. The loss is significant because we rely on such information to monitor whether the criminal system is effective and fair—in individual cases and also systemically. Taking such information off the public re- cord thus bolsters law enforcement authority while reducing the ability of legislatures, courts, the press, and the public to evaluate executive ac- tors and hold them accountable. This is a powerful and often troubling hallmark of informant culture and one of the dynamics that tends to go unremarked precisely because it takes place beneath the public radar. This chapter traces the depublicizing influence of informant use through several main areas of the criminal process—investigation, plea bargain- ing, and discovery—and its global impact on public access to informa- tion about the penal system. I. Investigation As a general matter, the process of investigating crime is one of the least regulated, least public aspects of the legal system.5 Police deci- sions such as whether to investigate a crime or make an arrest are for the most part not subject to legal challenge or judicial review.6 They are accordingly subject to few documentation requirements.7 Police reports—which record police decisions and the information gathered during investigations—are notoriously partial and provide only a lim- ited window of information, if they provide any information at all.8 Sometimes police reporting is purposefully opaque: the police depart- ments of Chicago and New York long maintained a system of “double files” in which publicly accessible police reports, including those given to prosecutors, contained only a partial version of the facts, while the department’s internal “street files” contained fuller information.9 This tradition of undocumented investigative decision-making has been challenged in a variety of ways, including decades-long demands for civilian review boards.10 For several decades, we have seen numerous attempts to require police to collect data on racial profiling practices.11 The excitement and controversies around body camera technologies are in large part about the tantalizing possibility of greater transparency and accountability regarding day-to-day police decision-making.12 The bit- ter struggles over these kinds of reforms reflect deep-seated traditions of discretionary policing, in which collecting public policing data has been a foreign and often difficult innovation. The use of criminal informants is a paradigmatic example of this kind of discretionary, undocumented decision-making; it is also a powerful engine of its expansion. In practice, police can flip a suspect, obtain information, and maintain an ongoing relationship with an informant without ever publicly revealing the transactions. Police reports will often omit mention of informant sources, while search warrant applications typically do not reveal informant identities. If police so choose, the crimes committed by cooperating informants may never be recorded. Conversely, harms to cooperators may remain secret as well. Informant- based investigations thus slip easily beneath the radar of the criminal system’s documentation processes. The unregulated character of informant investigations is no acci- dent. Starting with its decision in Hoffa v. United States, the Supreme Court has methodically exempted informant creation and deployment from the kinds of constitutional regulations that cover other investiga- tive techniques, including Fourth Amendment rules on searches, sei- zures, and warrants, the Fifth Amendment requirement that suspects be given Miranda warnings and counsel, and Sixth Amendment right-to counsel rules.13 In turn, because police are less constrained when using informants, this naturally makes informant-based investigations easier, cheaper, and more inviting. If the police can persuade an informant to cooperate in order to obtain information about a target, that decision is hard for third parties to challenge, and if it turns up no evidence, it need never be revealed. Likewise, a wired informant can collect information whenever the police want her to, off the record. By contrast, if the po- lice apply for a warrant or a wiretap, they must justify their requests to a court, their requests could be denied, and their justifications can be challenged later by defense counsel. For example, instead of getting a warrant, Virginia police used con- victed burglars as informants to break into a suspect’s home to look for marijuana. According to one of the informants, Renaldo Turnbull, po- lice assured them that they would be protected if they burglarized the suspect’s home: “The [police] dude said he was going to look out for us, so let’s go do it,” he said. Turnbull also explained the general instructions that he received from his police handler: “He told me what to look for. He said, if you know of any burglaries or anything, let [him] know. He said no evidence, no pay. He said if you know where it is, go get it.”14 When police do decide to seek a search warrant, the process becomes more regulated and requires more documentation. To get a warrant, an officer must submit a sworn affidavit containing information sufficient to find “probable cause,” that is to say, enough evidence from which the judge could conclude that there is a fair probability of criminal activity or evidence. When a police officer proffers an informant tip in order to obtain a warrant, she needs to provide the judge with enough in- formation about that informant and that tip so that the judge can in- dependently determine whether the informant is sufficiently reliable and therefore whether probable cause exists. This process is designed to ensure that warrants issue in conformity with the Fourth Amendment, which states that “no warrant shall issue but upon probable cause sup- ported by oath or affirmation.”15 Even in this more regulated, documented arena, using informants erodes public transparency. In Pittsburgh, for example, a 2014 inves- tigation identified what it called “an informant mill in which suspects became informants and helped agents to bust others, who then in turn became informants aimed at other targets.” The study found that nearly 40 percent of federal prosecutions in southwestern Pennsylvania in- volved an affidavit based on an unnamed confidential informant, the vast majority of whom were seeking leniency for their own crimes. The majority of requests were filed by the FBI or the DEA, but they also in- cluded affidavits from the Postal Inspection Service, the ATF, Immigra- tion and Customs Enforcement, the Food and Drug Administration, the U.S. Secret Service, the U.S. Marshals Service, the IRS, the Department of Agriculture, and Homeland Security. In all but a tiny number of cases, judges granted the request for a warrant or a wiretap without question- ing the reliability or identity of the unnamed informant.16 In his exhaustive study of narcotics warrants issued in San Diego in 1998, law professor Lawrence Benner discovered that informant-based warrant applications involved more secrecy and demanded less rigor than warrant doctrine contemplates. For example, 64 percent of all war- rant applications studied relied on a confidential informant, or “CI,” and 95 percent of those warrant applications withheld the identity of the in- formant from the magistrate. Police justified doing so on the basis of the following generic boilerplate language contained in each warrant application: I desire to keep said informant anonymous because CI has requested me to do so, and because it is my experience that informants suffer physi- cal, social and emotional retribution when their identities are revealed, because it is my experience that to reveal the identity of such informants seriously impairs their utility to law enforcement, and because it is my ex- perience that revealing such informants’ identities prevents other citizens from disclosing confidential information about criminal activities to law enforcement officers.17 As Benner points out, the use of such boilerplate language provides no factual or case-specific support for the proposition that the particular informant’s identity needs to be withheld from the court, which violates both the rule and spirit of the warrant process: A public entity is granted a privilege to refuse to disclose the identity of an informant only if the public interest requires it because the “necessity for preserving the confidentiality of [the informant’s identity] outweighs the necessity for disclosure in the interests of justice.” . . . The use of boil- erplate . . . bypasses this entire process and indeed denies judges the very information they would be required to have in order to make a determi- nation that the CI’s identity should not be revealed.18 The same study also revealed the practice of using “phantom affidavits,” in which the officer seeking the warrant does not know the confidential informant on whom she is relying for the information but rather swears under oath that another officer told her that the informant provided that other officer with the incriminating information. This practice means that the officer applying for the warrant does not know the identity of her source for probable cause and that, more generally, no officer ever has to swear under oath to the existence of the informant at all.19 Such practices do not necessarily mean that police are fabricating informants or that informants are lying. But they weaken established provisions for judicial oversight of search warrants and obscure from public view the means by which police obtain their evidence. Because informants can so easily be kept secret—even from the very police of- ficer seeking the warrant—they become a cheap, unregulated means for police to obtain the weighty investigative and highly intrusive authority of a warrant. Because investigative constraints tend not to apply to informant practices, this has fueled a culture of secrecy that goes beyond the lack of documentation. Using snitches has become a method of conceal- ing investigative techniques and police decisions, a practice in which the usual disclosure rules do not apply, one in which cutting corners and breaking rules can easily be hidden. Recall from chapter 4 the St. Louis police officers who lied about their informants and then tried to enforce the culture of secrecy by refusing to disclose the identity of their informants to their own police supervisors. In a similar vein, the Brooklyn police officers who traded drugs for information from their snitches were responding to systemic incentives: to use illegal infor- mant deals to get quick and easy drug busts. They could do so because their investigatory relationship with those snitches was discretionary, undocumented, and likely never to come to light. The same dynamic fueled the tragic death of Kathryn Johnston described at the begin- ning of this book, in which Atlanta police used an unreliable tip from a drug dealer to get a warrant, fabricated an informant for the warrant application, and then pressured another snitch to lie to cover up their misrepresentations. They could behave this way precisely because they knew that their use of informants—real and fabricated—would likely never be revealed, that they had tools at their disposal to prevent their misconduct from being exposed, and that if they did in fact produce drugs or a conviction the system would treat the ends as justifying the means.20 In sum, the discretion and secrecy associated with using criminal in- formants promotes a clandestine culture of secrecy that extends beyond individual cases. From constitutional rules that do not apply to police misconduct that will never be discovered, informant-based investiga- tions ensure that much of the criminal process will remain under wraps, inaccessible to public or judicial scrutiny. II. Plea Bargaining

#### Informant culture causes crime – decreases trust, doesn’t enforce rules, and encourages law-breaking to not be found out as a snitch

Natapoff 22 [Alexandra Natapoff, Lee S. Kreindler Professor of Law at Harvard Law School, member of the American Law Institute, and Guggenheim Fellow with a BA in philosophy from Yale University and a JD from Stanford Law School, 2022, “Snitching Criminal Informants and the Erosion of American Justice Second Edition,” NYU Press, https://arizona-ua.primo.exlibrisgroup.com/permalink/01UA\_INST/2eo519/alma991050104313703843]/Kankee

For these socially fragile, heavily policed communities, law enforce- ment policies have special significance. In many ways, criminal enforce- ment is the most palpable form of governance to make itself felt in these neighborhoods. Not only do criminal policies affect individuals and their families who are touched by crime; routine experiences with police, prosecutors, probation officers, and courts alter the ways that residents perceive the entire governmental apparatus. In communities where the penal system plays such a large role, law enforcement practices influ- ence people’s more general perceptions of the legitimacy, effectiveness, and fairness of the government, above and beyond its narrow crime- fighting function.11 When those practices are persistently debilitating or exclusionary, they can, as legal scholar Monica Bell puts it, “operate to effectively banish whole communities from the body politic.”12 As my Baltimore students made clear, informant use is one of these normatively influential practices. Drug enforcement has focused its resources in these neighborhoods, resulting in some of the heaviest concentrations of drug-related arrests and convictions in the country.13 Central to this pervasive drug enforcement presence is the creation and maintenance of criminal informants. These already vulnerable commu- nities thus experience the consequences of snitching to a higher and more extreme degree. This confluence has important implications. First, there will be more criminal informants in these communities than elsewhere, in some neighborhoods many more. This is detrimental to families, personal relationships, and social networks. Second, perva- sive snitching exacerbates certain kinds of crime and violence, worsen- ing the very neighborhood conditions that law enforcement is ostensibly tasked with remedying. Third, using informants is a racial focusing mechanism, exacerbating overpolicing and imposing the costs of infor- mant use disproportionately on communities of color. And fourth, the widespread use of criminal informants alters the role and authority of the legal system itself: it shapes police interactions with suspects, de- forms police relationships with residents, and worsens the community’s experiences and perceptions of being policed. I. More Snitches How many criminal informants might be active in low-income, heavily policed neighborhoods? This is a tough question because no one, not even the officials who use them, knows how many informants exist in the entire system. Even without direct data, however, we can extrapolate. In a nutshell, based on overall cooperation rates and the prevalence of drug enforcement in the most heavily policed communities of color, it is reasonable to infer that as many as 4 percent of the young Black male population in these particular communities might be actively cooperat- ing with police at any given time. The federal system provides the most information. The U.S. Sentenc- ing Commission reports that, in 2019, approximately 10 percent of all federal defendants received a sentencing departure for cooperation and 22.6 percent of drug defendants did.14 An early report by Sentencing Commission researchers estimates that less than half of all cooperating defendants receive a recorded sentencing benefit.15 Conservatively, if only half of all cooperating defendants get sentencing credit, this would suggest that about 20 percent of all federal offenders and 45 percent of federal drug defendants cooperate in some way even if their sentences do not publicly reflect it. These cooperating defendants do not include the approximately 30,000 confidential informants—who also often commit crimes—who work for the FBI and the DEA.16 While illuminating, federal statistics are of limited value in assessing the national state of affairs. First, the federal criminal system is small, comprising less than 5 percent of U.S. felony cases. Furthermore, as de- scribed above, the federal sentencing guidelines and U.S. criminal code are expressly designed to promote cooperation through the mechanics of mandatory minimum sentences and constraints on judicial discretion. State criminal systems often treat these issues differently. Accordingly, while the federal picture of pervasive cooperation is relatively clear, it is only one piece of a larger puzzle. At the state and local levels, we have far less direct information. Un- like the federal system, most states lack systemic record keeping to track defendants who benefit from having cooperated, either at sentencing or at earlier stages in a case. Nevertheless, while local law enforcement does not directly reveal how often it uses or rewards informants, we can still deduce the probable impact of informant use on heavily policed Black communities. First of all, we know that drug arrests and prosecutions are concen- trated in Black neighborhoods and populations: African Americans ac- count for approximately 13 percent of the national population but 32 percent of national drug arrests and approximately 30 percent of drug convictions.17 In particular, Black people are nearly four times more likely to be arrested for marijuana possession, which represents over 40 percent of all drug arrests.18 Criminal informants are staple features of such investigations and cases. All by itself, therefore, the scale of drug enforcement against the Black population indicates that the scale of criminal informant use will be similarly and disproportionately large. We also know that drug enforcement is not evenly distributed. In certain states and counties, Black arrest rates are especially high, even though drug use is evenly distributed throughout the population. For example, in Pickens County, Georgia, about an hour north of Atlanta, Black people are almost a hundred times more likely to be arrested for marijuana possession compared to white people.19 Criminal system involvement is also heavily concentrated in certain cities and neighborhoods, placing a staggering proportion of young Af- rican American men under criminal supervision at any given time. For example, in Maryland, approximately 30 percent of the young African American men in the entire state are under the control of the criminal system on any given day, which is to say, in prison or jail or on probation or parole; approximately 10 percent are actually behind bars. In Balti- more, the numbers are even higher: over half of the young Black men between the ages of twenty and thirty are under criminal justice control, and nearly one in five are in custody on any given day.20 Similarly, in one neighborhood in Milwaukee, an estimated 42 percent of Black males be- tween the ages of twenty-five and thirty-four were either incarcerated or under criminal justice supervision in 2013. In North Nashville, Tennes- see, in 2012, the incarceration rate alone—not including supervision— for Black men of that age was 28 percent.21 Cities and neighborhoods with high levels of criminal-system in- volvement are deeply intertwined with state carceral institutions. Four- teen percent of all people released from Maryland prisons in 2001, nearly 40 percent of whom were convicted of drug offenses, returned to a mere six Baltimore neighborhoods.22 Similarly, in 2003, half of all re- leased prisoners in Illinois returned to Chicago, and 34 percent of those returned to just six neighborhoods.23 In all these ways, criminal-system involvement is often highly localized in specific neighborhoods in ways that national statistics and averages obscure. Finally, we can ask the question that brought us here: How much of this highly localized involvement in the criminal system implicates snitching in communities of color? One way of approximating an an- swer is to ask how much of this criminal involvement involves drug offenses, substance use, or other crimes that law enforcement typically handles by creating or using informants. The answer is probably about one-third. Approximately 30 percent of all state felony caseloads are drug offenses, and approximately 30 percent of state felony drug prison- ers are African American.24 Of the 10 million arrests made in 2019, 1.5 million were drug arrests, and 26 percent of those drug arrests were of Black people. Conversely, 15 percent of all arrests of Black people are for drug offenses.25 Drug enforcement is not the only high-snitch arena. Burglary, for example, is an arena in which police traditionally rely on informants, representing a little over 8 percent of all state felony convictions.26 Widespread substance use among the criminally involved population also plays a crucial role. Many people commit crimes such as burglary, theft, and other property offenses in order to support an addiction. For example, from 2007–2009, 40 percent of all jailed defendants in the United States reported that they committed their offenses while under the influence of drugs, and 40 percent of people jailed for a property of- fense reported committing the offense in order to get money for drugs.27 More broadly, approximately 60 percent of people in prisons and jails meet medically established criteria for drug dependence or abuse.28 A large percentage of property crimes and other offenses are thus “drug- related,” in the sense that the defendant commits the crime because of a substance use disorder. Because such defendants have knowledge of and connections to the drug economy, they are prime candidates to become informants. The pervasiveness of substance use in the criminal justice population—and the law enforcement predilection for turning such in- dividuals into snitches—therefore suggests that pressure to inform is being brought to bear in a wide range of cases. Taken together, we can infer that at least one-third of the entire U.S. criminal justice population is facing drug or drug-related charges and/or has a substance use disorder and therefore is likely to experience strong pressure to cooperate. More than one-third of African Americans in the criminal system will likely fall into this category because they make up a higher proportion of drug cases. The system naturally puts pressure on this segment of the population to become informants by virtue of the nature of their offenses, their substance use problems, and the increas- ingly heavy sentences that drug and recidivist defendants face. But pressure is one thing, and snitching is quite another. How many suspects actually bend to the pressure and provide information? Again, we need to extrapolate. Federal statistics suggest a general cooperation rate of 20 percent, and 45 percent for drug offenses, but that will not hold true for all state or local jurisdictions. The pressure to cooperate is probably higher for federal drug crimes than it is in jurisdictions that lack high minimum sentences, mandatory sentencing guidelines, or that generally sentence at a lower threshold, although some states imitate the federal cooperation incentive structure.29 On the other hand, the federal system deals less with the kinds of petty drug offenses that are ripe for snitching, and the kinds of informal street deals described throughout this book are more likely to occur between local substance users and beat cops than with the FBI. For the sake of argument, let us assume that state and local drug sus- pects snitch at half the rate of federal drug defendants. In other words, assume that 22 percent of this high-risk group actually cooperates with law enforcement, providing information about accomplices, acquain- tances, friends, neighbors, or family. The implications of this estimate are potentially dramatic. In those localized highly policed neighborhoods in which as many as half of the Black men between the ages of twenty and thirty are under crimi- nal supervision, one-third of those fall into the high-risk, drug-related snitching group. If as many as 22 percent of those individuals are actually informants, that would mean that, in some of these neighborhoods, one in twenty-five Black men in this age group—or about 4 percent—could actually be giving the government information at any given time. In 2009, using these same types of data, I estimated the scale of infor- mant use to be higher, closer to 6 percent of the young Black male popu- lation in heavily policed neighborhoods. Since then, drug enforcement has receded as a percentage of national criminal dockets and Black drug incarceration rates have fallen, so it stands to reason that informant use would also decline. Remember these are all extrapolations—we have no more direct data on the phenomenon today than we did in 2009. But 4 percent would still be a lot. It would implicate many extended fami- lies, apartment complexes, neighborhood events, and congregations. It would make it likely that someone—maybe more than one someone— within that institution or social network would have already given in- formation to the police or might actively be trying to find incriminating information about others and would have the police’s ear when they do. To be sure, this estimate may still be too high. In some districts, po- lice and prosecutors indicate that they do not routinely rely on criminal informants, even in drug cases. Alternatively, this estimate may still be too low. Many observers of the criminal system, from judges to soci- ologists, conclude that drug cases almost always involve snitches, that street-level criminal suspects routinely cooperate with the police, and that informing is pervasive. In sum, we simply do not know directly or with any certainty how many people are actually working criminal informants or how many young African American men are under pressure to inform. Given the persistent lack of data, we cannot know. And the most serious mani- festation of the phenomenon will be limited to those neighborhoods with the highest concentrations of crime, police presence, and social vulnerability. But we do know that the structure of the penal system, with its continuous deep penetration into poor Black communities, to- gether with the habits of law enforcement, make it likely that in our most economically distressed neighborhoods a significant proportion of the young Black male population is under heavy governmental pres- sure to provide information about others in order to avoid arrest and incarceration. Answering the empirical question of how many snitches there are does not, of course, answer the normative question: What’s wrong with a lot of snitching? After all, residents of vulnerable communities have a deep interest in crime control, not least because high crime rates can mean high victimization rates. Such communities need police with the tools to prevent and solve crimes. Using criminal informants can be one way for police to get such information. Numbers alone also cannot explain what is problematic about living around snitches. It is sometimes said that only the guilty should fear informants because only the guilty have something to hide. If the prac- tice successfully disrupts criminal activity, law-abiding citizens should benefit. There is some truth in both these propositions. High-crime commu- nities need better crime control, better relations between police and resi- dents, and more safety and security. The tricky question is whether those goals are promoted by creating and deploying criminal informants in the ways that we currently do. And although the criminal process resists disclosure on this subject, the limited evidence indicates that snitching practices may be counterproductive in precisely this regard. Not only do informants exacerbate crime, violence, and other destructive phenom- ena; even for the innocent, the pervasive presence of criminals trying to work off their charges can create fear, distrust, and social dysfunction. These problems are explored below. II. More Crime Criminal informants commit crimes. This is true both by definition and in practice. First, by definition, an informant provides information in order to escape the consequences of having already committed, or at least being suspected of committing, a crime. That means that every snitch deal inherently involves a governmental decision not to pursue and punish those crimes. Active criminal informants also typically com- mit new crimes or help others do so while they are cooperating with the government. Those new crimes impact the communities in which they take place. For example, in Mount Vernon, New York, officers protected and sup- ported drug dealers who served as their informants. According to secret tapes made by a police whistleblower, “the department’s narcotics unit allowed favored drug dealers to sell with impunity, get deliveries, and control territory. In exchange, . . . the dealers, serving as confidential informants, gave [police] information leading to the arrests of their own low-level clients.”30 Similarly, as part of its investigation into a fencing ring in Portland, Oregon, the FBI promoted the ongoing theft of retail merchandise from local stores in order to collect evidence against ille- gal secondhand sellers. The shoplifting ringleaders—Lorie Brewster and David Pankratz—were given immunity from prosecution and permitted to keep hundreds of thousands of dollars in proceeds from the goods they stole.31 Above and beyond such authorized crimes, informants also routinely commit unauthorized crimes. As the stories throughout this book dem- onstrate, once a criminal actor agrees to provide information to the gov- ernment, he or she may continue to commit new offenses on their own initiative to which police and prosecutors may turn a blind eye. The fact that law enforcement tolerates some unchecked criminality by its infor- mants constitutes one of the practice’s major dangers and poses a special threat to communities in which this conduct takes place. For example, the Seattle ATF used Joshua Allan Jackson as an informant even though he had a long history of violence against women. His prison records revealed him to be a mentally unstable person who had been arrested in forty-three states. In 2012, he held an eighteen-year-old woman as a sexual prisoner in a motel room paid for by the ATF.32 In Pittsburgh, Robert Harper robbed a grocery store worker with an AK-47 after local police and prosecutors released him from jail in exchange for his grand jury testimony about jailhouse drug dealing. At the time, Harper was in- carcerated and awaiting sentencing for six prior armed robberies. While on release, he committed an additional sixteen armed robberies and shot two people.33 Informants who expect to be forgiven for their crimes can pose spe- cial threats to friends and families. In Tampa, Florida, police permitted their informant to use his government-issued cell phone to “scheme[] to steal property and beat up his friends. While his police handlers lis- tened in and looked the other way, he threatened to beat the mother of his child so badly ‘that her brain will seep from her ears.’”34 One of the dealer-informants in Mount Vernon had a string of domestic vio- lence convictions for choking and assault, even as police let him evade arrest for his drug business. A former prosecutor flagged the risks of using informants involved in domestic violence. “It’s natural to feel that you’re emboldened by this because you have the backing of the police and they’re going to help you if you get stuck in a situation,” he said. “It’s potentially very dangerous for everyone in that household or in that relationship.”35 In his classic study of police practices in a typical midsized Ameri- can city, Professor Jerome Skolnick concluded that, as a general mat- ter, “burglary detectives permit informants to commit narcotics offenses, while narcotics detectives allow informants to steal.”36 More generally, sociological studies find that police assume and know that their infor- mants commit unauthorized crimes. One study described a St. Louis street snitch who “stayed out of sight for several days after giving infor- mation to the police,” since snitching had permitted him to escape his “third weapons charge [and] he reasoned [that his] quick appearance almost certainly would indicate that he had snitched in exchange for his freedom.”37 Finally, every time police reward a person with a substance use dis- order with cash for drugs (or sometimes actual drugs), they enable that informant’s continued illegal drug use and dependence. As one officer acknowledged: Payment to addict-informants puts the officer in something of a moral quandary. We can be reasonably certain that monies given to an addicted person are going to be used to support that addiction. Because the ad- diction can only be maintained by violating the law, this places the of- ficer in the position of tolerating or at least knowing of ongoing criminal activity—something we are paid to stop.38 Of course not all informants commit new crimes, authorized or unau- thorized. Some simply provide information about past crimes and hope for reduced punishment for what they’ve already done. But active infor- mants populate a gray world of continuing criminal activity, in which some crime is openly encouraged by the government, some crime is tolerated or ignored, and some is never discovered. These new crimes typically occur in the communities in which informants live, forcing friends, families, residents, and businesses to contend with higher inci- dents of drug use and drug dealing, violence, weapons, thefts, and the myriad other offenses that informants commit while working for the government. III. More Violence In 1996, the criminologist Dr. Jerome Miller explained how using infor- mants exacerbates violence in urban communities. Not only do snitches commit crimes themselves, but they erode social mechanisms for keeping the peace by creating distrust and inviting retaliation. As Dr. Miller put it: No single tactic of law enforcement has contributed more to violence in the inner city than the practice of seeding the streets with informers and offering deals to “snitches.” . . . [R]elying on informers threatens and eventually cripples much more than criminal enterprise. It erodes what- ever social bonds exist in families, in the community, or on the streets— loyalties which, in past years, kept violence within bounds.39 Ten years later, sociologists confirmed this observation. Richard Rosenfeld, Bruce Jacobs, and Richard Wright wrote that police snitching tactics “contribute to the violence in already dangerous communities.” Their street-level studies of police and informant behavior revealed that, because criminals cannot trust each other, “dependence on firearms is likely to rise; without accomplices, guns become the backup.” More generally, “[t]he practice undermines trust and breaks apart communi- ties. It erodes faith in official authorities. It foments retaliation, which ignites the street-level microstructure in potentially deadly conflict spi- rals.” They concluded that “snitching is a pervasive element of inner-city street life that poses dangers for street criminals and law-abiding resi- dents alike.”40 Gangs and other criminal organizations famously use violence to deter snitching. Researchers in organizational science have long recog- nized that deploying informants in any organization can be expected to lead to violence, as the organization responds by trying to police itself more firmly.41 Government studies found that the spike in witness in- timidation in the mid-1990s was directly linked to increased gang activ- ity and was most prevalent in connection with violent crime.42 Even more specifically, studies of violence in the drug trade identify the “elim- ination of informers” as a structural source of ongoing violence.43 The death of sixteen-year-old Martha Puebla exemplifies the violent side effects of snitching policies. In an effort to obtain a confession, Los Angeles police lied to a gang member and told him that Puebla was in- forming on him. This misrepresentation led not to a confession but to Puebla’s murder.44 Likewise, when police in Brea, California, turned seventeen-year- old Chad MacDonald into an informant, it led not only to MacDonald’s death but also to the rape and shooting of his sixteen- year-old girlfriend by gang members against whom MacDonald was informing.45 This book contains numerous stories in which the govern- ment’s decision to use informants has meant tolerating violence against others—from the death of Kathryn Johnston in Atlanta to Karen Park- er’s childhood of sexual abuse at the hands of con man Paul Skalnik. In other words, when government officials turn to criminal informants as a law enforcement tool, they should expect to provoke more violence in the communities most affected by those tactics. Because fear and vio- lence constitute some of the most devastating aspects of impoverished urban life, this particular effect of snitching policies is one of the most costly. IV. Racial Focusing and Inequality

#### The coercion by cops towards informants under threat of punishment is like “slavery with extra steps”

Rich 10 [Michael L. Rich, Assistant Professor of Law at the Capital University Law School with a B.A. from the University of Delaware and a J.D. from Stanford Law School, 2010, “Coerced Informants and Thirteenth Amendment Limitations on the Police-Informant Relationship,” Santa Clara Law Review, https://heinonline.org/HOL/P?h=hein.journals/saclr50&i=697]/Kankee

INTRODUCTION On May 7, 2008, Rachel Morningstar Hoffman, a twenty- three-year-old Tallahassee resident and recent graduate of Florida State University, disappeared while trying to purchase 1500 pills of ecstasy, two-and-a-half ounces of cocaine, and a handgun for $13,000 from two suspected drug dealers.' Two days later, the Tallahassee Police Department ("TPD") arrested the dealers, Andrea Green and Deneilo Bradshaw, who led police to Hoffman's body. 2 Hoffman had been shot and her body dumped in a rural area outside of the city. 3 The swift apprehension of Bradshaw and Green might, at first glance, appear to be an example of efficient police work. But in fact, the TPD were intimately involved in the events that led to her death, as Hoffman was a confidential informant who set up the deal at the TPD's express direction and under threat of criminal prosecution.4 Three weeks before her death, the TPD searched Hoffman's apartment and found approximately five ounces of marijuana, six ecstasy pills, and other drug paraphernalia. 5 The next day, officers met with Hoffman and gave her a choice: she could help the TPD apprehend other drug dealers or face prosecution on multiple felony charges. 6 The decision no doubt seemed simple to Hoffman. The TPD told her that she only had to provide "substantial assistance" or do "one big deal" to avoid charges and promised that they would keep her safe.7 But if she refused to cooperate, they threatened significant prison time on multiple felony charges, and these new charges would have made her ineligible for drug court disposition of earlier marijuana possession charges.' Given her options, she agreed to cooperate with the TPD. 9 Hoffman's situation is typical of those faced by an increasing number of civilians ° who assist police in exchange for leniency." She decided to cooperate alone, without an opportunity to consult her attorney. 1 2 She lacked a meaningful understanding of the charges she could face as a result of the drugs found in her apartment,13 or what she had to do in order to receive leniency.14 Once recruited, she risked injury and death to cooperate with the government 5 and did so with no training in conducting undercover police operations or protecting herself from harm.'" Hoffman's murder has become a flash point in the debate over the use of confidential informants. 1 Local prosecutors and the ACLU have questioned why the TPD did not notify the State Attorney's Office about the drugs found during the April search or Hoffman's agreement to cooperate, arguing that the failure to do so vested too much unsupervised discretion with the police.' 8 Hoffman's parents have filed suit against the TPD, asserting negligence in the use of Rachel Hoffman-a young woman with no experience in trafficking firearms or cocaine-to purchase cocaine and a handgun, and have criticized the TPD for not allowing her an opportunity to consult an attorney. 19 A grand jury investigation of Hoffman's death concluded that "negligent conduct on the part of the Tallahassee Police Department and D.E.A. [contributed to Ms. Hoffman's death." 20 Meanwhile, Professor Alexandra Natapoff contends that the Hoffman case shows that police are not properly held accountable for their use of confidential informants and that their use is not sufficiently transparent. 2 ' These criticisms, however, miss the forest for the trees. They focus on symptomatic flaws in the TPD's handling of Hoffman while failing to appreciate a fundamental constitutional violation inherent in the relationship between the state and informants like Hoffman.2 2 By forcing Hoffman to decide between working for the state and facing criminal prosecution, the TPD compelled her to make a choice that, in a practical and constitutional sense, was no choice at all. An informant who agrees to cooperate when faced with such a dilemma is subjected to a condition of involuntary servitude prohibited by the express terms of the Thirteenth Amendment. 23 Since as early as the 1970s, commentators have argued that the Thirteenth Amendment applies in the informant context.24 However, the application of the Thirteenth Amendment to the use of confidential informants should be revisited for a number of reasons. First, in the intervening decades, the Supreme Court has clarified the Amendment's scope and Congress has passed broad enforcement legislation, thus strengthening the legal argument for using the Amendment to regulate the state-informant relationship.2 5 Second, scholars have begun to examine the use of informants in more depth, raising practical, structural, and normative concerns that the application of the Thirteenth Amendment would specifically address. 26 Third, no one has adequately addressed the dissonance between the Thirteenth Amendment's historical context and the modern use of confidential informants; earlier discussions have instead focused primarily on potential practical implications of applying the Thirteenth Amendment to the relationship between the state and confidential informants.2 7 Finally, the last thirty years have seen renewed interest in exploring the Thirteenth Amendment's potential reach.28 Scholars have argued that the Amendment can protect, among others, children abused by their parents, 29 battered women,30 prostitutes,3 ' bankruptcy debtors,32 women seeking an abortion,33 and victims of sexual harassment,3 among others.35 In response, critics have suggested that a careless expansion of the Thirteenth Amendment could have unintended and undesirable consequences, 36 and that such expansion without consideration of the Amendment's history and context, weakens the moral force of its blanket prohibition on slavery and involuntary servitude.37 In light of these concerns, this article asserts that the Thirteenth Amendment constrains the state-informant relationship, and provides legal, historical, and practical support for this argument. Part I lays out a brief history of informant use, defines the state-informant relationships relevant to the Thirteenth Amendment analysis, and describes the current model for handling informants like Rachel Hoffman. Part II discusses the original purposes of the Thirteenth Amendment and the Supreme Court's application of the Amendment in the involuntary servitude context. Part III argues in favor of applying the Thirteenth Amendment to the state-informant relationship and addresses the most apparent legal and historical criticisms of that application. Part IV sets forth a new model for the use of informants that complies with the Thirteenth Amendment. Part V discusses the Thirteenth Amendment's possible impact on criminal investigation and prosecution in light of this new model. Finally, Part VI explains how applying the Thirteenth Amendment to the state-informant relationship will address some of the societal concerns about confidential informant use that have been raised by other scholars. I. OVERVIEW OF INFORMANT USE

### Contention 2: Mass Incarceration

#### Aff’s utilitarian efficiency-first ethos is sanitized violence that perpetuates state disciplinary power

Gocha 16 [Alan Gocha, lawyer with a J.D. from Georgetown University Law Center, 2016, “The Sanitization of Violence: Exposing the Plea Bargain Regime as a Tool for Mass Injustice,” Georgetown Journal of Law and Modern Critical Race Perspectives, https://heinonline.org/HOL/P?h=hein.journals/gjmodco8&i=317]/Kankee

After elucidating the mechanics of this bizarre arrangement, Anan discloses that the Enterprise was destroyed by a Vendikan attack (second flash) and urges Kirk to order his crew to report for execution.8 7 Kirk emphatically refuses, declining to even entertain further discussion.8 8 Appalled, Anan commands an Eminian soldier to lock the Away Team in a secure room, which is to be put under constant surveillance.89 To keep a long story short, the Away Team manages to escape, capture the High Council, and take control of the command center.9 Kirk then delivers the following speech: "Death, destruction, disease, horror. That's what war is all about .... That's what makes it a thing to be avoided. You've made it ... [s]o neat and painless, you've had no reason to stop it. And you've had it for five hundred years. Since it seems to be the only way I can save my crew and my ship, I'm going to end it for you, one way or another." 91 He then uses his phaser to irreparably destroy the computers.92 Anan bellows, "You realize what you have done?"93 Kirk replies affirmatively and advises the Emin- ians that they only have two remaining options: start building bombs or attempt to negotiate peace. 94 Kirk and the Enterprisethen begin their journey home, but Ambassador Fox stays behind to assist the Eminians through the peace process. 95 A few weeks later, the Enterprisereceives a message from the Ambassador relaying the good news-a truce had been called and negotiations were underway. 96 Spock, noticing a smug look on Kirk's face, comments, "Captain, you took a big chance."9 Kirk quickly dismisses the suggestion, pointing out that while physical bombs are no more deadly than simulated ones, real war eventually has to end.98 II. SANITIZATION OF VIOLENCE The "virtual" war fought in "A Taste for Armageddon" can be understood as a dystopian critique of a particular orientation to violence. More specifically, it stands in opposition to the view that violence is somehow more virtuous or acceptable once anesthetized. Not to be confused with a call for unrestrained warfare, the episode serves as a cautionary tale against equating civility with humaneness. Although the storyline most directly relates to issues of wartime ethics, "A Taste of Armageddon" can be understood more generally as metacritique of the sanitization of violence (or as a noun, sanitized violence): "sanitization," defined as the process of making an act more acceptable or less objectionable by dulling unpleasant features; 99 and "vio- lence," being the intentional infliction of emotional, psychological, or physical in- jury.10 0 Sanitization, whether deliberate or inadvertent, promotes complacency through the neutralization of moral outrage-the primary instigating force and catalyst for public opposition.1 01 Four common sanitization techniques, which are present in both "A Taste for Armageddon" and the plea bargain regime, include: (1) misapplication of economic and utilitarian principles; (2) overemphasis on the mini- mization of physical pain and unpleasantness; (3) obfuscation of the act, pushing its view to society's periphery; and (4) manufacturing of consent A. Useful Backgroundllnformation 1. Definition of "Violence" Notably, while the term "violence" is traditionally reserved for physical assaults, I interpret it to include all deliberate acts that knowingly cause injury.10 2 I believe a narrow understanding of violence is problematic because it trivializes the effects of psychological and emotional trauma-both of which can be as deleterious to human health as a physical attack. 11 3 From this perspective, I argue incarceration ought to be considered a violent act.10 4 First, it axiomatically causes injury by encumbering freedom and liberty.10 5 Second, inmates are often subjected to repeated physical and sexual abuse.10 6 And finally, prison conditions can induce intense psychological suffering-in some cases, resulting in long-term mental illness, such as chronic depression, a severely diminished sense of self-worth, and post-traumatic stress disorderl7 The negative effects of incarceration are compounded in cases of injustice."' Wrongfully convicted defendants can experience trauma commensurate to that of war veterans and torture survivors.109 Similarly, when a post-incarceration defendant is exonerated, victims of the original crime may find themselves overcome with feelings of guilt, fear, helplessness and devastation. 110 "For some victims, the impact of the wrongful conviction may be comparable to-or even worse than-that of their original victimization."11 1 Describing incarceration as a non-violent act white- washes the psychological, physical, and personal hardship regularly experienced by prisoners. Although in some cases imprisonment may be morally justified, and even demanded, incarcerating a human being ought to be procedurally and substantively difficult. 2. Review of the Literature The phrase "sanitization of violence" (or "sanitized violence") is applied in variety of contexts, most frequently in discussions about: (a) the media's tendency to sim- plify and glorify acts of state sanctioned violence112 , (b) the subtextual propagation of violent political messages under the guise of "innocence" '1 13 , and (c) cultural efforts to regulate the portrayal of graphic imagery, such as gore and blood.1 1 4 Yet, its characterization appears to be relatively inconsistent and generally lacks specific definition. The concept of sanitized violence, as I am using the phrase, is more consonant with the work of Michel Foucault, and particularly his book Discipline & Punish: The Birth of the Prison (Discipline & Punish).115 Discipline & Punish is a genealogy of the evolution of punishment spanning from public torture and execu- tions in late 18th Century France to the modern western penal system.116 Foucault critiques the view that prisons developed as a result of moral enlightenment; instead, he argues this transition merely reflects modern power dynamics. 117 Foucault begins the book by discussing early methods of punishment, which were conducted as brutal public spectacles.1 1 8 For Foucault, like his predecessor Friedrich Nietzsche and his contemporary followers Gilles Deleuze and Felix Guattari, the human body is the primary site of production, domination, and socialization.11 9 Early punishment acted as a deterrent to crime by creating an association between criminal acts and physical pain."12 Thus, the visibility of punishment was essential for accomplishing its real purpose-exerting control over the social order, or what Foucault calls Discipline. 121 By the late eighteenth century, industrialization and technological development increased demand for skilled and specialized labor.122 Accordingly, technologies of Discipline that solely compel complacency were rendered inadequate.1 23 The state needed bodies with utility-trainable, manipulable, improvable, and transformable- "docile." '124 Thus, came the advent and rise of panopticism.125 The term is derived from Jeremy' Bentham's proposed prison design, the Panopticon, crafted to increase the efficiency of prison surveillance. 12 6 Bentham believed that prisons could be made more cost efficient by exploiting imbalances of knowledge.12 The basic structure places a tower in the center of the prison complex such that guards can surveil all prisoners from a single position.128 A one-way screen is strategically placed, prevent- ing prisoners' from viewing what or who is inside. 129 Consequently, even in a guard's absence, the prisoner would act as though they were under surveillance.130 Bentham cited this phenomenon as the "apparent omnipresence of the inspector." ' 131 Foucault says, "the major effect of the Panopticon [is] to induce in the inmate a state of conscious and permanent visibility that assures the automatic functioning of ",132 power. Foucault argues this surveillance-focused method of discipline has now permeated through the social stratus- connecting with a number of historical processes, includ- ing economic, juridco-poltical, and scientific.133 Modern discipline, or "disciplinary power", is therefore not established through public spectacles, but "in the shadows according to criteria and with instruments that elude control."134 "Instead of bend- ing all its subjects into a single uniform mass, it separates, analyses, differentiates, [and] carries its procedures of decomposition to the point of necessary and sufficient single units." 131 Applying Foucauldian principles, plea bargains are the ultimate panoptic instru- ments. The state is no longer required to prove guilt because defendants are coerced into policing themselves. Just like the invisibility of guards in the panoptic tower, the uncertainty of trial and its accompanying disproportionate punishment allows pros- ecutors to make defendants submit to their will. The plea bargain regime is, likewise, a tool of disciplinary power, allowing for the autonomous individualization of punish- ment using criteria that is free from scrutiny. The prisoners' admission of guilt in turn legitimizes the state's exertion of arbitrary power. Systematic inequality, as seen in racial sentencing disparities, can be observed-serving a disciplinary function over minorities-yet cannot be specifically identified and, therefore, cannot be addressed. 136 Sanitization, like panopticism, can be understood as a modality of disciplinary power. Although my conception of sanitization does not necessitate a Foucauldian analysis, Foucault's theory of power provides invaluable insight into how each of the four processes operates. 137 Additionally, Discipline and Punish lays critical ground- work for understanding the relationship between state power and tolerance to pen- alty.138 Foucault and I diverge in respect to the efficacy of reformism. 139 Although we are in agreement that the legal system is riddled with problems,1 40 I am unaware of any acceptable alternative. Moreover, 1,unlike Foucault, believe the promotion of justice is both important, and when done right, advantageous. 14 1 B. Economic and UtilitarianEfficiency Perpetrators of sanitizedviolence ("sanitizers") often, whether intentionally or unin- tentionally, deflect attacks through equivocation and abstraction. Allegations of un- fairness and unjustness are easily diverted to conversations about the broader efficacy of a particular political or philosophical ideology. Sophisticated actors can miscon- strue legitimate and sensible intellectual positions to serve as a defense for their nefarious activities. A common instrument of this deception is the invocation of economic and utilitarian principles. These concepts are powerful devices for sanitiz- ers, because they: (1) are exceedingly complicated, and therefore difficult to combat, (2) sufficiently malleable to suit various purposes; (3) are presumed to be entirely objective processes; and (4) subvert notions of human emotion and intuition. 1. Defining and Understanding "Efficiency" (a) Economic Efficiency. The term "efficiency" varies from field to field and is dependent on the context in which it is used. 142 For economists, "efficiency is a relationship between ends and means." 143 Efficiency is frequently expressed in rela- tion to monetary considerations, but for many economists, "value" and "cost" can include any number of factors, such as time, effort, or sentimental significance each worth what a person or entity deems them to be. 14 4 Similarly, economic effi- ciency is not restricted to measures of the economy as a whole; it can be applied to an individual transaction, a group of transactions, solely from the perspective of a single individual, or from the perspective of multiple individuals-i.e. society.1 45 Determining whether a transaction is efficient from the perspective of any particu- lar individual is relatively easy. 146 More often than not, it is unnecessary to translate costs and values into quantifiable measures, since the evaluation is entirely self- referential-one must only ask the relevant individual, what would you prefer?147 Alternatively, economic efficiency models are more complicated when applied to multiple parties and transactions. 148 First, what is economically beneficial for any given person may not be for others. 149 Second, the interpersonal comparison of gain and loss is an inherently subjective process.1 50 When values and costs are qualitative in nature-e.g. freedom-economists must translate qualitative information into numerical representations ("quantification"). 15 1 This translation requires subjective determinations, such as choosing which variables and measurement tools to use. 152 Abstractly, it can be simply said that the economy is efficient when "every resource is optimally allocated to serve each person in the best way while minimizing waste and inefficiency"'1 53 However, efficiency can be defined only in relation to a pre- determined goal, and it is not obvious what the objective for economic efficiency should be.154 Economic calculus is often fraudulently characterized as an entirely neutral and objective science.15 5 This veil of objectivity can be extremely dangerous-at a minimum, an impediment to critical examination, or more omi- nously, a tool for manipulation1 56 (b) UtilitarianEfficiency. Utilitarianism is a subset of consequentialism, a class of normative ethics roughly defined as the philosophical position that ethical decisions should be evaluated solely on their material consequences. 1 57 Utilitarians generally share the common position that the most moral action is the one producing the greatest utility for the greatest number of people.1 58 Utilitarianism and economic efficiency theory overlap in many respects, but nonetheless have important differ- ences. 159 Most notably, utilitarianism is categorically concerned with normative eth- ics, 16 while economists disagree over the role of normative claims in the field of economics, if any at all. 16 1 Judge Posner, in his famous book The Economics ofJustice, makes a more aggres- sive claim, contending that normative economics and utilitarianism are fundamen- tally heterogeneous. 162 His primary argument is that while utilitarianism is concerned with promoting the surplus of pleasure over pain, normative economics is interested in the singular goal of wealth maximization. Problematically, his delineation is entirely self-serving. 164 He uses an overly simplistic definition of utilitarianism, which at best is applicable to classical utilitarians-e.g. John Stewart Mill and Jeremy Bentham-but is more aptly suited to describe hedonism.16 5 Utilitarianism should be more broadly understood as the normative prioritization of utility, which for some utilitarians is measured by pleasure and pain.16 6 There is no credible basis for assert- ing that utilitarianism categorically excludes wealth maximization as a measure of utility. 167 Similarly, Judge Posner implicitly claims, erroneously, that all normative economists believe wealth maximization ought to be the singular goal of economics. 168 Importantly, utilitarianism is potentially dangerous in many of the same ways as economic efficiency theory. First, it is sufficiently complicated, consisting of many different forms, rendering it amenable to manipulation. 169 Second, utility, in both fields, is exceedingly difficult to define, leaving room for the exploitation of its ambiguities. 170 Third, utilitarianism is commonly mischaracterized as an entirely objective science; but as is the case in economics, it requires subjective decision- making when weighing probabilities and selecting measurement methodologies. 1 1 2. "Efficiency" and the Plea Bargain Regime This article should not be read as an attempt to discredit economics or utilitarianism-both of which have extremely valuable applications. Rather, I pro-vide a specific and narrow indictment of their imprudent use, including: (1) making unfounded and wide-sweeping claims; (2) arbitrarily excluding relevant intangible considerations; and (3) posing as an entirely objective science. Economics and utilitari- anism merely provide decision-making tools that are, by themselves, incapable of providing normative guidance.1"2 In the language of efficiency theory, they are but the means to an end. We must resist the compulsion to fetishize neatness and quantifiability; otherwise we run "a very real risk of inhumanity-of maximizing a sterile and behaviorally defined value without regard for the organic, lived conse- quences of legal or moral decision-making." 173 Sadly, I believe such caution was not taken when crafting the plea bargain regime. 174 (a) The Price of so-called "Efficiency" Unlike the expansive rules, regulations and laws applied to criminal trials, plea-bargaining is approached with a laissez-faire attitude. 17 1 While trial preparation typically includes various fact-finding exercises (e.g. Discovery), plea-bargains rarely, if ever, involve comparable attention to de- tail.176 Congress' involvement with the regime has been almost entirely formalistic, e.g. prohibiting judges from participating in negotiations as opposed to creating substantive regulations.1 7 7 These shortcuts are not without consequence-each in- creases the likelihood that misinformation affects the disposition of a case. 1 78 Giving similar cause for concern, the Supreme Court in United States v. Ruiz unanimously held that prosecutors are permitted to require defendants to waive their right to impeachment information, as well as their right to appeal if such information comes to light. 17' Therefore, a defendant may be coerced into a plea deal on the basis of fraudulent witness testimony, prosecutors can knowingly conceal information exposing this fact, and defendants are without meaningful judicial recourse.180 The Court reasoned that while trial procedures are judged on the standard of fairness, the proper inquiry for plea bargains is voluntariness (discussed further in part E, manufac- turing of consent).18 1 The Court goes on to justify this counter-intuitive position by stating, "a constitutional obligation to provide impeachment information during plea bargaining ... could seriously interfere with the Government's interest in secur- ing those guilty pleas that are factually justified, desired by defendants, and help to secure the efficient administration of justice.""' (b) But What about Frye and Lafler? Arguably, the most meaningful protection afforded to criminal defendants during the plea process is the result of two Supreme Court companion cases, Missouri v. Frye 83 and Lafler v. Cooper184 , each five-four decisions. Both cases broaden the scope of Strickland v. Washington, which estab- lished the standard for overturning criminal convictions on the basis of ineffective assistance of counsel.185 Under Strickland, to prevail on an infective assistance of counsel claim, a defendant must prove: (1) defense counsel's representation fell below an objective standard of reasonableness ("performance prong"); and (2) a reasonable probability that but for this failure, the results of the proceedings would have been different ("prejudice prong").186 In Frye, the Court imposed a "duty to communicate formal offers from the prosecu- tion to accept a plea on terms and conditions that may be favorable to the ac- cused .... 18 Thus, defense counsel's failure to notify their client about the availability of a plea offer before its expiration presumptively satisfies the perfor- mance prong of the Stricklandtest.188 In Lafler the Court held that a defendant could seek relief if ineffective counsel both led to the rejection of a plea and resulted in a relatively harsher sentence at trial.18 9 Unlike Frye, defendants still carry the burden of proving the first prong of the Stricklandtest-failure to meet an objective standard of reasonableness.19 ° Note, under either case, relief will not be granted unless the defendant can sufficiently meet the requirements of the second prong. 191 Thus, in cases where an attorney failed to inform their client about the availability of a plea offer, to succeed on a an ineffective assistance of counsel claim, defendants must prove: (1) "a reasonable probability they would have accepted [it]"; and if "the prosecution had the discretion to cancel it or if the trial court had the discretion to refuse to accept it," then (2) "there is a reasonable probability neither the prosecution nor the trial court would have prevented the offer from being accepted or imple- mented." 192 When a defendant rejects a plea offer on the advice of counsel, the defendant must prove: (1) "but for the ineffective advice ... there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have with- drawn it in light of intervening circumstances)"; (2) "that the court would have accepted its terms"; and (3) "that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed."' 19 3 Plea-bargain reformers are divided as to the significance of these two decisions.194 My position is that, although a step in the right direction, neither offers relief from the regime's greatest ills. First, overturning a conviction merely places the defendant back into the plea-bargain system. 195 Second, neither has an impact on the pervasive- ness of plea-bargains generally.1 96 Third, they do address the economic or cultural drivers of "meet em' and plead em"' and, accordingly, maintain the de facto policy of mass incarceration. 197 Some commentators take an even more critical position, argu- ing that these cases actively encourage unscrupulous plea-bargaining, given that both decisions impose duties directionally geared towards advising defendants to take a plea-deal. 198 Finally, Fye and Lafler leave intact the four processes of sanitization critiqued in this paper, as evidenced by Justice Scalia's dissenting opinions.1 99 In both dissents, Justice Scalia's primary argument-aside from insisting the major- ity decisions lack constitutional foundation-is that there is no logical reason to protect defendants from ill-advised or uninformed plea rejections given that a defen- dant has no constitutional right to a plea-bargain in the first place.2"' On a surface level, this is perfectly rational. Nevertheless, it implicitly relies on the faulty premise that the trial system and plea bargain regime operate independently.2"1 In reality, sentencing guidelines implicitly account for penalty reductions that result from plea- bargaining.2"2 Problematically, this means that if defendants invoke their constitu- tional right to a trial, they face an artificially high penalty.2 ° 3 "Many have surmised that the larger the sentencing differential, the greater likelihood a defendant will forego his or her right to trial and accept the deal." 20 4 Proof of this scheme can be deduced through elementary logic. First, we should take as an assumption that sentencing lengths are intended to serve some legitimate purpose-e.g. deterrence, rehabilitation, or retribution.20 5 The alternative would be to authorize incarceration on an entirely arbitrary basis, which is more akin to slavery than criminal justice.20 6 If we accept this as true, then why would society allow criminal penalties to be reduced at all?20 7 Proponents of the plea bargain regime argue that this sacrifice simply reflects a compromise between two competing objectives-justice and efficiency. 208 But the proposition that these concerns are meaningfully balanced collapses under inspection. First, the fact that plea deals represent ninety-five percent of convictions is strong evidence that efficiency consid- erations have been elevated above fairness and justice.20 9 Second, plea bargains do not typically involve a minor sentence reduction; rather, they are most often dra- matic. 210 For example, "[]n 2012, the average sentence of federal drug offenders convicted after trial was three times higher (16 years) than that received after a guilty plea (5 years and 4 months). '2 11 Finally, the plea bargain regime actively encourages defendants to think like economists, weighing risks and probabilities, rather than to seek an outcome most in line with truth and justice. 12 3. Conclusion Proponents of the regime have defended its merits by improperly invoking no- tions of economic and utilitarian efficiency. However, if truth, fairness, and justice are essential goals of the criminal justice system, plea-bargaining has proven to be exceedingly inefficient.2 13 And thus, its proponents, either consciously or uncon- sciously, rely on a hidden and dangerous belief, that none of those things matter. C. Minimization of Pain and Unpleasantness

#### Mass incarceration and state racial violence is rationalized and obfuscated via plea bargaining – it avoids penal consciousness and direct consequences

Gocha 16 [Alan Gocha, lawyer with a J.D. from Georgetown University Law Center, 2016, “The Sanitization of Violence: Exposing the Plea Bargain Regime as a Tool for Mass Injustice,” Georgetown Journal of Law and Modern Critical Race Perspectives, https://heinonline.org/HOL/P?h=hein.journals/gjmodco8&i=317]/Kankee

C. Minimization of Pain and Unpleasantness A powerful sanitization tactic is to minimize the pain and unpleasantness experi- enced by the perpetrator's victims. Minimization can be: real, a reduction or elimina- tion of painful and unpleasant features; discursive, the rationalization of violence through the invocation of logically fallacious reasoning or exploitation of linguistic ambiguity; or illusory, the propagation of distorted beliefs about the severity of suffering being inflicted. Sanitizers often avoid discussing an act's justifiability in absolute terms, instead, diverting the conversation to a relative comparison of what was done versus what could have been done. This approach to ethics is ill-advised, to say the least. First, it authorizes nearly any violent act because, almost always, it is possible to identify a more abhorrent alternative. Second, it is logically indefensible. Granted, in order to determine the preferability of a course of action, a comparative inquiry is required, i.e. we ought to weigh the advantages and disadvantages of each available option. Nonetheless, it is not the case that a choice is good simply because it is less bad than other alternatives.2 14 A good example of minimization is the Supreme Court's analysis in Baze v. Rees.2 1 5 The Court held that, under the Eighth Amendment, a method of lethal injection is not cruel and unusual unless there is an "objectively intolerable risk of harm. '2 16 The Court further ruled that "an isolated mishap alone does not give rise to an Eighth Amendment violation, precisely because such an event, while regret- table, does not suggest cruelty .... 217 This discourse is sanitizing in a number of respects: (1) describing an excruciatingly painful death as a "mishap"; (2) positing that something is not cruel simply because it was an "accident"; (3) implicitly expand- ing the definition of "accident" to be inclusive of foreseeable and avoidable conse- quences; (4) using "objectively" in conjunction with "intolerable risk", even though tolerance is definitionally a subjective determination; and (5) describing "harm" to describe physical pain but not death. Additionally, consider the Court's statement that "it is difficult to regard a practice as 'objectively intolerable' when it is in fact widely tolerated." '2 18 In other words, the Court takes the tautological position that a method of execution is neither cruel nor unusual if it does not offend society's sensibilities. In duplicitous fashion, the Court notes that while this "heavy burden" is not insurmountable, it has never found an execution technique to be cruel and unusual.2 19 The decision concludes with an eerie attempt to offer comforting words: "Our society has ... steadily moved to more humane methods of carrying out capital punishment. The firing squad, hanging, the electric chair, and the gas chamber have each in turn given way to more humane methods, culminating in today's consensus on lethal injection."2 2 ° Foucault says that lethal injection is legitimized through the double process of the decline of the spectacle and reduction of pain.22 1 "Today a doctor must watch over those condemned to death, right up to the last moment-thus juxtaposing himself as the agent of welfare, as the alleviator of pain, with the official whose task it is to end life." '2 22 We make killing more "tolerable" through the relative reduction of pain, but as the Court analysis illustrates, this reduction, in reality, is merely a pretext. The plea bargain regime is justified in a similar fashion, claimed to mercifully spare defendants from the pains and anxieties of trial while granting them relief from a worse, but "deserved", fate.22 3 Yet, plea bargains in the aggregate are bad for criminal defendants.224 First, the plea bargain regime has driven the establishment of artificially high criminal penalties, thus, functionally eroding the constitutional right to a jury trial.22 5 And second, the plea bargain regime is a pipeline for mass incarcera- tion, making it possible to systematically imprison millions for non-violent and 226 minor drug offenses. If prosecutors were required to go to trial to secure convictions, the vast majority of low-level crimes would not be prosecuted.22 The Supreme Court in Santobello v. New York explicitly recognized this reality, commenting that, absent plea bargains, the federal government would need to multiply, by many times, the number of judges and court facilities. 228 Nevertheless, it is unlikely that the elimination of plea-bargaining would result in such an expansion given how unpopular it would be to (a) substantially enlarge taxpayer burden and (b) dramatically increase the fre- quency of jury service. Thus, by making society internalize the cost of incarceration, financially and personally, society would be incentivized to critically examine crimi- nal penalties-likely resulting in greater demand for reform.22 9 D. Obfuscation oftheAct Perhaps Foucault's greatest contribution to my conception of sanitization is in relation to obfuscation. Foucault argues that "[s]ecret punishments and punishments not specific in the legal code, a power to punish exercised in the shadows according to criteria and with instruments that elude control ...[is] enough to compromise the whole strategy of... reform. 23" Hence, the power of the government to apply criminal penalties in such a manner allows it to inflict punishment despotically and arbitrarily.23 1 As discussed in the introduction, prosecutorial discretion is near absolute-allowing for the disparate treatment of defendants for unknowable and 232 unreviewable reasons. Plea bargains obfuscate the violence of incarceration in three ways. First, it quite literally removes the act from public view.2 33 Excluding outsiders from the process reduces the frequency in which Americans think about incarceration and limits 234 exposure to experiential evidence that may challenge the dominant narrative. Secondly, even insiders become less intimately involved with the process by substan- tially constraining defendant interaction with prosecutors, defense attorneys, and judges. 23 5 Taken together, resistance to mass incarceration is unable to gain momen- tum, because for the vast majority of Americans, the human element of the penal system is kept out of sight and out of mind. Finally, plea bargains produce far less detailed documentation as compared to trials, and what record is maintained tends to be fairly one sided. 236 This acts as yet another obstacle for reform movements given that it makes it difficult, and sometimes impossible, to prove innocence at after the fact.23 Additionally, in terms of racial disparities in sentencing, plea-bargaining effec- tively conceals all direct evidence of racially motivated discrimination, because: (a) prosecutors can offer minority defendants worse plea deals without review; (b) the failure to preserve counter-evidence makes it more difficult to prove discrimination occurred in the first place; and (c) lack of public interaction with the criminal justice system allows myths about racial differences in criminality to be maintained.2 38 Accordingly, the elimination or substantial reduction of plea-bargaining would go a long way to disrupt the stranglehold of institutional racism on minority populations. As previously discussed, without the availability of plea bargains, the prosecution of low-level drugs crimes, the primary mechanism for mass incarceration, would be- come virtually non-existent.2 39 This would not only directly benefit people of color by removing a significant driver of racial inequality, but it would also have the cyclical effect of reducing racialized views about criminal behavior. Obfuscation, although arguably the simplest processes of sanitization,is one of the most insidious. Falsities perpetuated by the other three processes can at least be combated through diligent attacks. Obfuscation, however, suppresses the debate entirely. E. Manufacturingof Consent

#### No pretrial detention link turns – the ease of assembly line justice via guilty pleas causes the presumption of guilt that encourages preemptive punishment in jails.

Hessick 21 [Carissa Byrne Hessick, Ransdell Distinguished Professor of Law at the University of North Carolina School of Law, where she also serves as the director of the Prosecutors and Politics Project, 2021, “Punishment Without Trial: Why Plea Bargaining Is a Bad Deal,” Abrams Press, ISBN: 9781419750304]/Kankee

The justices overruled the trial court and released the defendant, who had already spent more than two years awaiting trial. Judges’ fears about losing electronics are not unfounded. There are many examples of criminal justice decisions in favor of defendants being used as a wedge issue in judicial elections. But I think there is another reason, too: judges no longer think trials are necessary in order to impose punishment. Because most defendants plead guilty, trials are no longer the defining moment when a defendant’s guilt is established. Instead, guilt is basically presumed in most cases, and the defendant entering a guilty plea is just a formality that has to be observed. The idea that a guilty plea is just a formality may also explain why judges are so comfortable “counting” the time served before a conviction as part of a defendant’s punishment. And because judges are told that they can make a quick and informal decision themselves about guilt at the bail hearing, they may be refusing to release defendants because they’ve already made up their minds that those defendants are guilty. If judges already presume that defendants are guilty, then it shouldn’t surprise us to see them using bail and pretrial detention as a way to punish those defendants before trial. One of the judges in Houston, Texas, admitted that he and the other judges in his courthouse had been using bail as a way to punish people if they showed up late to court. “You come in late? I was doubling, tripling bonds,” he said. “Bond was a way to punish people. It’s like a whooping. ‘Go get the belt. You get three licks.’ ” This doesn’t just happen in Texas. A study of a Connecticut court found that police would use their power over bail to ensure that some defendants spent at least some time incarcerated. If a defendant was belligerent when the police interviewed him, the police would sometimes incarcerate the defendant to “teach him a lesson” or until he calmed down. Police would do this by initially setting a high bail, requiring the defendant to come up with a large amount of money in order to be released, and then reducing the amount of bail eight or twelve hours later. In other words, judges and law enforcement know that pretrial detention is no different from actual punishment. And so they intentionally use it to punish people for behavior that they find annoying or disrespectful, even if it isn’t a crime. Those of us who care about plea bargaining can’t overlook the central role that pretrial detention plays in the modern criminal justice system. People who are detained before trial—people like José and like Elizabeth’s clients in Houston—often plead guilty because that is the only way that they can leave jail and go home. If they insist on their innocence, then they have to stay in jail for weeks or months waiting for a trial. There are a lot of people in this situation. A recent study by researchers at the University of Pennsylvania’s law school found that people charged with misdemeanors were 25 percent more likely to plead guilty if they were detained pretrial than if they were released. More important, when defendants accused of minor crimes are offered plea bargains for “time served,” it shows that the legal arguments judges tell us about detention being different from punishment are really just lies. Detention is no different from punishment. So we shouldn’t be surprised when police and judges use detention to punish people—people who are supposedly innocent until and unless proven guilty. And we shouldn’t be surprised to see defendants pleading guilty just in order to escape jail. They are already being punished, so they may as well just get the formality of the guilty plea over with. CHAPTER FIVE LEGAL THEFT

#### NOTE: See the 2024 Mar-Apr “Rehabilitation” Kankee Brief for life-without-parole/long-prison sentence impacts (and that topic’s AT File for potential answers to related arguments).

#### Mass incarceration is a project for antidemocracy and racial subjugation

Hasbrouck 24 [Brandon Hasbrouck, Associate Professor of Law and Director at the Frances Lewis Law Center at the Washington and Lee University School of Law with a Doctor of Law from Dominican College, a J.D. degree from Washington and Lee University School of Law, and a B.A. from Dominican College, 2024, “Prisons as Laboratories of Antidemocracy,” Washington and Lee University School of Law Scholarly Commons, https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1829&context=wlufac]/Kankee

I should pause briefly to explain how I will contrast democracy and antide- mocracy in this Book Review. Democracy, broadly considered, is the ability of the people to participate meaningfully as equals in the decisions that shape their lives.16 Democracy is necessarily more than simply voting and taking the preferences of majorities as law, as democracy’s commitment to political equality demands some measure of respect for minority positions.17 To preserve a de- mocracy, the people must remain vigilant against the creep of oligarchy and re- tain some mechanism to wrest control when power becomes too concentrated.18 Antidemocracy, by contrast, seeks to accelerate and solidify this concentration of power through the subversion of democratic institutions.19 Antidemocracy sus- tains hierarchical inequality by suppressing the political and economic power of disfavored groups to entrench the power of an oligarchic elite. Mass incarceration presents considerable opportunities for antidemocratic actors. First, incarcerated people are typically excluded from voting.20 Prison ger- rymandering uses these disenfranchised people in redistricting to bolster white, rural voting power at the expense of diverse cities.21 Incarcerated people are sub- jected to the last legal vestiges of involuntary labor, forced to work for the insti- tutions that imprison them or even for for-profit corporations at less than mini- mum wage.22 Convictions also carry a wide range of collateral consequences that rob individuals of essential dignity interests and cause lingering harm to their communities.23 These burdens fall disproportionately on marginalized commu- nities.24 All of this serves to reinforce America’s most fundamental hierarchy: the racialized caste system that persists as a lingering echo of slavery.25 Political elites driving the march of antidemocracy today are largely descended from their predecessors who held other human beings in bondage.26 It should come as little surprise that the political and economic descendants of slaveholders—and their ideological allies—would support slavery and racial caste in their modern trans- formations. Yet, prisons hold another benefit for antidemocracy. They offer a proving ground for new antidemocratic policies. Where Justice Brandeis famously hailed the ability of a state to act as a laboratory of democracy,27 prisons, by contrast, have become the laboratories of antidemocracy. Antidemocratic actors can exert all manner of abuses on incarcerated people, far from the condemnation of courts and the voting public. While prisoners challenge such policies in court, they of- ten face an unsympathetic court and resource disadvantages, leading to prece- dents favoring the prisons’ policies.28 Such decisions then stand as support and justification for politicians interested in broader social control, allowing the spread of antidemocratic policies to the public at large.29 Even when politicians do not explicitly cite to such cases, the cases have already served to demonstrate the roadmap for defending such policies. While the well-documented harms of our carceral state sit uncomfortably with our concept of democracy, prisons’ roles in developing antidemocratic policies could represent an even greater threat. This Book Review is the first piece of scholarship to explore the connection be- tween antidemocratic policies in prison and their subsequent counterparts among the free population.30 Black scholars and activists have long opposed prisons—especially in their modern incarnation—as tools of an antidemocratic order. Prisons by their very nature are an aberration within a democracy, but their potential as laboratories of antidemocracy presents an even greater threat. The lessons of the Attica up- rising resonate today, as prisons still fail to provide adequate medical care, censor material on ideological grounds, refuse to pay minimum wage, and incarcerate people for decades at a time.31 While a surge of reform followed the uprising, mass incarceration has exacerbated the problems, and meaningful changes were fleeting. This Book Review proceeds in three parts. Part I reviews Bellin’s Mass Incar- ceration Nation, exploring the consequences of Bellin’s meticulously detailed re- search into the many causes of mass incarceration. It also uses Bellin’s book to probe the question his work implies: Is mass incarceration compatible with de- mocracy? Part II then discusses various antidemocratic policies in place in Amer- ican prisons, including antilabor practices, censorship, restrictions on bodily au- tonomy, and limits on legal recourse for official misconduct. Part III discusses the analogs of these antidemocratic policies which are developing in more gen- eral applications outside the prison walls. It also addresses the difficulty of prov- ing a direct link between antidemocratic practices and their antecedents in pris- ons. The final section of Part III examines the necessity of radically reimagining our criminal legal system to preempt these threats to democracy. Mere reform may be sufficient to mitigate mass incarceration, but prison’s antidemocratic ef- fects cannot be resolved without abolitionist interventions. i. the state of mass incarceration Free labor’s the cornerstone of U.S. economics. —Killer Mike32 The United States incarcerates a higher percentage of its population than any other country today.33 This large percentage represents over two million people at any given time.34 State and federal prisons are ill-equipped to confine so many people.35 The burdens of our extreme reliance upon incarceration fall dispropor- tionately on Black people.36 Michelle Alexander has documented the devastating impact of mass incarceration on Black Americans: “When the War on Drugs gained full steam in the mid-1980s, prison admissions for African Americans skyrocketed, nearly quadrupling in three years, and then increasing steadily until it reached in 2000 a level more than twenty-six times the level in 1983.”37 Collec- tively, all the above trends are the phenomena that make up the core of mass incarceration. Bellin’s Mass Incarceration Nation provides an exhaustive analysis of the state of mass incarceration in America and the policies that brought us to this point. His thesis is that no single policy created mass incarceration. Rather, a constel- lation of policies—accelerated by the public’s fear of crime and appetite for pun- ishment—drove parallel processes that must be dismantled individually if mass incarceration is to end. None of this is particularly new information, though Bel- lin presents the material with an uncommon thoroughness, demonstrating each policy choice’s contribution to the trend through a wealth of statistical evidence. The conclusions that Bellin reaches are aimed at anyone who would seek to end mass incarceration, whether reformist or abolitionist.38 Mass incarceration can- not be undone with a single policy change, or even a cluster of policy changes. Those policy changes must be implemented together, along with serious efforts to reduce violence and shift popular attitudes away from retribution.

#### The prison industrial complex intentionally fails to rehabilitate for the purpose of enriching elites and increasing inequality

Fasching-Varner et al. 14 [Kenneth J. Fasching-Varner, Shirley B. Barton Endowed Assistant Professor of Edu- cational Foundations at Louisiana State University, Roland W. Mitchell, Associate Professor of Higher Education and Associate Director of the School of Education at Louisiana State University, and Lori L. Martin, Associate Professor of Sociology at Louisiana State University, and Karen P. Bennett-Haron, Chief Judge of Las Vegas Justice Courts, 2014, “ Beyond School-to-Prison Pipeline and Toward an Educational and Penal Realism,” Equity & Excellence in Education, https://ubwp.buffalo.edu/aps-cus/wp-content/uploads/sites/16/2015/07/eyond\_School-to-Prison\_Pipeline\_and\_Toward\_an\_Educational\_and\_Penal\_Realism.pdf

The Economic Benefits of a Growing Inmate Population While understanding the financial impact prison has on those incarcerated, it is equally important, if we are to understand that there is no crisis in place for “the system,” to also understand the economic benefits in place creating prisons. That is to say that while the prison culture has negative social and financial impacts on the individuals being “punished,” it has great rewards for those in the prison business. Engels (1843), in his famous piece Outlines of a Critique of Political Economy, asserted, “The struggle of capital against capital, of labour against labour, of land against land, drives production to a feverpitch at which production turns all natural and rational relations upsidedown” (p. 1). While it appears unnatural and irrational to want to incarcerate individuals, doing so in ways that disproportionately impact populations considered by the dominant factions of society to be without value eliminates that segment of the population from accessing the wealth of the dominant group. Such an approach also creates an industry (infrastructure, employment, and market) in keeping those “undesirables” away from wealth and access. In essence, those in prison do not simply help maintain the balance of wealth and power, they actually serve to create larger differences between the “haves” and the “have nots.” Not only do the imprisoned remain poor, but their families (as shown earlier) remain poor, helping those with power and privilege to gain more. As Engels (1843) asserted, “with the fusion of the interests now opposed to each other there disappears the contradiction between excess population here and excess wealth there” (p. 5). Neutralizing and isolating a segment of the population and creating an industry whose sole purpose is to neutralize and isolate works in tandem to reproduce inequities that allow both wealth and poverty to grow in disproportion. Chang and Thompkins (2002) asserted, “the dominant classes use imprisonment as a means of political, economic, and social control” (p. 47). One end of that social control is seeking to create economic market balance. That is, the state adjusts incarceration practices to match the economic equilibrium within the society. In times of low unemployment, less imprisonment occurs, but “when unemployment is high, the state imprisons greater numbers to absorb surplus labor and suppress social unrest associated with economic deprivation” (Chang & Thompkins, 2002). Chang and Thompkins (2002) also suggested, “increases in the unemployment rate, poverty, income inequality, racial conflict, and political conservatism contribute to an increase in the incarceration rate, independent of the crime rate” (p. 47). A major shift in economic trends of modern times traces back to the Reagan administration’s military-like assault on the economy in which the privileged became more privileged and the masses were fed the lie that money would trickle down as a result of protecting and privileging the wealthy—Reaganomics. The early 1980s mark a decisive turn, which has only accelerated as time passes, toward leveraging crime, punishment, and incarceration as a neauveaux industry—a mechanism for wealth to replicate and for those not deemed worthy to produce more than they consume. Many benefit from our industrial approach to incarceration, including “construction companies, architects, and the suppliers of high-tech surveillance equipment and other materi- als [who] earn profits when a new prison is built. . .[creating] the transformation of prisoners into profits” (Sudbury, 2004, p. 12). As Samara (2000) suggested, the 1980s and 1990s saw a widespread and swift expansion of prison construction. The 21st century has seen that expan- sion of prisons notably shift toward privatization. Private prisons turn profit by lowering labor costs, which Chang and Thompkins (2002) have noted are responsible for upwards of 60% of prison budgets. Lowering labor costs means accessing a labor force just slightly beyond those imprisoned, who are willing to work for low wages, often in rural communities plagued by the elimination of manufacturing industries (Chang & Thompkins, 2002; Hallett, 2002; Samara, 2000; Sudbury, 2004). Our industrialized approach to punishment “has become a key economic development strategy for rural towns devastated by the economic restructuring brought about by globalization” (Sudbury, 2004, p. 13). Consequently, rural communities in need of economic stimulation are willing to provide cheaper labor costs for private prisons, expanding the profit margins for the corporations that run these prisons. The landscape, then, is rural communities engaged in battles to make the most attractive offer for private prisons to invest. According to Samara (2000), “much like Third World nations competing to attract foreign investment, rural communities fighting each other for prisons risk engaging in a race to the bottom and becoming dependent on their community’s new employer and the crime that supports it” (p. 42). The busi- ness of prisons is big, and to put the picture into better perspective, “the United States spends more than $146 billion dollars on the criminal justice system, including police, the judiciary and court systems, and corrections. More than $50 billion of this is spent directly on corrections” (Brewer & Heitzeg, 2008, p. 637). Put differently, if the judiciary, police, and criminal justice system were a country, it would be 57 out of 200 in top GDP and would rank higher than the lowest 67 countries combined (World Factbook, 2014). Once built, there is a need to fill the private prisons with “residents” and ensure they are there to stay for long periods of time and, hopefully, once let out, recidivate. The goal in these prisons, according to Samara (2000), is not rehabilitation or correction but, in fact, failure: If the prison-industrial complex is successful, it will be the cause of its own demise. If it fails. . .this failure will be used to expand the industry. From the point of view of the prison business, then, failure is much more likely to lead to success. (p. 43) Additionally, the private prison industry, according to Dolovich (2005), exerts considerable force, through lobbying, on legislators both for expansion and in sentencing. According to Sarabi and Bender (2000), through donations and hyper-lobbying think tanks, legislation is created that favors incarceration—the market has significant influence on our approaches to punishment. According to Sudbury (2004), the sphere of influence extends to prison guard unions, politicians, and the media, who use fear of crime and the criminalization of minority peoples as ways to advocate their own financial interests. Dolvich highlighted that “any time criminal justice policy is influenced by parties hoping to further their own financial interests through increased incarceration. . .is cause or concern” (p. 533). To provide a clear and succinct analysis of what is in place with respect to the prison-industrial complex, it is important to understand that This complex now includes more than 3,300 jails, more than 1,500 state prisons, and 100 federal prisons in the United States. Nearly 300 of these are private prisons. More than 30 of these institutions are super-maximum facilities, not including the super-maximum units located in most other prisons. (Brewer & Heitzeg, 2008, p. 637) While the academic conversation has consistently called the pipeline “school-to-prison,” in- cluding the framing of this special issue, the economic and market forces driving the prison- industrial complex urge us, as the editors of this special issue, to consider and reframe the pipeline as a “prison-to-school” pipeline. That is, we do not believe that incarceration occurs simply because crime is committed or because of cracks in the schooling system. We believe that the impact of prisons opens our vision to seeing that prisons demand a clientele, particularly given the relative economic instability over the last 35 years, save some time in the mid-1990s. This economic state requires prisons, as previously mentioned, to regulate unemployment and to create financial separation between races, ethnicities, and socioeconomic groups. Prisons, which are increasingly privatized, do not simply meet society’s demand for a space to execute pun- ishment; they, in fact, create an entire enterprise and a well-lobbied one, whose base function rallies around having a population to punish. Without that population, the economic equilibrium is threatened as more people have a need for employment that would otherwise be locked up, and the prison profiteers lose serious wealth potential reality that the free market will not allow to come to fruition. Schools, consequently, are used as a social landscape, particularly within urban centers, to prepare the next generation of future inmates. EDUCATIONAL AND PENAL REALISM

### Contention 3: Advantage Counterplan

#### The United States criminal justice system ought to:

* Increase funding to pay for all additional actors to ensure a right to a speedy trial.
* Build new trial courtrooms.
* End pretrial detention, abolish cash bail, and encourage alternatives to imprisonment.
* End all overly punitive policies that allow prosecutorial overcharging to encourage plea bargaining.
* End court fees unable to be paid for by defendants

#### The counterplan is entirely for solving the aff – our only offense is the “trials good” arguments on the other contentions.

#### Plea bargains are due to limited judicial resources – increasing judicial capacity decreases plea bargain incentives and solves court clog

Covey 16 [Russell D. Covey, Professor at Georgia State University College of Law with a J.D. from Yale Law School, an M.A. from Princeton University, and an A.B. from Amherst College, 2016, “Plea Bargaining and Price Theory, George Washington Law Review, https://www.gwlr.org/wp-content/uploads/2016/08/84-Geo.-Wash.-L.-Rev.-920.pdf]/Kankee

1. Judicial Scarcity One of the most critical factors in plea pricing is the extreme scar- city of judicial resources. 76 Trials, in particular, are a scarce commod- ity. Indeed, the time and attention of all the actors in the criminal justice system—prosecutors, police detectives, defense attorneys, criminal investigators, judicial law clerks, and judges most of all—are fixed and subject to the laws of scarcity, 77 as are, for that matter, courtroom availability for trying and processing defendants 78 and jail beds for housing them both before and after disposition of the charges.79 Given the current size of the judicial infrastructure, the number of trials that can be conducted in any given year cannot ex- ceed some fixed ceiling. As Figure 1 illustrates, there is a strong cor- relation between judicial caseloads and the guilty plea rate. As judicial caseloads increase, so too does the rate of guilty pleas. 80 This relationship follows from the fact of judicial scarcity. If there are ten courtrooms in the county courthouse, and each trial consumes on av- erage three days of court time, and those courts are in session 200 days a year, simple arithmetic suggests that no more than 666 trials could be conducted per year. Add in the amount of additional court time consumed by pretrial hearings, arraignments, plea colloquies, sentencing hearings, and the like, and that number will shrink even further. If 600 defendants are charged each year in that district, then the scarcity of courtrooms and judges will not matter much to the price of a guilty plea. Indeed, if adjudicative (and prosecutorial) ca- pacity ever greatly exceeded the supply of defendants, the price prose- cutors would be willing to pay for guilty pleas might plummet or even disappear.81 If 6000 defendants are prosecuted in the district each year, however, demand for the scarce resource of court time will be quite intense. With 6000 defendants, it is quite clear that ninety per- cent or more of those cases must be resolved without trial. 82 All things being equal, prosecutorial demand for guilty pleas will sky- rocket, and prices will rise, given the limited supply of court time for trials.83 Figure 1 illustrates this correlation. In 1946, the average federal judge carried 558 civil and criminal cases on his docket. 84 That same year, 82.3% of all federal criminal convictions were obtained through guilty pleas.85 After a brief uptick, federal judicial caseloads steadily declined, reaching their nadir in 1968, when they averaged 311.7 per judge. 86 After 1946, the guilty plea rate continued to increase until 1951, five years after the peak in judicial caseloads, after which it too fell into a decline, bottoming out in 1973 at 78.5%, again five years after the recent bottoming out of judicial caseloads in 1968. 87 Mean- while, beginning in 1968, caseloads began to rise. 88 The guilty plea rate remained relatively stable for five years and then it too took an- other uptick in the early 1980s. 89 Since then, caseloads and the guilty plea rate have both trended higher, with caseloads spiking in 1985 (reaching an all-time high of 640 cases per judge), while the guilty plea rate jumped to a then-new high in 1991 of 85.2%. 90 The movement of the two lines strongly suggests that judicial caseloads are a leading indicator of the guilty plea rate. 91 Intuitively, that conclusion makes sense. Where judges face high caseloads, they may well pressure pros- ecutors to settle cases rather than try them; prosecutors may feel com- pelled to resolve the case with a plea bargain rather than let it linger, risking potential speedy trial problems, evidence deterioration, and decreasing the deterrent sting of the sentence. Judges might also in- crease trial penalties where they perceive a need to induce more guilty pleas. 2. Value of Legal Entitlements

#### This half of the counterplan discourages overcharging for crimes and solves harms from pretrial detention

Raghavan 18 [Priya Raghavan, counsel in the Justice Program at the Brennan Center for Justice with a B.A. from the University of Michigan and a J.D. from Yale Law School, 2018, “Criminal Justice Solutions: Model State Legislation,” Brennan Center, https://www.brennancenter.org/media/129/download/Report\_Criminal\_Justice\_Model\_Legislation.pdf?inline=1]/Kankee

Introduction America’s criminal justice system is in crisis. It is both inequitable, placing a disproportionate burden on communities of color, and extremely expensive, costing $270 billion a year.1 What’s more, our current approach is not necessary to protect public safety. Research conclusively shows that high levels of imprisonment are simply not necessary to protect communities. The Brennan Center has found that around 40 percent of America’s prison population is incarcerated with little public safety justification — in other words, they are behind bars unnecessarily.2 Understandably, voters across the political spectrum have lost faith in the fair administration of justice, and the urgency of criminal justice reform continues to be a rare point of bipartisan agreement. Despite this voter consensus — and with some notable exceptions — policymakers generally have been slow to respond. This report offers state lawmakers model legislation based on smart, bold policy solutions that would keep crime low while reducing mass incarceration. These model bills are based on the policy solutions put forth in our March 2018 publication Criminal Justice: An Election Agenda for Candidates, Activists, and Legislators (“Criminal Justice Agenda”).3 More background on the impact and motivation for these policies can be found in that report. This report provides the blueprint to make those policy solutions achievable. In some cases, the report spotlights robust and useful examples of state legislation already introduced or in effect. In others, the Brennan Center created original model legislation that can be easily adapted to the needs of different jurisdictions. Notably, if every state passed the Alternative to Prison Act and the Proportional Sentencing Act, two new and original policy proposals, the national prison population could safely be reduced by nearly 40 percent.4 The report includes model and example legislation to: • Eliminate Imprisonment for Lower-Level Crimes. Incarceration is too often the punishment of first resort. It can be especially counterproductive for people convicted of lower-level crimes who could be better sanctioned by alternatives to incarceration, such as treatment, community service, or probation. Our model bill would eliminate imprisonment for certain qualifying lower-level offenses and instead require diversion into various alternatives to incarceration. • Make Sentences Proportional to Crimes. State prison sentences are excessively long. A growing body of research shows that there is little or no relationship between length of incarceration and recidivism. Our model bill would reduce sentences by 25 percent for those offenses that make up the largest share of the prison population. • Abolish Cash Bail. The decision of whether a defendant should be jailed while awaiting trial is often based on a defendant’s wealth and not on public safety considerations. This 2 report highlights a model bill developed by Civil Rights Corps that would end the use of money bail. • Reform Prosecutor Incentives. Our model bill incentivizes local prosecutors to change their practices by providing bonus dollars to their offices if they reduce incarceration while keeping recidivism rates low. • Reform Marijuana Laws. Jail and prison spaces are expensive, and beds in these facilities should not be used for people convicted of low-level marijuana offenses. This report highlights a ballot initiative that legalized marijuana possession in California and legislation that decriminalized marijuana possession in Delaware, serving as useful models for lawmakers to enact as legislation in other states. • Calibrate Fines to Defendants’ Ability to Pay and Eliminate Fees. Courts continue to levy fees and fines on defendants convicted of crimes and civil violations without considering whether they are financially able to pay them. This leads to never-ending cycles of criminal justice debt and even modern-day debtors’ prisons. Our model bill would calibrate criminal fines (monetary sanctions prescribed by courts as punishment for committing a crime) to a defendant’s ability to pay and eliminate the assessment of court fees (flat fees intended to offset court costs) on criminal defendants. It would mandate that fines are calculated with reference to the number of days of income a person must forego to pay them — called “day fines.” • Reduce Opioid Deaths. The over-prescription of legal opioids, such as oxycodone and codeine, contributes significantly to America’s opioid crisis. This report highlights legislation in New Jersey that limits when and how doctors can prescribe opioids. It also highlights a Vermont bill that increases access to drugs that can neutralize the effects of opioid overdoses. • Curb the Number of Women Entering State Prisons. The best way to help incarcerated women is to significantly reduce the female prison population. Additionally, incarcerated women have unique needs, and reforms aimed at conditions of confinement can help meet them. This report provides summaries of legislation in New Jersey and Oklahoma that encourage diversion and improve conditions of confinement and reentry services for women and primary caretakers of children.

#### Banning peremptory challenges makes juries more diverse

Levinso et al. 21 [Ariana R. Levinso, Professor of Law at the Louis D. Brandeis School of Law at the University of Louisville, Sonya Faber, researcher with a PhD and MBA from Bioville GmBh, Dana Strauss, researcher with a BS from the School of Psychology from the University of Ottawa, Sophia Gran-Ruaz, researcher with a BS from the School of Psychology from the University of Ottawa, Amy Bartlett, researcher with a LL.B. and LL.M. from the Department of Religious Studies from the University of Ottawa Maria Macaluso, JD candidate at the Louis D. Brandeis School of Law at the University of Louisville, and Monnica T. Williams, researcher with a PhD and ABPP from the School of Psychology at the University of Ottawa, 2021, “Challenging Jurors' Racism,” Gonzaga Law Review, https://heinonline.org/HOL/P?h=hein.journals/gonlr57&i=397]/Kankee

2. Peremptory Challenges The second type of challenge is the peremptory challenge. All jurisdictions permit each attorney a specified number of peremptory challenges.101 An attorney need not specify any reason to invoke a peremptory challenge and have a juror removed.10 2 Peremptory challenges permit attorneys to strike a juror if they believe, based on a juror's answers to questions or the juror's demeanor, that the juror is unlikely to keep an open mind about the client's claims or defenses.1 03 In these cases, the attorney may not have enough information to invoke a for-cause challenge. However, the attorney could either have a strong feeling that the juror would not be impartial or believe that the juror's worldview or other characteristics (e.g., political ideology) would cause the juror to heavily favor the opposing side. In any event, a peremptory challenge would be appropriate.104 Peremptory challenges are intended to enhance the parties' confidence in the jury system.105 However, the legal literature has critically examined peremptory challenges for decades, with many scholars noting that attorneys have historically used and continue to use peremptory challenges to cement racism in the jury selection process. 106 For example, according to Deborah Zalesne and Kinney Zalesne, throughout the twentieth century, peremptory challenges have mainly served to "manifest racial discrimination and irrational prejudice rather than to balance the scales between the state and the accused." 107 Danielle Ward Mason further explains that in prosecutorial use of peremptory challenges, "[r]acial discrimination occurred when a prosecutor would strike all eligible black jurors from service, especially when the defendant was black. Since the number of blacks on the venire was usually very small, the prosecutor had enough peremptory challenges at his disposal to remove all of them."' 08 Although Batson v. Kentucky attempted to provide a safeguard against racial discrimination in peremptory challenges, unfortunately, it has proven largely ineffective.1 09 Attorneys must simply provide "race-neutral" reasons for striking potential jurors, and the burden then shifts to the opposing side to prove racist intentions. 110 Many scholars have also acknowledged that the process to ensure attorneys do not use peremptory challenges to systematically eliminate jurors of a certain race is inadequate.1"' Some have proposed the use of questionnaires rather than relying solely on voir dire. 1' 2 Importantly, peremptory challenges originated in the English common law system and were entirely abolished in England in 1989 as well as in Canada in 2019.113 Our belief is that peremptory challenges do more harm than good and cannot be reformed. As such, peremptory challenges should be abolished and replaced with measures aimed at eliminating racist potential jurors with for-cause challenges, such as those described herein. However, because this may not happen in the foreseeable future, we suggest ways that attorneys can use peremptory challenges to root out racism in the jury selection process. While, as discussed above, the peremptory challenge may often be used in a way that promotes racial bias in jury selection,114 attorneys can also use the challenge to eliminate jurors who exhibit racism of any type."1 5 Thus, the research shared in this Article can enable the effective use of peremptory challenges to combat the influence of racism on juries and their deliberations. 1 6 Having a few more attorneys equipped with tools to identify bias in the jury pool admittedly cannot solve the large problem of structural racism in the American legal system; however, given that intractable structural problems are difficult to remedy and require multiple initiatives at different points of contact within the system, increasing the number of attorneys trained in identifying and challenging a racist juror can offer a concrete, short-term option to aid in the selection of a bias-free jury. We recognize that some attorneys may apply our research and use peremptory challenges to eliminate individuals who are bias-free and select jurors who exhibit racial bias because such bias will benefit their client's claim or defense. Given that peremptory challenges already appear to be used in this way," 7 our hope is that the benefits of informing attorneys about the types of racism and how to better identify it will be used to remove racism at jury selection rather than further implant it. C. Current Ways of Addressing Racism in Juries

#### Justice comes before money

Lynch 11 [Tim Lynch, adjunct scholar at the Cato Institute and former director of Cato’s Project on Criminal Justice with a BS and a JD from Marquette University, 6-24-2011, "The Devil's Bargain: How Plea Agreements, Never Contemplated by the Framers, Undermine Justice", Cato Institute, https://www.cato.org/commentary/devils-bargain-how-plea-agreements-never-contemplated-framers-undermine-justice#]/Kankee

Most Americans are under the mistaken impression that when the government accuses someone of a crime, the case typically proceeds to trial, where a jury of laypeople hears arguments from the prosecution and the defense, then deliberates over the evidence before deciding on the defendant’s guilt or innocence. This image of American justice is wildly off the mark. Criminal cases rarely go to trial, because about 95 percent are resolved by plea bargains. In a plea bargain, the prosecutor usually offers a reduced prison sentence if the defendant agrees to waive his right to a jury trial and admit guilt in a summary proceeding before a judge. This standard operating procedure was not contemplated by the Framers. The inability to enter into plea arrangements was not among the grievances set forth in the Declaration of Independence. Plea bargaining was not discussed at the Constitutional Convention or during ratification debates. In fact, the Constitution says “the Trial of all Crimes, except in Cases of Impeachment; shall be by Jury.” It is evident that jury trials were supposed to play a central role in the administration of American criminal justice. But as the Yale law professor John Langbein noted in a 1992 Harvard Journal of Law and Public Policy article, “There is an astonishing discrepancy between what the constitutional texts promise and what the criminal justice system delivers.” No one ever proposed a radical restructuring of the criminal justice system, one that would replace jury trials with a supposedly superior system of charge-and-sentence bargaining. Like the growth of government in general, plea bargaining slowly crept into and eventually grew to dominate the system. From the government’s perspective, plea bargaining has two advantages. First, it’s less expensive and time-consuming than jury trials, which means prosecutors can haul more people into court and legislators can add more offenses to the criminal code. Second, by cutting the jury out of the picture, prosecutors and judges acquire more influence over case outcomes. From a defendant’s perspective, plea bargaining extorts guilty pleas. People who have never been prosecuted may think there is no way they would plead guilty to a crime they did not commit. But when the government has a “witness” who is willing to lie, and your own attorney urges you to accept one year in prison rather than risk a ten-year sentence, the decision becomes harder. As William Young, then chief judge of the U.S. District Court in Massachusetts, observed in an unusually blunt 2004 opinion, “The focus of our entire criminal justice system has shifted away from trials and juries and adjudication to a massive system of sentence bargaining that is heavily rigged against the accused.” One point often stressed by progressives is that trials bring scrutiny to police conduct. But when deals are struck in courthouse hallways, judges never hear about illegal searches or detentions. This only encourages further misconduct. Conservatives, meanwhile, are right to wonder whether overburdened prosecutors give the guilty too many lenient deals. Why should an armed robber get to plead guilty to a lesser crime such as petty theft? It is remarkable how few people will openly defend the primary method by which our courts handle criminal cases. The most common apologia for plea bargaining is a pragmatic argument: Courthouses are so busy that they would grind to a halt if every case, or even a substantial share of them, went to trial. But there is nothing inevitable about those crushing caseloads. Politicians chose to expand the list of crimes, eventually turning millions of Americans into criminals. Ending the disastrous war on drugs would unclog our courts in short order. In any case, trials are one of the few things the government indisputably should be spending money on. If additional funds are needed, free them up by stopping the nation-building exercises abroad and the corporate welfare here at home. The administration of justice ought to be a top priority of government.

### Contention 4: Racism (Stock)

#### Court clog is good – crashing the system causes a crisis resulting in mass civil rights protests and jury nullification that ends racialized mass incarceration

Heiner 15 [Brady Heiner, Affiliated Faculty of African American Studies at CSU Fullerton, 2015, “The procedural entrapment of mass incarceration: Prosecution, race, and the unfinished project of American abolition,” Philosophy and Social Criticism, https://journals.sagepub.com/doi/abs/10.1177/0191453715575768]/Kankee

Conclusion: ‘Go To Trial: Crash the Justice System [L]aw and order exist for the purpose of establishing justice, [but] when they fail to do this they become the dangerously structured dams that block the flow of social progress. (Martin Luther King, Jr, ‘Letter From a Birmingham Jail’ (1963), p. 10) Functionally analogous and genealogically linked to the unimpeachable immunity and irresponsible power enjoyed by Frederick Douglass’ overseer, the actions of contempo- rary American prosecutors, who operate inside the black box of prosecutorial discretion, are not subject to judicial review. And the subjects of color who have recently sought (and might presently seek) to raise claims of racially discriminatory prosecution are barred from legal standing by judicially (though not judiciously) imposed evidentiary standards that are virtually impossible to meet in the absence of active cooperation from prosecutors in their own prosecution. The functional discretionary space carved out for American prosecutors constitutes an irresponsible power – a space of power in which conscious and unconscious biases are allowed to flourish, at the direct expense of the flourishing of struggling communities of color across the country.120 But like the past regimes of racial democracy to which it is genealogically linked, the contemporary sys- tem of mass incarceration is disrupted and resisted by agents of abolition whose power and ingenuity are akin to those of Frederick Douglass and Harriet Tubman. One such abolitionist is Susan Burton,121 whose insightful conversation with civil rights lawyer and author of The New Jim Crow, Michelle Alexander, inspired this article in the first place.122 Burton knows a lot about being processed through the criminal justice sys- tem. She began a downward spiral when a Los Angeles police cruiser tragically ran over and killed her 5-year-old son. Consumed with grief, without receiving as much as an apology from law enforcement, and without access to the therapy or anti-depressant medications to which someone with greater medical resources might turn for support, Bur- ton sought comfort through illicit drugs and became addicted to crack cocaine. Living in an impoverished Black community under siege in the ‘war on drugs’, she was arrested and offered the first of many plea deals that put her behind bars for a series of non-violent, drug-related offenses. Every time she was released, she found herself trapped in an under-caste, subject to legal discrimination in employment and housing. After 15 years of revolving in and out of prison, Burton was finally admitted to a pri- vate drug treatment facility and secured a job. When she got sober, she dedicated her life to making sure no other woman would suffer what she had been through. Burton now runs 5 safe homes for formerly incarcerated women in Los Angeles. Her organization, A New Way of Life Re-entry Project,123 supplies a lifeline for women released from prison. It is also building a movement with groups like All of Us or None, organizing formerly incarcerated people and encouraging them to demand restoration of their basic civil and human rights. Burton explicitly links her organization’s efforts to abolitionist struggles akin to those of Harriet Tubman, referring to A New Way of Life as ‘an under- ground railroad [that] starts at the prison gates and arches over all barriers to freedom’.124 Burton is painfully aware that the norm of pleading guilty enhances prosecutors’ capacity to process an ever-increasing number of cases, widening the net of mass incar- ceration. She also knows that the system of mass incarceration relies upon the wide- spread ‘forfeiture’ of rights that the plea bargain regime manufactures. With this in mind, Burton posed the following question to Alexander: ‘What would happen if we organized thousands, even hundreds of thousands, of people charged with crimes to refuse to play the game, to refuse to plea out? What if they all insisted on their Sixth Amendment right to trial? Couldn’t we bring the whole system to a halt just like that?’ Initially stunned, Alexander ‘launched, predictably, into a lecture about what prose- cutors would do to people if they actually tried to stand up for their rights’, reminding Burton of the risks involved in facing down the arsenal of excessive and overlapping sen- tencing schemes that prosecutors were equipped with. She may also have reminded Bur- ton of the severity of the so-called ‘trial penalty’ that, according to recent data analysis, makes the sentence following a jury trial conviction on average 3.5 years more severe than the sentence imposed after a guilty plea.125 Painfully and personally aware of such risks, Burton replied, ‘Believe me, I know. I’m asking what we can do. Can we crash the system just by exercising our rights?’ To which Alexander responded: The answer is yes. The system of mass incarceration depends almost entirely on the coop- eration of those it seeks to control. If everyone charged with crimes suddenly exercised [their] constitutional rights, there would not be enough judges, lawyers or prison cells to deal with the ensuing tsunami of litigation. Not everyone would have to join for the revolt to have an impact; as the legal scholar Angela J. Davis noted, ‘if the number of peo- ple exercising their trial rights suddenly doubled or tripled in some jurisdictions, it would create chaos.’ Such chaos would force mass incarceration to the top of the agenda for politicians and policy makers, leaving them only two viable options: sharply scale back the number of criminal cases filed (for drug possession, for example) or amend the Constitution (or eviscerate it by judicial ‘emergency’ fiat). Either action would create a crisis and the sys- tem would crash – it could no longer function as it had before. Mass protest would force a public conversation that, to date, we have been content to avoid. Burton, who shares Alexander’s assessment of the risk and potentiality of mass plea refusal, claimed: I’m not saying we should do it. I’m saying we ought to know that it’s an option. People should understand that simply exercising their rights would shake the foundations of our justice system which works only so long as we accept its terms. As you know, another brutal system of racial and social control once prevailed in this country, and it never would have ended if some people weren’t willing to risk their lives. It would be nice if reasoned argu- ment would do, but as we’ve seen that’s just not the case. So maybe, just maybe, if we truly want to end this system, some of us will have to risk our lives. It would be difficult to overstate the strategic advantages and potentially transformative political repercussions of the mass conscientious plea refusal that Burton incisively pro- poses. In the tradition of the civil rights movement practice of non-violent direct action – which, in Martin Luther King, Jr,’s famous formulation, sought to ‘create a crisis’ in the racist structures of society by establishing a ‘creative, constructive tension’ that forces society to confront and correct racial injustices that it has constantly refused to address – the mass assertion of constitutional due process rights would rapidly and efficiently overwhelm the prosecutorial regime, throw the system of mass incarceration into crisis, and force the government to take immediate and substantive action to remedy its racial injustice.126 In the short term, state and federal prosecutors could use their discretion to desist from prosecuting the hundreds of thousands of rights-demanding people who are annually charged with the multitude of economic, drug, immigration and other non-violent offenses currently criminalized in existing penal codes. To give a sense of the number of defendants in question, the federal system convicted 90,000 people in 2010, nearly 97 per cent of which cases were the product of plea bargains.127 Fewer than 6,000 (6%) of these convictions were for violent and sex crimes; 54,000 (60%) involved immi- gration or drug offenses as the most serious conviction offense.128 State courts made 1.1 million felony convictions in 2006, 94 per cent of which were the product of plea bar- gains. Only 205,000 (18%) of these convictions were for violent and sex crimes. Of those remaining, 320,000 (30%) were for property crimes and 375,000 (34%) involved a drug offense as the most serious conviction offense.129 Taking these two annual snapshots as relatively representative, it is reasonable to claim that across state and federal jurisdic- tions some 750,000 people – 60 per cent of all those convicted – plead guilty or no con- test each year to non-violent offenses related to immigration, drugs and property. That is equivalent in size to the entire population of Birmingham, Alabama. However, even if prosecutors were willing en masse to shoulder the responsibility themselves of declining to litigate some significant portion of these cases, it is doubt- ful that the political system would allow this decidedly de-carceral deployment of pro- secutorial discretion to remain in the black box (i.e. free from governmental and public scrutiny) that the widespread carceral use of discretion currently enjoys. A more likely scenario of systemic prosecutorial desistence in the face of the mass asser- tion of constitutional due process rights would involve prosecutors turning higher up the executive chain of command to pressure the state and US Attorneys General and Departments of Justice, and then state Governors and the US President to sanction a generalized plan for desistence. However, since the prosecutorial function is only a valve (albeit the main valve) in the pipeline of the prison industrial complex, even a generalized and federally sanctioned policy of prosecutorial desistence would not quell the tsunami of litigation produced by a systematically organized mass movement of conscientious plea refusal unless the influx of criminal cases were also curtailed at the source – that is, unless prosecutorial desistence were combined with a parallel desis- tence throughout law enforcement, which would necessitate seismic shifts and reductions in policing priorities, practices, expenditures and departmental organizations. Executive desistence in the face of the systemic crisis generated by the mass asser- tion of due process rights would likely prove unsustainable, however, as it would pre- sumably raise widespread doubts about the rationality, legitimacy and procedural justice of maintaining an arsenal of criminal statutes that routinely go unenforced. Selective enforcement is, of course, the stock-in-trade of the prosecutorial and policing professions, which, while financially flush in the era of mass incarceration, are execu- tors of a distended body of criminal law that, as Harvard Law Professor William Stuntz claims, ‘covers far more conduct than any jurisdiction could possibly punish’.130 How- ever, programmatic desistence of the magnitude that would be required to restrict crim- inal justice processing to the levels that could be maintained while still accommodating the constitutional trial rights demanded by a mass movement of conscientious plea objectors would arguably erode the perceived legitimacy of the criminal law (at least with respect to the lower-spectrum of the penal code). Such potentialities would likely force the question of state and federal legislative reform in the direction of de- criminalization, or even legalization (e.g. in the case of certain classes of drugs).131 Recent state direct-democracy initiatives suggest that there may be fairly substantive popular support for attenuating criminal codes through selective statutory mitigation, decriminalization and legalization. For example, Colorado (2012), Washington State (2012), Oregon (2014), Alaska (2014) and Washington, DC (2014) have all passed measures to legalize, regulate and tax the production and sale of marijuana for rec- reational use. Californians also overwhelmingly passed the Three Strikes Reform Act of 2012 (Proposition 36), which shortens sentences of those subjected to life prison terms for ‘non-serious’, ‘non-violent’ offenses, and Proposition 47 (2014), which de- felonizes all drug use, downgrades a multiplicity of non-violent economic and drug offenses from felonies to misdemeanors, and reinvests the estimated $150 million in annual state savings toward school truancy and drop-out prevention, victim services, mental health and drug abuse treatment, and other programs designed to expand alter- natives to incarceration. Such measures demonstrate popular support for advancing a public safety strategy beyond incarceration to include treatment and prevention. Mass plea refusal could intensify such efforts by striking a major blow to the prison industrial complex, which, as Angela Y. Davis points out, ‘devours the social wealth needed to address the very problems [related to employment, education, housing, addiction, mental disorder, etc.] that have led to spiraling numbers of prisoners’.132 Not even accounting for the multibillion dollar corporate industry that weaves in and out of the public and private prison systems,133 US criminal justice expenditures grew by over 600 per cent between 1980 and 2006, from $35 billion to $215 billion. Criminal justice system employment (including police, and corrections, judicial and legal, at federal, state and local levels) doubled during that same period, rising from 1.2 million to 2.5 million people.134 Widespread sentencing mitigation at all or most levels of existing criminal codes and de-criminalization in the lower-spectrum of existing penal codes would disemploy and disencumber a significant portion of these people and resources for more socially generative employment and investment. As an exercise in imaginative possibility, consider the following scenario. If we cut public financing of mass incarceration by, for example, returning criminal justice spending to the inflation-adjusted levels spent in 1980 – prior to the escalations of the wars on drugs and illegal immigration, which have since fueled the 500 per cent increase in the incarcerated population – over $125 billion of public wealth would be freed up each year for investment in socially reparative and generative enterprises like education, childcare, mental and physical health care and drug treatment, public housing, job training, food assistance, parks and recreation, etc. Such enterprises could easily absorb and constructively employ the millions of people that America’s carceral system currently employs and confines. As Davis maintains, ‘The creation of new institutions that lay claim to the space now occupied by the prison [industrial complex] can eventually start to crowd out the prison so that it would inhabit increasingly smaller areas of our social and psychic landscape’.135 Of course, rather than a complex of executive desistence, legislative mitigation and de-criminalization, and public reinvestment that tilts toward a less carceral and puni- tive society, it is also possible that government could respond to the crisis generated by mass conscientious plea refusal by pursuing a still more punitive agenda to enlarge and shore up the procedural pipelines of mass incarceration. State legislatures could pro- cure emergency funding to expand the procedural capacity of their respective criminal justice systems. Federal legislators could seek to bolster such expansion efforts by enacting an emergency financial bail-out of the criminal justice system akin to the 2008 bail-out of the US financial system, ramping up national criminal justice spend- ing exponentially over and above the already historically unprecedented heights. However, this course of action seems politically unlikely. State and municipal bud- gets have not only been shrinking due to regressive tax reforms and the economic crises produced by American finance capitalism and corporate outsourcing, the portions of those budgets devoted to corrections and law enforcement have already exponentially swelled, due largely to current (and in some cases unconstitutional) overcrowding in many state prison systems. The electorate’s appetite for bankrolling the prison industrial complex is waning amid steeply declining and non-existent state financing of other social priorities like education, childcare, recreation and infrastructure. Criminal proce- dural expansion would also be logistically fraught, straining political support, as it would entail appointing an army of judges, many of whom are elected, which would in turn require special elections, etc., as well as enlisting a multitude of eligible citizens for jury duty service, and hiring the necessary personnel to coordinate them. In effect, on the side of utility, increasing swaths of the populace have begun to iden- tify that public investment in mass incarceration is depleting valuable social resources while producing disproportionately little social benefit in the short term and over the long term exacerbating the very social problems related to intergenerational poverty (e.g. unemployment, substance addiction, educational disparity and mental disorder) that lead to increased incarceration. On the side of justice, increasing numbers of people are beginning to recognize that the US carceral state is falling short of the threshold of social justice requisite to render state punishment morally legitimate.136 ‘If a society is to have the moral right to punish, its laws must be just’, writes Igor Primoratz in his book Justifying Legal Punishment. But that is not all; society must be doing something [constructive] about those social con- ditions that breed crime . . . If it does little or nothing about those social problems that generate law-breaking, and then goes on to punish the law-breakers, it will be rightly seen as both callous and hypocritical, and thus as lacking the moral standing requisite for punishing offenders in good faith.137 In addition to (and in virtue of) producing a structural crisis in the procedural system of state punishment, the widespread assertion of constitutional due process rights among those protesting procedural entrapment would openly expose the moral illegitimacy of the institutional agencies of mass incarceration, which require the compelled forfeiture of constitutional rights of nearly all their targets in order for the system to function. In elaborating the critical and transformative moral, political and socio-economic work that the strategy of mass plea refusal would and could do, one must also squarely confront its acute risks and disadvantages. By calling upon masses of individual defen- dants, as Susan Burton put it, ‘to refuse to play the game, to refuse to plea out’, such a movement against mass incarceration would effectively be asking those individuals to risk the severe existential burdens meted out by the unconscionably exorbitant ‘trial pen- alty’ that has been fashioned by the system’s deliberately disproportional sentencing schemes. It would, as an anonymous reviewer of this article noted, ‘dilute the existential situatedness of many criminal defendants who may have good reasons for pleading guilty’. In real human terms, a mass assertion of constitutional due process rights would call upon conscientious objectors to potentially spend years, even lifetimes, in cages cut off from their communities, for the cause of social and racial justice. Michelle Alexander gave voice to the very legitimate reluctance such severe existen- tial risks would prompt among even those, such as herself, most committed to ending mass incarceration: As a mother myself, I don’t think there’s anything I wouldn’t plead guilty to if a prosecutor told me that accepting a plea was the only way to get home to my children . . . I truly can’t imagine risking life imprisonment, so how can I urge others to take that risk – even if it would send shock waves through a fundamentally immoral and unjust system?138 As a parent myself, I strongly identify with Alexander’s hesitancy, which reflects the significant human risks and costs of this grassroots strategy of challenging mass incarceration and its system of procedural entrapment. Nevertheless, when we read (and likely identify with) her words – ‘I don’t think there’s anything I wouldn’t plead guilty to if a prosecutor told me that accepting a plea was the only way to get home to my chil- dren’ – I think we also ought to hear the echoes of the words spoken a century ago by the anonymous African American laborer from postbellum Georgia mentioned earlier. When faced with the plea bargain of his day, he claimed, ‘We would have signed anything, just to get away.’ We should also recall the consequence of the coerced consent that he and his contemporaries gave to that executive order of the postbellum racial contract: ‘Really we had made ourselves lifetime slaves, or peons, as the laws called us.’ By continuing to indi- vidually consent (on, however, an instrumentally rational basis) to the coercive contract of the plea bargain regime, by continuing to collectively consent to the procedural entrapment of the system of mass incarceration, we are greasing the wheels of the carceral machine that labels those whom it targets as lifetime felons and imposes upon them permanent status-based forms of civil death and disability comparable with those experienced by antebellum slaves and postbellum debt peons and leased convict laborers.139 Inspired by Susan Burton, this article conceptualizes procedural entrapment as a con- temporary mechanism of racial domination, begins to think through organized mass plea refusal as a viable strategy of resistance, and articulates the connections between these forms of domination and resistance and those of the antebellum and postbellum periods. In tracing these connections, I, like Burton, seek to foster a historical and imaginative way of thinking about contemporary anti-racist struggle against mass incarceration that enables us to see ourselves as acting in concert with the legacy of struggle left to us by Frederick Douglass, Harriet Tubman, Ida B. Wells and Martin Luther King, Jr. They, along with a multitude of other abolitionists and civil rights activists of the past, also faced inestimable odds, severe existential risks and the inevitability of racialized legal violence, and yet they persevered in fashioning radically reconstructive collective proj- ects of racial and social justice. Galvanized by our connection to this legacy, we ought to allow ourselves to be embol- dened by Burton’s incisive observation that, by simply demanding and exercising their constitutional rights to due process, those who are systematically targeted by our carceral state can swiftly throw it into crisis through organized, concerted action. Such action on the part of the procedurally entrapped, who shoulder the most existential risk, would in turn have to be sustained by solidarity efforts outside of prison walls and court halls, by an abolitionist movement that collectively struggled and sacrificed to counterbalance the social, economic and existential costs incurred by those refusing to forfeit their consti- tutional rights, especially those punitively sentenced on account of their refusal.140 Creatively reinventing the organized efforts of the civil rights movement to support political prisoners and civil disobedients who acted heroically and at great sacrifice to themselves to advance the cause of racial justice, the movement to abolish the prison industrial complex would have to extend the arc of Burton’s underground railroad from prison gates to courthouses and police precincts. The movement would have to commit to pool and develop resources and raise funds to support the legal defense of those engaged in conscientious plea refusal. It would have to help defendants overcome the unconscionable information deficits they face by supplying them with resources to assist them in understanding the collateral consequences of criminal conviction where the courts fail to do this.141 It would have to commit to materially and socially support the families of those protesting entrapment, and create childcare collectives to refuse to allow protesters’ children to be claimed by the injurious arms of the foster care system.142 Those eligible would have to up-end trends of diminished adherence to the civic duty of jury service and revive the 19th-century abolitionist understanding of the jury as ‘the People’s last check against oppressive government and arbitrary official power’.143 Like abolitionists of the 19th century who used the jury box to resist and nullify immoral and unjust fugitive slave laws, contemporary abolitionists should seriously consider the proposal of Paul Butler, critical race legal scholar and former Washington, DC, federal prosecutor, who argues that jurors should resist the systematic racial injustice of mass incarceration and ‘dismantle the master’s house with the master’s tools’ by exercising their power of jury nullification in the trials of oppressed people charged with non-egregious offenses.144 People would have to protest in the streets, jails and prisons and coordinate multifar- ious media and petition campaigns to publicize and publicly support the actions of those engaged in conscientious plea refusal (e.g. by informing citizens of their right to jury nul- lification), to articulate the political analysis that animates the movement and the goals toward which it strives. Mass political pressure would have to be applied to the legisla- tive and executive branches of government to address the crisis through law enforcement desistence and de-carceral reforms rather than further carceral fortification. The move- ment could support, pressure and embolden public defenders (e.g., through the American Bar Association’s Standing Committees on Ethics and Professional Responsibility and on Legal Aid and Indigent Defendants) to refuse cases, and demand that the American Bar Association’s Standards of Public Defense Related to Excessive Workloads be upheld to materially enable public defenders to furnish the competent and diligent coun- sel that the rules of ethical professional conduct require.145 To diminish the risks of con- scientious plea refusal, the mass assertion of constitutional due process rights could also be specifically taken up and organized in a targeted manner among those facing charges in the lower-spectrum of the criminal code and who thus face less severe risks of pena- lization for exercising their constitutional right to trial.146 This is only a sampling of the ways that the movement to abolish the prison industrial complex might coordinate the strategy of conscientious plea refusal with other solidarity efforts and modes of resistance to counterbalance, if not completely offset, the asymme- trical existential risks that would be shouldered by those directly resisting procedural entrapment through the assertion of their constitutional rights. Such reflections make clear the extensive and profound genealogical linkages and functional parallels between American slavery and contemporary mass incarceration. They also make clear Burton’s claim that while it would be nice if reasoned argument would suffice to overturn mass incarceration’s brutal system of racial and social control, we have seen that that is just not the case. As Martin Luther King, Jr, argued from a jail cell in 1963, ‘We know through painful experience that freedom is never voluntarily given by the oppressor; it must be demanded by the oppressed.’147 If the epistemic resistance displayed by the highest courts of the land in the face of reasoned arguments in favor of responsibly restricting present-day prosecutorial powers and their racially unjust outcomes is any indication, Burton is right that civil rights litigation is insufficient to end the procedural entrapment of mass incarceration. As was the case with abolitionist struggles of prior eras, larger risks will have to be taken. Like Burton in 2012 and Martin Luther King, Jr, in 1963, Frederick Douglass famously argued in 1857 that: The whole history of the progress of human liberty shows that all concessions yet made to her august claims have been born of earnest struggle . . . Those who profess to favor freedom and yet deprecate agitation are men [sic] who want crops without plowing up the ground . . . This struggle may be a moral one, or it may be a physical one, and it may be both moral and physical, but it must be a struggle. Power concedes nothing without a demand. It never did and it never will.148 Those who are currently the targets of mass incarceration and its system of procedural entrapment should not wage this struggle and shoulder these risks alone.

#### Plea bargain speediness exacerbates implicit bias

Greenberg 21 [Elayne E. Greenberg, Assistant Dean for Dispute Resolution and Professor of Legal Practice and Faculty Director of the Hugh L. Carey Center for Dispute Resolution at St. John’s Law School, 2021, “When Public Defenders and Prosecutors Plea Bargain Race – AMore Truthful Narrative,” Ohio Northern University Law Review, https://digitalcommons.onu.edu/cgi/viewcontent.cgi?article=1306&context=onu\_law\_review]/Kankee

II. PLEA BARGAINING RACE AS P RACTICED YIELDS RACIALLY DISPARATE OUTCOMES In this section, I explain how the plea bargaining process, as traditionally practiced by the stereotypical public defender and prosecutor, is likely to yield racially disparate justice outcomes. The speed of the process, 52 the unfettered discretion of the prosecutor,53 and the retributive focus 54 coalesce to create a justice negotiation that is compromised by racial bias. Furthermore, the positional posture of plea negotiations in which public defenders and prosecutors maintain a narrow focus on retributive justice precludes any meaningful discussion about what would be an appropriate and responsive justice outcome for that defendant.55 A. Traditional Plea Bargaining Practice56 A common plea bargaining scene: A public defender and a prosecutor, both assigned to the same case, meet by happenstance in a busy courthouse corridor.57 Even though neither prosecutor or public defender has spent much time preparing for this negotiation, they still decide to seize the moment, check one more item off their “to do” list and plea bargain the case. 58 Together they seek refuge in a corner of the corridor and throw out possible pleas and prison sentences, framed within the contours of what the prosecutor is willing to consider a just resolution.59 This negotiation may take place in under five minutes. B. Cognitive Behavior Psychologists: The Plea Bargaining Structure Is Conducive to Allowing Prosecutors’ and Public Defenders’ Implicit Racial Biases to Emerge Cognitive behavioral psychologists teach that our implicit biases are more likely to emerge and influence our decision making when we are required to make fast decisions and when we have broad discretion, rather than a defined structure, about how to make that decision.60 Thus, “[t]he speed of the plea bargaining process itself makes it more likely that the implicit racial biases” of public defenders and prosecutors may emerge and further prejudice the plea negotiation.61 Moreover, the broad discretion of the prosecutor to decide the appropriate contours of the plea and sentence make it more likely that the prosecutor’s implicit racial bias will emerge and demand more punitive and harsher sentences for Black defendants. 62 Consequently, the speed and lack of procedural structure in plea bargaining make it more likely that the implicit racial biases of the public defenders and prosecutors will contaminate the plea bargaining process. 63 C. Retributive Justice Focus Narrows the Justice Options For the most part, the plea bargaining focus maintains a narrow focus on retributive justice: what is the appropriate amount of prison time a defendant should serve for the crime committed? Retributive justice focuses on punishment at the exclusion of rehabilitation.64 This narrow focus precludes a broader understanding of why, if at all, the defendant committed the crime, and what are possible responsive options for the defendant to acknowledge and take responsibility for the crime committed.65 Moreover, since retributive justice is doled out by the state, there is no meaningful input from the community or the victim. 66 Thus, the focus on retributive justice in plea bargaining race narrows the possible value added that could be had if plea bargaining race was expanded to include a restorative justice focus. 67 D. Negotiation Scholars: Plea Bargaining As Practiced Ignores Good Negotiation Practice Plea bargaining scholars have called out to prosecutors and public defenders to heed the lessons taught by negotiation scholars and integrate the lessons into their plea bargaining process. 68 As one lesson, renowned negotiation scholar William Ury states that in effective negotiations, it is vital to “go slow to go fast.”69 In other words, plea bargaining race, as in all negotiations, requires a slower, more deliberate process to achieve a more equitable justice outcome. 70 As part of a slower negotiation process, public defenders and prosecutors must prepare for the negotiation.71 Part of that preparation for plea bargaining race includes figuring out each side’s prioritized interests, 72 considering viable options,73 using objective standards to help select an option,74 and identifying the best alternative to a negotiated agreement if your plea bargaining fails.75 It is important to note that racial bias, like any bias, contributes to making plea bargaining a subjective process swayed by the preferences of the negotiators, the public defenders, and prosecutors. 76 Therefore, objective data about the ultimate sentences received by other similarly situated white defendants will help keep the race plea bargaining process a fairer process in which Black defendants do not receive harsher sentences than their white counterparts who committed a similar crime. 77 Negotiation scholars also advise how to shift the traditional in person plea bargaining process from a positional one in which public defenders and prosecutors trade charges and sentences back and forth to an interest-based negotiation in which public defenders and prosecutor share information and problem-solve to arrive at an equitable and responsive justice resolution rather than just going back and forth about acceptable charges and sentences. 78 Rather than have a case be just one more file to dispense with among an overflowing pile of case files, together the public defender and prosecutor should meet to consider the justice options for a particular case. 79 A central distinction in an interest-based negotiation is that the prosecutor and public defender share information.80 According to an interest-based plea bargaining process, the prosecutor readily shares all evidence, including exculpatory evidence, with the goal of working with the public defender to arrive at an equitable resolution.81 A public defender participating in an interest-based plea bargaining shares information about the defendant that helps humanize the defendant, explain any extenuating circumstances, and contribute to the public defender’s independent investigation. Together the prosecutor and public defender consider what is a just, equitable resolution for each defendant, given the particular circumstances of their case. How likely is it that public defenders and prosecutors actually implement these plea bargaining changes? The remainder of the paper will discuss how these changes are being implemented and how progressive prosecutors are creating reform in the criminal justice culture that incentivize prosecutors and public defenders to implement these plea bargaining process changes. III. P ROGRESSIVE P ROSECUTORS ARE CHANGING THE P LEA BARGAINING RACE CULTURE

#### Plea bargains perpetuate modern day slavery via mass incarceration

Greenberg 21 [Elayne E. Greenberg, Assistant Dean for Dispute Resolution and Professor of Legal Practice and Faculty Director of the Hugh L. Carey Center for Dispute Resolution at St. John’s Law School, 2021, “Unshackling Plea Bargaining from Racial Bias,” Journal of Criminal Law and Criminology, https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7692&context=jclc]/Kankee

The United States fought back against the drug epidemic and gun violence with its War on Drugs. During the War on Drugs, the United States enacted punitive policing policies, stricter drug laws that penalized drug possession with the same severity as drug dealing, and mandatory minimum sentencing.138 The Comprehensive Crime Control Act of 1984, which included the Sentencing Reform Act, was one such sweeping criminal justice reform to accomplish these ends.139 The Violent Crime Control and Law Enforcement Act of 1994 was another.140 All of these criminal interventions had a racially disparate impact on African Americans. War was being waged, and African Americans were now presumed guilty, rather than innocent.141 They endured repeated unprovoked searches and pretextual traffic stops.142 African American imprisonment rates were greater than those of Stalin’s Soviet Union.143 The push for these criminal policies came not only from white politicians and their constituents, but also from Black officials and the Black middle class.144 What does it say about our country that the response to this drug crisis was with criminal solutions rather than root-cause solutions?145 Both white and Black supporters failed to predict that these measures would have such a racially disparate impact on poor, Black communities.146 Many consider these draconian criminal measures a leading cause of the racialized mass incarceration that exists today. William J. Stuntz reminds us that the mass incarceration of Black people today is, in fact, slavery.147 First, “incarceration is a form of slavery.”148 The Thirteenth Amendment provides, “[n]either slavery, nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist in the United States.”149 However, because African American male defendants are forced to navigate a racialized criminal justice system, too many are deprived of a fair and just process and often unduly convicted. Second, prisoners, like enslaved people, are subjugated to the will of their jailers.150 Prison is all about subjugation, not rehabilitation. Third, incarceration, like slavery, is a way of controlling the poorest, least educated.151 Part of the subjugation is keeping the incarcerated poor and uneducated. A disproportionate number of black prisoners who are incarcerated do not receive the adequate training or education necessary to reenter the world as contributing citizens. Fourth, prisoners, like enslaved people, are unable to vote and decide who is chosen to rule. Even when Black people are finished serving their prison sentences, they remain shackled to their incarcerated status.152 Finally, as with the fear that surrounded ending slavery, a fear exists about reform efforts to reduce the number of incarcerated people.153 Thus, prison reform efforts to end the mass incarceration of Black men are blocked by entrenched, racialized fears. Professor Sheldon Evans offers a different analogy to illustrate how the racialized justice outcomes of our criminal justice system are a continuation of the discriminatory values underlying slavery. Professor Evans notes a sobering link between how society perpetuated slavery and our modern law enforcement system.154 “So, like the ‘slave catcher’ roots of our modern police force, law enforcement are incentivized to catch ‘criminals’ in African American communities, as their slave catching predecessors were, to return them to the racial hierarchy that maintained what they saw as a proper balance in society.”155 The modern system of criminal justice enforcement in the United States is in many ways a continuation of a slavery system that fosters racialized discrimination against African American male defendants. In the following part of this Section, the author will explain how the racialized presumption of guilt took hold in the plea-bargaining process. B. THE EVOLUTION OF PLEA BARGAINING AND THE RACIALIZED PRESUMPTION OF GUILT Plea bargaining is when a criminal defendant offers to plead guilty in return for concessions in the offenses charged and the sentences imposed.156 This Part chronicles the evolution of plea bargaining. When plea bargaining finally became the primary justice resolution process for criminal cases, the legal actors involved continued to be influenced by the discriminatory animus that historically contaminated the criminal justice system. This discriminatory animus helped to shape the presumption of guilt towards African American male defendants and involve it in plea bargaining. Plea bargaining scholars disagree about when plea bargaining began to be used in the criminal justice system.157 One reason for this disagreement is that it is difficult to ascertain if a guilty plea before trial was a result of a plea bargain.158 Moreover, during the early 1800s, courts disfavored and discouraged guilty pleas.159 There were multiple reasons for the distrust of guilty pleas. First, from as far back as the 1600s, guilty pleas were often coerced by the King.160 Second, there were concerns that the guilty plea might be entered by an innocent person who just was fearful, hopeless, or forgetful.161 Third, many defendants did not have attorneys.162 Fourth, at that time, the punishment for committing a felony was death, so defendants were less likely to voluntarily plead guilty to felony charges. 163 Another reason it is difficult to determine the exact moment plea bargaining began is that it is difficult to distinguish between implicit and explicit plea bargaining.164 Implicit plea bargain refers to when “there is no actual bargaining but defendants realize they are better off if they plead guilty.”165 “Hence defendants who plead guilty strike a kind of bargain even though no word of a ‘deal’ has been spoken.”166 The first regular use of plea bargaining is said to have taken place during the attempted resolution of Massachusetts liquor cases in 1824.167 The structure of the liquor law provided a defined dollar penalty for each enumerated offense, depriving judges of any sentencing discretion.168 Prosecutors, however, had discretion. Unlike judges, prosecutors were able to use that discretion and charge defendants with lesser offenses that came with a lower dollar penalty.169 Yet, during the 1800s there was no pressing need to mainstream plea bargaining. During that time, the criminal system was not yet professionalized and rendering justice was simpler than it is today. Public prosecutors worked part-time, and during the course of the 1800s, the police were first introduced as part of law enforcement.170 Even during the late 1800s, the trial process was still simple and brief.171 A trial would last less than thirty minutes.172 During the trial, each side could present one or two witnesses before a jury rendered a verdict.173 There were still part-time prosecutors and no fingerprint or ballistic technology.174 It was not until the 1920s that explicit plea bargaining took hold.175 Multiple reasons contributed to plea bargaining’s acceptance. First, the criminal justice system became more professionalized with the increased prevalence of police, prosecutors, and defense lawyers.176 This contributed to the court’s greater comfort with guilty pleas. Second, criminal law was also being shaped by the introduction of “the bondsman, the ward politician, the newspaper reporter, the jailer, and the fixer.”177 Third, there was an expansion of the criminal law.178 Fourth, with growing urbanization, there was a concomitant growth in crime.179 Particularly, there was a growth of victimless crimes such as liquor-prohibition cases that were harder to convict.180 Fifth, as political corruption infiltrated the criminal justice system, a “fixer” of some political influence, police officers, and court officers were all instrumental in helping procure pleas.181 Sixth, and finally, trials became longer and more complicated, making pleas a more efficient option.182 One significant and unexpected change caused by the professionalization of our criminal justice system is that the presumption of innocence that had always existed until a defendant was proven guilty at the conclusion of a trial was replaced with a presumption of guilt when an arrest was made by the police and prosecutors who brought charges.183 This presumption of guilt, combined with racial animus towards African American defendants, made plea bargaining for African American men a risky justice choice. Thus, the danger of plea bargaining is that the “factually innocent may be convicted” because they have negotiated away the protection of their trial rights.184 Not only did plea bargaining grow, but so did guilty pleas. Researchers note that during the 1920s more convictions came from guilty pleas than bench or jury trials.185 There were several reasons that defendants pleaded guilty. First, prosecutors promised those already in jail that their case would be dealt with quickly if they pleaded guilty. If they did not, they would suffer long delays. Second, defendants were often represented by young, appointed lawyers who lacked experience and received little compensation.186 Thus, these lawyers encouraged their clients to plead guilty rather than suffer through a trial. Third, “court officers,” also known as “plead getters,” would frighten defendants who were already in prison to plead guilty or face the horrors of trial and a longer sentence.187 As plea bargaining began to take hold, it attracted both supporters and critics.188 Plea bargaining concerned the Progressives because it was ripe for prosecutorial corruption and allowed criminals a “pass” from receiving punishment that actually corresponded to the seriousness of their crimes.189 The Realists, however, regarded plea bargaining as a necessary way to efficiently deal with burgeoning caseloads, and they prevailed.190 Moreover, the U.S. Supreme Court’s decision in Brady v. United States, which came down at a time when it was estimated that 90 to 95 percent of convictions were the result of pleas, assuaged Progressives’ concerns and adopted protections to ensure that guilty pleas were voluntary and not coerced.191 In Brady, the Court held that pleas were acceptable so long as the defendant had competent counsel, there were no threats or false promises made while negotiating the plea, and the defendant made the plea “intelligently.”192 However, the line between what is coerced and what is voluntary is blurry193 and has not been applied in a racially-neutral way. In fact, a closer look at state and U.S. Supreme Court decisions shows that courts historically demeaned African American defendants and regarded them as “ignorant negroes” to justify providing African Americans with procedural justice protections during and after the 1960s.194 For example, the Supreme Court’s decision in Gideon v. Wainwright, which recognized a defendant’s right to counsel in felony criminal cases, did not help African Americans combat the institutional racism that denied them equal justice under the law.195 A lawyer was not sufficient protection to help African American defendants overcome their lack of an affluent family, social network, and credible witnesses—all of which are societal privileges that help defend against criminal charges and avoid conviction.196 From the 1970s onward, the U.S. criminal justice system established plea bargaining as vital because efficiency became a priority at the expense of rights.197 McConville and Mirsky posited that plea bargaining’s usefulness was that it was a socially acceptable way of “imposing control and discipline” on those “highly visible sections of society, those who are perceived as dangerous because of their lack of involvement in an acceptable labor market and the intensity of their involvement with the criminal justice system.”198 Under this model, the police are proactive, rather than reactive, using surveillance and sweeps to target people of color.199 All the legal actors understand that there is a presumption of guilt.200 Defense lawyers may not interview witnesses or conduct further negotiations if the system presumes their client is guilty.201 “Subordination and degradation” were the tools used to convince defendants to plead guilty.202 By the 1990s, certain scholars characterized the U.S. criminal justice system “a steroid era in criminal justice.”203 When Congress adopted mandatory minimum sentences and sentencing guidelines, it made plea bargaining an even more attractive option.204 Today, plea bargaining is the criminal justice system for many, with little constraint or oversight. Three recent Supreme Court cases cast a crumb of hope that the Court recognizes the need for court guidance on plea bargaining.205 Yet, as we saw with Gideon and other laws and decisions, these decisions will not help African American defendants claim their justice rights if these decisions are applied in a racially biased way. II. THE PERPETUATION OF IMPLICIT RACIAL BIAS IN PLEA BARGAINING TODAY

#### Mass incarceration socially constructs antiblack beliefs about black criminality and poverty

Johnson 12 [Jacqueline Johnson, Assistant Professor in the Department of Sociology and Criminal Justice, Adelphi University with a Ph.D., 2012, “Mass Incarceration: A Contemporary Mechanism of Racialization in the United States,” Gonzaga Law Review, https://blogs.gonzaga.edu/gulawreview/files/2012/04/johnson-final.pdf]/Kankee

\*NOTE: table of contents omitted

Mass incarceration dominates the social and economic context of life for millions of African Americans, and continues a historical pattern of structural disadvantage that is defined by race. This article examines the broader consequences of prison expansion by focusing on its contribution to contemporary racial ideologies and structures of economic disadvantage. While other scholars have argued that ideological beliefs about African American criminality have facilitated their disproportionately high rates of imprisonment, this article argues that ideological beliefs about race are also informed by African American men’s disproportionately high rates of incarceration. Mass incarceration produces structures of disadvantage, as economic disparities are magnified along racial lines long after ex-inmates are released. Ultimately, this article develops the idea that mass incarceration operates as a contemporary mechanism of racialization—a structure for continuing social stigma and economic marginalization by race—and illustrates this point by examining the impact of incarceration stigma on labor market exclusion. I. INTRODUCTION The election of Barack Obama to the United States presidency was heralded by some as a symbol of the demise of the Jim Crow era socioeconomic and cultural landscape that defined systems of justice, mobility, and daily life for millions of African Americans along racial lines.1 Yet in every state of the nation, a disproportionately high percentage of African American men presently live under some kind of state or federally mandated detainment.2 Just one year prior to the 2008 election, roughly 35% of incarcerated men in federal and state prisons and jails were African American,3 although they comprised just over 12% of the total non- incarcerated adult male population.4 Patterns of racial disparity in 2008 were even more dramatic in states such as Massachusetts, where African American men were incarcerated at eight times the rate of non-Hispanic whites.5 In 2010, the U.S. prison population declined for the first time since 1972,6 but this trend has not significantly changed racial disparities in imprisonment. According to recent estimates, African American males are imprisoned at an overall rate of nearly seven times that of white males.7 The high rate of incarceration among African American men is part of an overall trend in punishment defined by a dramatic increase in the “carceral system”8 —a term used to characterize the legitimization and normalization of imprisonment as a factor of social life.9 Yet the collateral consequences of increased incarceration are most significant for African American men.10 According to author Michelle Alexander, “More African Americans are under correctional control today—in prison or jail, on probation or on parole—than were enslaved in 1850, before the Civil War began.”11 Moreover, a long list of “invisible punishments,” such as housing loss, labor market exclusion, and political disenfranchisement, continue to plague former inmates long after release.12 Restrictions associated with felony convictions meant that nearly 1.4 million African American men were ineligible to vote in the 2008 presidential election which, ironically, has been identified as a major turning point in American race relations and has led many to conclude that race is no longer a significant factor in social or economic progress in the United States.13 But, this type of “end-of-race” rhetoric14 ignores the continued social and economic disenfranchisement of millions of African American men by recasting it as a racially neutral, color-blind occurrence that is the lone outcome of individual choice. The reality is that mass incarceration dominates the social and economic context of life for millions of African Americans, and continues a historical pattern of structural disadvantage that is defined by race. Scholar Manning Marable identifies the criminal justice system as one of three pillars forming a deadly triangle of “institutional racism.”15 Alexander agrees with this characterization, arguing “mass incarceration has established a ‘racial caste system’ in society, primarily driven by politics, not crime.”16 Others claim that while historical “Jim Crow”17 barriers have been abolished, criminal justice policies and procedures that stress incarceration as a means of social control continue to challenge basic U.S. principles of democracy and justice, especially for the significant amount of affected individuals involved in non-violent crimes.18 These critiques have led to calls for an evaluation of the cultural effects of prison expansion, both in terms of its emphasis on violence and dehumanization as a means for solving social conflicts, and the policing policies and political slogans that focus on a so-called “war” on crime.19 This is particularly problematic when such wars are disproportionately fought in communities of color and members of those communities are targeted as the primary criminals and victims.20 Others contend that the punitive ideology that justifies contemporary forms of punishment reify the eugenic arguments embraced by classical criminologists that there is a dangerous class of criminals.21 Such essentialist ideology is used not only to justify the unequal treatment of members of socially disadvantaged groups within systems of criminal justice, but also to justify their devalued status in all areas of social life.22 This article examines the broader consequences of prison expansion by focusing on its contribution to contemporary racial ideologies and structures of economic disadvantage. Part II explores recent writings on racialization, criminal stigma, and incarceration. Racialization is defined as a process that reproduces and magnifies racial classifications as structures of inequality within interlocking ideologies, institutions, social systems, and everyday practices.23 While other scholars have argued that ideological beliefs about African American male criminality have facilitated their disproportionately high rates of imprisonment,24 this article argues that ideological beliefs about race are also informed by African American men’s disproportionately high rates of incarceration. Correspondingly, the economic disadvantages that lead a large number of African American men to jail and prison cells are reproduced and magnified by mass incarceration to produce systemic economic disparities along racial lines. Ultimately, this article proposes that contemporary ideas about race and structural-level racial disparities are heavily informed by the stigma and economic marginalization produced in mass incarceration. Part III illustrates this point by examining the impact of incarceration stigma on labor market exclusion. Research is presented to show that the ideological link between incarceration and race is so pervasive that race and a record of incarceration are often conflated as mutually reinforcing forms of labor market bias experienced by African American men.25 This article makes the case that the relationship between racial ideology and economic marginalization is made possible by mass incarceration’s close structural relationship to other social systems, such as labor markets, which magnify these forms of racial disadvantage. In this light, mass incarceration operates as a contemporary mechanism of racialization. II. INCARCERATION AS A MECHANISM OF RACIALIZATION [T]he role of the carceral institution today is different in that, for the first time in US history, it has been elevated to the rank of main machine for “race making”. Its material stranglehold and classificatory activity have assumed a salience and reach that are wholly unprecedented in American history as well as unparalleled in any other society.26 In this statement, Loïc Wacquant discusses the criminal justice system as a major site of racialization—a term defined by sociologists Michael Omi and Howard Winant as “the extension of racial meaning to a previously racially unclassified relationship, social practice or group.”27 Racial classifications are forms of inequality that use physical differences to define and rank groups on the basis of status, power, and access to resources.28 Racial classifications are realized through “racial projects,” which are described by Omi and Winant in the following manner: A racial project is simultaneously an interpretation, representation, or explanation of racial dynamics, and an effort to reorganize and redistribute resources along particular racial lines. Racial projects connect what race means in a particular discursive practice and the ways in which both social structures and everyday experiences are racially organized, based upon that meaning.29 In other words, racial projects are where racial ideology meets structural disadvantage to form structural patterns of racial inequality. Omi and Winant discuss slavery, Jim Crow laws, and exclusionary immigration policies as examples of “racial projects” within the United States that have used the legal system to reproduce and control essentialist notions of race in order to establish and maintain structures of social and economic hierarchy.30 For some, the criminal justice system has simply replaced slavery and segregation as a contemporary racial project.31 Indeed, this perspective argues that the criminal justice system is “inherently racialized” as a result of the disproportionate representation of people of color “as both victims and perpetuators of crime.”32 Wacquant builds on this idea, but focuses on the race and class dynamics involved in the expansion of the carceral system.33 He argues that the term “mass incarceration” obscures race by erroneously conceptualizing African American men’s disproportionate involvement in the criminal justice system as an unfortunate, unintended consequence of widely cast policies and procedures, rather than the outcome of racially focused policies and practices: [T]he expansion and intensification of the activities of the police, courts, and prison over the past quarter-century have been anything but broad and indiscriminate. They have been finely targeted, first by class, second by that disguised brand of ethnicity called race, and third by place. This cumulative targeting has led to the hyperincarceration of one particular category, lower-class black African American men trapped in the crumbling ghetto, while leaving the rest of society—including, most remarkably, middle- and upper-class African Americans—practically untouched.34 As Wacquant contends, high rates of incarceration are often driven by class dynamics, as poverty is a prevailing factor among the incarcerated.35 Although it often said, “the poor get prison,”36 statistics indicate that African Americans bear the brunt of punitive policies that feature incarceration.37 Studies have exposed large scale patterns of racial disparity in sentencing, where, as a consequence of departures from sentencing guidelines, African American males with low levels of education are more likely to be incarcerated, receive longer sentences, or are less likely to receive a no-prison option when it is available, than similar whites.38 Racial disparities in sentencing have been explained by some as a consequence of African American men’s higher rates of arrest and participation in serious, violent crimes, rather than discriminatory policies or judgments.39 Yet, after reviewing forty studies published since 1980 that investigate racial bias in sentencing, a report compiled by the Sentencing Project maintains that type and severity of crime do not fully explain racial disparities in sentencing outcomes.40 On the contrary, the report found greater racial disparities in sentencing (in terms of type of judgment and length of sentence) for less serious crimes, such as low level drug offenses and property crimes. “There is evidence of direct racial discrimination (against minority defendants in sentencing outcomes),” the report concluded.41 Using the discussion of racialization and racial projects as a foundation,42 we can think about mass incarceration as a racial project that operates as a mechanism of racialization. This view should be contrasted from one that conceptualizes the criminal justice system as a racial project and sees mass incarceration as an outcome of that process of racialization.43 As defined earlier, racialization is a process that reproduces and magnifies racial classifications as structures of inequality within interlocking ideologies, institutions, social systems, and everyday practices.44 The criminal justice system is comprised of a collection of institutions, processes, and procedures that facilitate mass incarceration. African American men’s dis- proportionate relationship to the criminal justice system is a function of mutually reinforcing processes of race and class stratification that construct African American males, as a racialized group, in a position of devalued, marginalized social status in society.45 But it is mass incarceration—the outcome—where racial ideology meets structural disadvantage, thereby embedding African Americans in a web of social and economic disadvantage not experienced by other racial groups, regardless of their levels of criminal involvement. Racial ideology is a key factor in how mass incarceration operates as a mechanism of racialization. Racial ideology is informed by status and power differentials and operates as both the facilitator and byproduct of the convergence of race and class stratification.46 Professor Eduardo Bonilla-Silva states: “Racial stereotypes are crystallized at the ideological level of a social system. These images ultimately indicate (although in distorted ways) and justify the stereotyped group’s position in a society.”47 When considering the lack of collective public concern over the excessive rates of incarceration among young African American men, the stigma of black-male criminality associated with their devalued status may act as a core part of the common-sense understandings that most Americans have about African American men.48 Thus, “stigmatization is not merely the drawing of a negative surmise about someone’s productive attributes,” but instead involves the “virtual social identity” that stems from negative meanings ascribed to race and structured racial inequality.49 This has led some to point out that the collective identity of African American male criminality developed to justify slavery has now been ingrained in the structure of institutions, interactional conventions, and individual perceptions of reality within American society.50 Significant research shows that racial stereotypes play an important role in public perceptions of African Americans and crime.51 What may be surprising for some, however, is the demonstrated link between perceptions of race and support for punitive crime policies that result in incarceration.52 One study indicated that white respondents who embraced racial stereotypes were generally more likely to support harsh punitive sanctions, such as the death penalty and longer prison sentences.53 The study also found that support for harsh punishment measures varied with the race of offenders.54 In particular, whites are more likely to support punitive measures for African American offenders than white offenders for the same crimes.55 No doubt, racial biases can be heavily influenced by media images that portray African Americans as criminogenic—especially local news broadcasts that display more images of African American suspects than other racial groups in handcuffs, receiving guilty sentences in court proceedings, or other images suggesting their culpability in serious crimes.56 In one study, white non-college educated adults were shown a local news broadcast of a crime story where the skin color of the male suspect was manipulated.57 Afterwards, they were asked a series of questions about crime control policies.58 Respondents were more likely to support punitive policies when the perpetrator was depicted as African American than when the perpetrator was racially ambiguous or white.59 In another study, researchers constructed a punitive index poll that included questions concerning support for three strikes laws, parole, trying juveniles as adults, and harsher penalties for violent offenders.60 Results of this study also revealed that whites are generally more likely than African Americans to support punitive crime policies.61 This same study claimed that racial prejudice can explain support for harsher penalties among whites, while perceived racial injustice helps explain African Americans’ lack of support for such policies: “Whites’ and Blacks’ attitudes towards crime policies are associated with their social structural location vis-à-vis the criminal justice system.”62 In other words, perceptions of one’s personal experiences and the experiences of other members of one’s racial group within the criminal justice system inform one’s perceptions about the individual and collective experiences of members of other racial groups within the criminal justice system. Thus, public perception is not only affected by racial stereotypes of perceived criminality, but also informs public support of incarceration along racial lines. This raises an important point about the consequences of mass incarceration that has significant implications for race, particularly in the case of African Americans. While racialized perceptions of criminality may have a strong effect on attitudes about race or crime, criminality suggests the potential for criminal activity that may be associated with a multitude of racial or ethnic groups.63 For example, Italians are often associated with potential criminality based on stereotypes about their disproportionate involvement in organized crime, often as a consequence of popular characters in films and television shows.64 However, as stated in the aforementioned research, perceptions of criminality for African Americans are informed by devalued class status, devalued racial status, and a large-scale pattern of disproportionate involvement within a formal, institutionalized criminal justice system.65 Perceptions of incarceration are thus not simply about racially neutral perceptions of potential criminality. Instead, incarceration stigma is racialized and is most often directed towards African American men.66 Race, then, is “embedded in the very foundation of our criminal law . . . . [and] helps to determine who the criminals are, what conduct constitutes a crime, and which crimes society treats most seriously.”67 For example, one study finds that evaluators pressed to estimate the race of former inmates are much more likely to identify them as “black” than other racial groups, even when the race of that inmate appears to be mixed or ambiguous.68 Moreover, the same study found that many ex- inmates who self-identified themselves as “mixed” or “ambiguous” before serving time were likely to self-identify themselves as “black” after being incarcerated.69 This finding led the researchers to conclude that incarceration has a racializing effect on individuals that can be linked to the proliferation of stereotypes about African American male criminality.70 I argue, however, that it is not the association with criminality that affects perceptions of race. Alternatively, it is modern processes and structures of institutionalization—in an era of mass incarceration that disproportionately features African American men—that have a significant impact on perceptions of race. It is incarceration, not criminality, where racial ideology and economic inequality intersect to magnify structural level racial disparities. Because African Americans are disproportionately more likely to be institutionalized,71 their high rate of physical location in jails and prisons brings race to what might otherwise be racially neutral physical space, a process referred to earlier in this article as racialization.72 Their disproportionate presence in positions of social and economic disadvantage also racializes the processes, expectations, interactions, and stigma commonly associated with that space. Unlike the stigma of criminality, the stigma of incarceration is based on a perception of an individual or group that has been systematically accused, arrested, prosecuted, convicted, and imprisoned for committing a crime. Embedded in this stigma is an assumption that formal, organized, and color-blind legal procedures can address any questions of criminality in a carceral system based on truth, justice, and consequences.73 Incarceration stigma, then, provides a rationale for stereotypes about potential criminality by grounding them in a structural, physical reality. At the ground level, mass incarceration acts as a form of social and residential segregation—that is, the removal of large numbers of African American men from their communities to “reside” within penal institutions.74 Meanwhile, the removal of large numbers of African American men from urban underclass neighborhoods adds to the stigmatization of those neighborhoods, which, in turn, results in increased racial segregation and devalued status of those spaces.75 Recent legal disputes involving the political and social implications of how and where prisoners are counted for census and redistricting purposes provide evidence that this population is racialized and manipulated though formal social controls.76 Because mechanisms of stratification do not operate in isolation,77 mass incarceration reproduces devalued status and patterns of racial disadvantage throughout other areas of society. Part III illustrates this by discussing how the ideological and physical constrictions of mass incarceration are reproduced in the labor market experiences of young, poor African American men. III. INCARCERATION STIGMA, RACE, AND LABOR MARKET EXCLUSION

#### Plea bargaining is a tool of racist mass incarceration that has created the worst criminal system in the history of the world- it incentivizes police to hunt down poor minorities and constructs Blackness as equal to criminality

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Despite such stark statistics, there is no shortage of commentators who steadfastly refuse to see what’s right in front of them. As populations of people of color surged in U.S. prisons, scholars rushed to assure the public that there was “No Racism in the Justice System.” Even as Breonna Taylor was shot and killed in her own home based on a bogus search warrant, and George Floyd was murdered in full view of the public, conservative pundits furiously penned op-eds about “The Myth of Systemic Police Racism.” Visit any comment thread on a local news article to see what the general public thinks, and it’s always some version of the same old trope: Be a good citizen, do whatever the nice officer says and you’ll be fine. But individual choices and behaviors cannot override a bad system, no matter how “good” the citizen. What’s wrong with the system itself? The simplest answer to this question is: volume. Take arrest rates as but one example. In 2019, British law enforcement arrested about 1,200 out of every 100,000 people. In Australia, it was about 1,600. In the United States, the number was more than 3,000. By nearly any criminal justice metric — be it arrest, conviction or incarceration rates — the U.S. is bigger (and worse) than any other civilization in the **history of the world**. The only true explanation for this anomaly is that the mechanisms of the U.S. state have artificially created an abundance of so-called criminals. In my book, Pleading Out: How Plea Bargaining Creates a Permanent Criminal Class, I argue that the state’s chief criminal-creating mechanism is the plea bargain. The U.S. is unique in that more than 95 percent of all criminal cases end in a plea bargain. No other country comes anywhere close. Our uniqueness in plea bargaining has led us to uniquely bad outcomes. We couldn’t have gotten these astronomical numbers of system-involved people without a method of getting lots of convictions quickly, and that’s what the plea bargain is. Shameka Parrish-Wright, a bail reform activist and the director of VOCAL-KY, an organization that provides support to low-income people in the criminal legal system, explained: “While doing bail reform work … I ran into so many people right before they were about to decide on taking a plea deal…. I remember working with public defenders and other defense attorneys to pay bails and get people out before accepting terrible plea deals. Plea deals build prisons and keep people incarcerated. Plea deals also feed the probation and parole system, which needs a complete overhaul.” But why should plea bargaining lead to racist outcomes? This answer requires a little more parsing. Because of the prevalence of plea bargaining, police know that virtually any arrest they make will end in a conviction. This alone can lead to racially unequal outcomes if you’ve got a racist cop who is only interested in arresting people of color. Since nearly every arrest is justified by its inevitable conclusion, i.e. a plea bargain and conviction, an officer’s motives are almost never meaningfully questioned in court or anywhere else. The problem is more complicated than that, though. Because their performance is often measured in number of arrests, there is little incentive for any officer to exercise much on-the-job caution. If a cop is told to arrest as many people as possible every day, they will likely start looking in the poorest part of town. That’s not to say that poor people commit more crime than their suburban counterparts — they don’t. But the arrestees harvested from the poorest communities are the easiest prey for officers who need to meet quotas because once they are sucked into the system, they often must plead guilty to something or face even worse consequences than the conviction itself. Think of it this way: A cop would more likely arrest someone who is likely to take a deal and get convicted quickly, rather than someone with the means to post bail, prolong the process and hire private lawyers to put the officer’s behavior under a microscope. Many of the poorer communities in the U.S., especially in urban centers, are populated by people of color. This is thanks in large part to “redlining” practices which relegated Black people and other people of color into the places that white people didn’t want to live. “Often, people of color who reside in under-resourced communities do not have the means to hire a private attorney that will fight for a better outcome,” explained Melba Pearson, a former prosecutor and civil rights attorney who specializes in policy. “Often, private attorneys have more investigators at their disposal, will provide broader mitigation for a judge to consider and can provide a more robust defense than a public defender who has 2 – 3 times the number of cases…. A public defender may encourage their client to plea for fear of a harsher sentence at trial, or a lack of resources to be able to investigate the case with a fine-tooth comb despite the possibility of an acquittal.” Thus, while anyone of any race can be arrested at any time for anything (or for nothing at all), the target on your back becomes bigger if you’re poor, and bigger still if you’re poor and Black. An officer need not be a member of the Aryan Brotherhood to arrest a disproportionate number of people of color; they need only follow a simple order to maximize the number of arrests they make. CalvinJohn Smiley, professor of sociology at Hunter College-City University of New York, explained how plea bargaining racializes crime in **plain sight**, immediately affecting incarcerated youth. “The expectation is that many of these young men who are racialized as Black and Latinx will eventually succumb to a plea agreement, which typically occurs after spending a year, if not more, within the juvenile facility. During that time, they are exposed to various forms of violence and if/when they turn 18 and ‘catch a case’ in the facility, often, will be transferred to [an adult jail], which in turn places them at higher risk for exposure to violence.” Here’s where the serpent swallows its tail: After generations of unequal arrests of Black people for everything under the sun, with most of those arrests ending in quick convictions, many of the players in the criminal legal system — including cops, judges, prosecutors and even defense attorneys — have come to **equate “Blackness” with “criminality.”** Legal scholar Carlos Berdejó described the practice of “using a defendant’s race [an observable attribute] as a proxy for the defendant’s inherent criminality [an unobservable attribute].” In other words, the law has gotten so used to rapidly affixing the label of “criminal” to Black people that it assumes the Venn diagram between “Black” and “criminal” is a **perfect circle**. There’s no easy way to disrupt this process, but I believe it can be disrupted. The first step is to recognize the mechanism that enables the harm. For decades, the U.S. has been without a serious dialogue about basing an entire criminal legal system on backroom “deals” that are sure to end in convictions. It’s time we started one.

#### Mass incarceration overly punishes minorities

Miller and Alexander 16 [Reuben Jonathan Miller, Assistant Professor of Social Work, Faculty Associate in the Population Studies Center at UMich, Faculty Affiliate in the Department of Afroamerican and African Studies at UMich and a member of the Institute for Advanced Study in Princeton with a PhD, Amanda Alexander, Assistant Professor of Afroamerican and African Studies at the University of Michigan, a postdoctoral scholar at Michigan Law School, and a member of the Michigan Society of Fellow with a JD and PhD, 2016, “The Price of Carceral Citizenship: Punishment, Surveillance, and Social Welfare Policy in an Age of Carceral Expansion, Michigan Journal of Race and Law, https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1059&context=mjrl]/Kankee

Even the universe of human service agencies tasked with addressing former prisoners needs—prisoner reentry programs in criminal justice par- lance—are overwhelmingly located in these neighborhoods.63 As a result, prisoners are now arrested from, returned to, and provided rehabilitation services all within the low-rent districts they learn to call home.64 While one could claim this phenomenon simply scratches an itch—that is, pro- gramming is located in areas with great need—this social arrangement raises important questions about the containment of the criminalized poor in disadvantaged, largely urban spaces. Furthermore, the proliferation of reentry programming as the rehabilitative strategy of choice in the current age implicates the loose networks of public and private welfare state actors and organizations in the management and control of the criminalized poor. While these more interventionist, community-based behavioral management strategies speak to how a new series of actors and institutions have emerged to manage the carceral citizen, urban policing practices speak most clearly to how this group is sorted for criminal justice selection. III. POLICING SUITABLE TARGETS Racial disparities in arrest and incarceration are staggering. A recent study estimating arrest rates of Black and White youth found that 49 per- cent of Black men will be arrested for a non-traffic violation by their 23rd birthday, compared with 38 percent of White men.65 A look across age categories reveals that Blacks are twice as likely to be arrested as Whites66 and remain six times more likely to be incarcerated. 67 Policing research has consistently supported these findings and provides evidence of one mecha- nism that explains them. Blacks and Latinos are stopped, frisked, and ar- rested at much higher rates than Whites, although they represent a smaller share of the general population and are less likely to have weapons when searched.68 This pattern persists even when controlling for suspects’ actual involvement in the crimes for which they were questioned 69 or for crime rates in the areas where they were stopped. 70 Put differently, racial dispari- ties in street-level criminal justice contact remain even when controlling for the guilt of the presumed offender, the racial descriptors used by crime victims to relay who committed actual crimes, or the recent history of crimes committed by members of their presumed racial group in the given area. At the same time, law enforcement practices like “hot-spot”71 and “order maintenance”72 policing ensure the concentration of police in poor, racialized spaces. Thus, the kinds of crimes associated with the over- whelmingly poor people that cycle in and out of jails and lockup facilities, like drug use, public urination, and trespassing, are met by arrests, fines, court fees, and eventual incarcerations, perpetuating these trends. Arrest records and misdemeanor offenses alone are enough for some employers, government officials, and landlords to exclude the accused from jobs, housing, and government licensure. 73 The collateral consequences of a felony conviction are all the more severe, excluding former prisoners from meaningful participation in social, civic, and economic life.74 The long-term effects of imprisonment on poor racial and ethnic minorities cannot be overstated. It is by now well known that Blacks and Latinos, at just 30 percent of the U.S. population, represent nearly 60 percent of the nation’s prisoners.75 Subsequently, they disproportionately shoulder the burdens associated with imprisonment, which range from chronic unem- ployment and near-intractable poverty, to housing instability and poor health and mental health care access.76 If imprisonment rates were held constant, nearly one in three Black men born after 2001 would spend some time in jail or prison, along with one in eighteen Black women— about five times the rate of similarly situated Whites. 77 More insidious, incarceration’s spillover effects extend well beyond the suspected “legal of- fender,”78 affecting their partners, children, and extended family mem- bers. 79 Indeed, 44 percent of Black women and 32 percent of Black men have a family member who has been incarcerated, 80 while one in nine Black children has an incarcerated parent,81 extending disadvantage across generations. Carceral expansion has therefore facilitated the emergence of an im- poverished, racialized, and denigrated social category that is both materi- ally and symbolically stranded. This is in part due to shifting trends in liability law, making the owner, employer, or state agency responsible for the conduct of those whom they house, employ, or license. 82 It is also likely facilitated by the emergence and proliferation of inexpensive crimi- nal background checks83 and public expectations that responsible stake- holders will access criminal records and withhold access to the criminalized poor.84 For whatever reasons these practices exist, once ar- rested, this group becomes subject to legal practices that exclude them from full social, civic, and economic participation. The concentration of criminal justice resources in poor inner-city communities, coupled with the propensity of police officers to stop, frisk, and arrest Black and Brown residents, ensure that the people subject to these forms of exclusion are disproportionately poor Black and Brown people. IV. ON RISK AND RESPONSIBILITY Given the consequences associated with having a criminal record, carceral expansion has produced a jobless, maligned, and socially excluded class subject to the vagaries of a flexible economy, the retrenchment of social welfare benefits, and the volatility of the low-wage labor market.85 A recent report from the American Bar Foundation revealed that nearly 45,000 laws restrict former prisoners’ mobility.86 The domain of these policies range from limiting the franchise to diminishing access to housing, food, employment, and education. 87 These legal restrictions dictate where former prisoners can live, what kinds of occupations they can take up, and with whom they can associate. 88 Further complicating matters, there are nowhere near the community resources needed to adequately address the challenges former prisoners face during reentry.89

#### The carceral state destroys black communities with long-term poverty

Miller and Alexander 16 [Reuben Jonathan Miller, Assistant Professor of Social Work, Faculty Associate in the Population Studies Center at UMich, Faculty Affiliate in the Department of Afroamerican and African Studies at UMich and a member of the Institute for Advanced Study in Princeton with a PhD, Amanda Alexander, Assistant Professor of Afroamerican and African Studies at the University of Michigan, a postdoctoral scholar at Michigan Law School, and a member of the Michigan Society of Fellow with a JD and PhD, 2016, “The Price of Carceral Citizenship: Punishment, Surveillance, and Social Welfare Policy in an Age of Carceral Expansion, Michigan Journal of Race and Law, https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1059&context=mjrl]/Kankee

This peculiar social arrangement has resulted from three key processes that operate in formal and informal ways. First, the circulation of people between confinement and disadvantaged communities exacerbate already existing social inequalities, signaling greater police presence and the repeated cycle of arrest and incarceration.31 Second, the mark of a criminal record constrains the mobility of the criminalized poor, activating third parties in their management and exclusion.32 Third, “[s]hifts in social welfare and criminal justice policy have at once hollowed out rehabilitative services and expanded the reach of the state, ensuring that former prison- ers’ family and friendship networks are the resource of first and last resort in their transition from prison back home.” 33 II. PUTTING MASS SUPERVISION IN ITS PLACE Carceral expansion has been theorized as an instrument of domina- tion that promotes inequality across class and racial strata34 and as a geo- graphic solution used to address social problems. 35 The prison, along with its corollary institutions of surveillance and control, have been viewed as a relatively unified form of poverty governance,36 producing particular ways of being in the social world,37 and a regulatory valve, disciplining low- wage workers. Wacquant finds that these processes render poor, unskilled Black laborers “redundant” through social exclusion, a changing political economy, and the state’s abdication of responsibility for their social and economic outcomes. 38 Unskilled Black men are therefore the most “suita- ble targets” for criminal justice intervention, selected first by class, second by race, and third by geography.39 Wacquant’s thesis is compelling. More than two-thirds of former prisoners live at or below half of the U.S. pov- erty line,40 with 80 percent qualifying as indigent for the purposes of legal representation.41 The Black imprisonment rate is roughly six times that of Whites42 and, when incarcerated, Blacks serve lengthier sentences. 43 Fur- thermore, states with stingier welfare expenditures typically have higher rates of incarceration.44 Noting these trends, Wacquant admonishes schol- ars to “reconnect social and penal policies” in order to “grasp the new politics of marginality.”45The outcomes associated with these “new politics” are jarring. Peo- ple in prison are overwhelmingly poor.46 Half are estimated to have a diagnosable mental health issue. 47 A recent study found that former pris- oners are 129 times more likely to die of a drug overdose and twelve times more likely to die of any other cause within just two weeks of their release than members of the general population.48Straining federal, state, and county budgets,49 mass incarceration ex- tends a host of burdens to entire communities due to heightened rates of unemployment,50 the loss of wages, 51 family disruption,52 and the in- creased risk for health and mental health problems associated with impris- onment.53 For example, sociologist and demographer Evelyn Patterson’s recent study shows that for every year an inmate serves in prison he or she loses up to two years of life expectancy. 54 Further complicating matters, former prisoners are released into notoriously disadvantaged spaces, and particularly into the so-called inner city. 55 For example, Paul Street’s study of the effects of mass incarceration on poor communities in Chicago re- vealed that the neighborhoods where the highest concentration of arrests took place were nearly identical to the neighborhoods where most prison- ers returned.56 Criminologists and urban sociologists have found similar trends in large cities across the nation.57 These spaces, which service providers refer to as “receiving commu- nities,”58 are either the few places willing to host former prisoners when they return, or they simply lack the political power to resist the return of prisoners to their already disadvantaged spaces. Either way, in states like Michigan, where the prison population exceeds 45,000, nearly one-third of all prisoners are arrested from and returned to eight disadvantaged zip codes, all of which are within the Detroit city limits. 59 This is despite the city representing just seven percent of the state’s population.60 In Illinois, where roughly 35,000 prisoners are annually discharged, more than half return to Chicago and more than a third return to just six of seventy-seven Chicago community areas.61 Mirroring national trends, these neighbor- hoods have poverty, crime, and unemployment rates at three times the national average. Black people comprise no less than 90 percent of these neighborhoods, save two, where 90 percent of the residents were Black or Latino.62 Similar trends can be found in most large cities. Even the universe of human service agencies tasked with addressing former prisoners needs—prisoner reentry programs in criminal justice par- lance—are overwhelmingly located in these neighborhoods.63 As a result, prisoners are now arrested from, returned to, and provided rehabilitation services all within the low-rent districts they learn to call home.64 While one could claim this phenomenon simply scratches an itch—that is, pro- gramming is located in areas with great need—this social arrangement raises important questions about the containment of the criminalized poor in disadvantaged, largely urban spaces. Furthermore, the proliferation of reentry programming as the rehabilitative strategy of choice in the current age implicates the loose networks of public and private welfare state actors and organizations in the management and control of the criminalized poor. While these more interventionist, community-based behavioral management strategies speak to how a new series of actors and institutions have emerged to manage the carceral citizen, urban policing practices speak most clearly to how this group is sorted for criminal justice selection. III. POLICING SUITABLE TARGETS

#### The carceral state causes civic disability for black folks due to their legal, social, and economic exclusion

Miller and Alexander 16 [Reuben Jonathan Miller, Assistant Professor of Social Work, Faculty Associate in the Population Studies Center at UMich, Faculty Affiliate in the Department of Afroamerican and African Studies at UMich and a member of the Institute for Advanced Study in Princeton with a PhD, Amanda Alexander, Assistant Professor of Afroamerican and African Studies at the University of Michigan, a postdoctoral scholar at Michigan Law School, and a member of the Michigan Society of Fellow with a JD and PhD, 2016, “The Price of Carceral Citizenship: Punishment, Surveillance, and Social Welfare Policy in an Age of Carceral Expansion, Michigan Journal of Race and Law, https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1059&context=mjrl]/Kankee

Carceral expansion has therefore facilitated the emergence of an impoverished, racialized, and denigrated social category that is both materially and symbolically stranded. This is in part due to shifting trends in liability law, making the owner, employer, or state agency responsible for the conduct of those whom they house, employ, or license.82 It is also likely facilitated by the emergence and proliferation of inexpensive criminal background checks83 and public expectations that responsible stakeholders will access criminal records and withhold access to the criminalized poor.84 For whatever reasons these practices exist, once arrested, this group becomes subject to legal practices that exclude them from full social, civic, and economic participation. The concentration of criminal justice resources in poor inner-city communities, coupled with the propensity of police officers to stop, frisk, and arrest Black and Brown residents, ensure that the people subject to these forms of exclusion are disproportionately poor Black and Brown people. IV. ON RISK AND RESPONSIBILITY Given the consequences associated with having a criminal record, carceral expansion has produced a jobless, maligned, and socially excluded class subject to the vagaries of a flexible economy, the retrenchment of social welfare benefits, and the volatility of the low-wage labor market.85 A recent report from the American Bar Foundation revealed that nearly 45,000 laws restrict former prisoners’ mobility.86 The domain of these policies range from limiting the franchise to diminishing access to housing, food, employment, and education. 87 These legal restrictions dictate where former prisoners can live, what kinds of occupations they can take up, and with whom they can associate. 88 Further complicating matters, there are nowhere near the community resources needed to adequately address the challenges former prisoners face during reentry.89 Limited availability of treatment, housing, employment, and mental health services facilitates the reliance of former prisoners on already vul- nerable networks of care. 90 Prisoners’ families are thereby made responsi- ble to support them as they attempt to become integrated in their home communities.91 At the same time, their exclusion from welfare benefits, sustainable labor, housing, and education render their personal networks as the primary mechanism of their rehabilitation, a role the state once at least rhetorically played.92 When the state does fund rehabilitative programs, it does so through contracts with private nonprofit, community-based vendors.93 Despite increasing in number during the age of mass supervision, there are not enough community-based prisoner reentry programs to ad- dress returning prisoners’ needs. 94 Thus, the state—represented by correc- tions officers, the police, and the courts—has off-loaded its capacity to respond to the needs of former prisoners onto the actors least able to do so. This support network consists of other former prisoners, their families, their community members, and the human services agencies that attempt to address social problems associated with incarceration through social ser- vice provision. As a result, the rehabilitation of prisoners “has been out- sourced and privatized, moving from within prison walls into the . . . church basements . . . and community centers” of the post-industrial city. 95

#### Carceral citizenship causes power imbalances that allows the exploitation of ex-convicts

Miller and Stuart 17 [Reuben Jonathan Miller, Assistant Professor of Social Work, Faculty Associate in the Population Studies Center at UMich, Faculty Affiliate in the Department of Afroamerican and African Studies at UMich and a member of the Institute for Advanced Study in Princeton with a PhD, and Forrest Stuart, assistant professor of Sociology and the College at the University of Chicago, 2017, “Carceral Citizenship: Race, Rights and Responsibility in the Age of Mass Supervision,” Theoretical Criminology, https://sci-hub.se/https://journals.sagepub.com/doi/abs/10.1177/1362480617731203]/Kankee

From New York City to Los Angeles, federal housing mandates are interpreted in such a way that a mother who allows her son to sleep on her couch can be evicted if he has a felony. She takes this risk to house him, but the stakes involved in caring for him may change how they relate to one another. Furthermore, employers, landlords and social service providers are subject to lawsuits or reputation loss should an employee commit a crime on their premises. They therefore either exclude formerly incarcerated people from services altogether or cream applicants, accommodating those considered least risky. These cases show how interpretations of liability law raise the risk for well-meaning family, friends and professionals who help people with criminal records (See Thacher 2008). In fact, there is a tacit expectation that they will exclude them from services and care. With the advent of electronic databases and the proliferation of what Sarah Lageson (2016) calls “digital punishment”, even convictions for low level offenses and arrest records where charges are dropped are used as a reason to reject an applicant. Given the risks involved for supporters, public pressure to fleece “criminals” from applicant rolls, and legal cover to discriminate, providing help to formerly incarcerated people is consid- ered beyond reasonable expectations and construed as a kind of favor (Miller and Alexander, 2016). These favors are connected to everyday modes of exchange, like hiring a qualified candidate or providing a family member with a couch to sleep on, rais- ing the consequences of everyday interactions for people with criminal records. These practices endow caregivers, employers and other third parties with inordinate power. This is because third parties represent one of the few resources that carceral citizens have access to, introducing a new kind of vulnerability where the carceral citizen is subject to the whims of the people they encounter in everyday life—even those whom they are clos- est to. An argument with a partner or a misunderstanding with a social worker could warrant a trip back to prison, a night on the street or restricted access to food, work, healthcare or their family. This is not the case with other marginalized groups whose access to goods, services and stabilizing institutions are protected under the US constitution. This combina- tion of precarity and derision creates a power imbalance, altering even the most intimate exchanges between the formerly incarcerated and the most important people in their lives. While there is a long literature on women’s incarceration, Susan Burton’s powerful memoir, Becoming Ms. Burton (Burton and Lynn, 2017), along with the recent and grow- ing literature on the post prison experiences of black American women demonstrate the profound and complex ways that black women uniquely experience this new form of citi- zenship (Gurisami, 2017; Richie, 2012; Rumpf, 2014; Threadcraft and Miller, this vol- ume). While a full accounting of the criminalization of black women is beyond the scope of this article, black women occupy a particularly precarious position in the social land- scape that deserves scholarly attention. They are objects of and subject to gendered forms of carceral citizenship, and remain targets of criminal justice intervention and the main support system for their formerly incarcerated partners, parents, siblings and children. Put simply, black women experience a deep and trenchant form of vulnerability to re- arrest, to housing instability, to disruption and displacement, that has a cumulative effect that exacerbates their precarity. Crime control filters into their family life, civic engage- ment, friendships and professional networks of carceral citizens in unique and powerful ways that vary by the “kind of person” who experiences them. These practices have changed urban sociality, and with it, the very nature of social interaction for the criminal- ized poor. As such, the ways in which they experience citizenship is fundamentally dif- ferent from the experiences of other marginalized groups.

#### Plea bargain driven mass incarceration causes racialized mass death from disease

**Smith 25** [Riley Smith, researcher at the Boston University School of Public Health, 2025, "Plea Bargains as Drivers of Incarceration-Related Health Outcomes", PubMed Central (PMC), https://pmc.ncbi.nlm.nih.gov/articles/PMC12179529/]/Kankee

Incarceration as a Public Health Issue Public health research and principles have evolved an ever-broadening understanding of the forces affecting health. Public health experts have adopted the Social Determinants of Health framework to identify the multifaceted and interconnected ways that our systems, institutions, communities, and selves affect health at every level. From this perspective, the discipline of public health has begun to recognize the structural inequities of the carceral system as drivers of poor individual and population health, which upstream and downstream interventions can target. In the US, 1 2 million people (565 per 100,000 residents) are in some way confined by the State, either through imprisonment, probation/parole, home confinement, or pre-trial detention. 2 The Eighth Amendment to the Constitution requires that incarcerated people receive some minimum standard of necessary care during periods of State confinement. 3 However, currently and formerly incarcerated people and their allies, as well as many healthcare providers and health experts, frequently highlight the ways in which jails and prisons cause and exacerbate physical and mental illness and disease. Disease Transmission Prisons and jails are **prime** sites for rapid and **unmanageable** disease transmission both within the walls and out in the communities that prison staff return to when their shift ends. These facilities are overpopulated and poorly ventilated, and part of the punitive process includes extremely restricted and regimented movement. Prisoners do not have the **autonomy** to isolate themselves from others, nor do they have access to personal protective equipment (PPE) or other preventative measures to minimize transmission risk of infectious diseases. Staff bring in any contagions they may have which can then rapidly spread within the facilities. Similarly, staff who become infected with communicable diseases bring these diseases back to their communities. During the COVID-19 pandemic, prisons were a primary site of mass infection, and many advocates argued for depopulating the prisons, especially of those who were particularly vulnerable to COVID infection, as a means of slowing the spread of the disease. Sanitation and Hygiene The COVID-19 pandemic also highlighted the ways in which prison procedures fail to provide adequate sanitary conditions within their facilities. Prisoners often must purchase sanitizers, cleaning supplies, soaps, body washes, and menstrual products through the commissary. These items must be purchased by money either earned through work — where wages can be pennies an hour in parts of the country — or money donated by family and friends in the free world. 4 This shifting of sanitary responsibility onto prisoners, of whom most are unable to afford necessary products to meet minimum sanitation standards, fosters an environment of poor personal hygiene and environmental sanitation. Medical Care Despite being **constitutionally entitled** to medical care, prisoners and many medical staff report inadequate or wholly absent care for everything ranging from small injuries to chronic illnesses. Prisoners report misdiagnoses, unnecessary invasive procedures, poor maternal healthcare, and more. Many are inhibited from seeking care in the first place, as they are only allowed to receive medical treatment if a correctional officer brings them to the medical wing. 5 Necessary care can be delayed indefinitely with little recourse as reports of medical neglect are largely ignored. Trauma Incarceration is a traumatic experience. Incarcerated individuals are **caged**, **dehumanized**, **violated**, punished, and otherwise mistreated, and this is justified by the societal agreement that these individuals deserve whatever happens by virtue of being a criminal. Additionally, many individuals who enter these facilities — including 90% of women — have experienced traumatic events prior to interacting with the carceral system, and the conditions of their confinement prevent them from recovering and healing while further traumatizing them. 6 These effects and others are felt long after a person is released from prison as well. Though in theory a person’s punishment ends when their sentence does, the effects of the punishment often continue indefinitely. For example, criminal records often disqualify people from employment and housing 7 with minimal recourse. Further, the stigma associated with incarceration can be incredibly isolating, preventing formerly incarcerated people from getting basic needs met. 8 Additionally, incarceration impacts the families and communities of those incarcerated because of the emotional, financial, and social challenges caused by their absence. It is estimated that 80 million individuals in the United States have a criminal record and nearly half of all adults in the United States have immediate family members who are currently or formerly incarcerated. 9 The burden of these poor health and community outcomes is disproportionately borne by people of color, especially Black people. Black people are overrepresented in prison populations due to policies that increase police presence in predominantly Black communities, laws targeting behaviors associated with communities of color, and discriminatory actions taken at all levels of the legal process, from arrest to conviction to release. 10 These practices were introduced to reinforce white power as slavery was being abolished, systematizing racial disparities as **fundamental** to the operation of the modern carceral system. 11 Black and brown communities experience higher rates of disease prevalence, especially infectious diseases and those that affect the immune system, which are exacerbated by periods of incarceration. 12 They are more likely to be arrested, more likely to receive a conviction, and more likely to receive longer sentences for the same crimes as their white counterparts, increasing the likelihood and duration of exposure to the health consequences of incarceration. 13 These compound other disease burdens, leading to more significant detrimental effects. The number of people incarcerated, and the length of their incarceration, determines the scope and gravity of their exposure to these individual and public health effects. Therefore, one way to minimize the public health effects of incarceration is to address factors that increase the likelihood of incarceration and lengthy sentences. In this paper, I argue that plea bargains are a **driver** of incarceration and its subsequent health effects. I propose several pathways through which to eliminate or severely restrict the practice of plea bargaining to minimize the health effects associated with incarceration. Each intervention would be implemented through different government channels and may affect some or all individuals charged with a crime. I determine effectiveness by considering how broad the reduction in the practices is as well as how many people are likely to experience shorter or no periods of incarceration. I determine feasibility through resources, capacity, and political will. Plea Bargaining and Its Relationship to Incarceration Length

#### Plea bargaining encourages targeting poor income and black folk to meet quotas, causing the criminalization of blackness

Canon 23 [Dan Canon, civil rights lawyer and a law professor at the University of Louisville in Kentucky, 1-29-2023, "Plea Bargains Are a Tool of Racist Mass Incarceration", Truthout, https://truthout.org/articles/plea-bargains-are-a-tool-of-racist-mass-incarceration/]/Kankee

Shameka Parrish-Wright, a bail reform activist and the director of VOCAL-KY, an organization that provides support to low-income people in the criminal legal system, explained: “While doing bail reform work … I ran into so many people right before they were about to decide on taking a plea deal…. I remember working with public defenders and other defense attorneys to pay bails and get people out before accepting terrible plea deals. Plea deals build prisons and keep people incarcerated. Plea deals also feed the probation and parole system, which needs a complete overhaul.” But why should plea bargaining lead to racist outcomes? This answer requires a little more parsing. Because of the prevalence of plea bargaining, police know that virtually any arrest they make will end in a conviction. This alone can lead to racially unequal outcomes if you’ve got a racist cop who is only interested in arresting people of color. Since nearly every arrest is justified by its inevitable conclusion, i.e. a plea bargain and conviction, an officer’s motives are almost never meaningfully questioned in court or anywhere else. The problem is more complicated than that, though. Because their performance is often measured in number of arrests, there is little incentive for any officer to exercise much on-the-job caution. If a cop is told to arrest as many people as possible every day, they will likely start looking in the poorest part of town. That’s not to say that poor people commit more crime than their suburban counterparts — they don’t. But the arrestees harvested from the poorest communities are the easiest prey for officers who need to meet quotas because once they are sucked into the system, they often must plead guilty to something or face even worse consequences than the conviction itself. Think of it this way: A cop would more likely arrest someone who is likely to take a deal and get convicted quickly, rather than someone with the means to post bail, prolong the process and hire private lawyers to put the officer’s behavior under a microscope. Many of the poorer communities in the U.S., especially in urban centers, are populated by people of color. This is thanks in large part to “redlining” practices which relegated Black people and other people of color into the places that white people didn’t want to live. “Often, people of color who reside in under-resourced communities do not have the means to hire a private attorney that will fight for a better outcome,” explained Melba Pearson, a former prosecutor and civil rights attorney who specializes in policy. “Often, private attorneys have more investigators at their disposal, will provide broader mitigation for a judge to consider and can provide a more robust defense than a public defender who has 2 – 3 times the number of cases…. A public defender may encourage their client to plea for fear of a harsher sentence at trial, or a lack of resources to be able to investigate the case with a fine-tooth comb despite the possibility of an acquittal.” Thus, while anyone of any race can be arrested at any time for anything (or for nothing at all), the target on your back becomes bigger if you’re poor, and bigger still if you’re poor and Black. An officer need not be a member of the Aryan Brotherhood to arrest a disproportionate number of people of color; they need only follow a simple order to maximize the number of arrests they make. CalvinJohn Smiley, professor of sociology at Hunter College-City University of New York, explained how plea bargaining racializes crime in plain sight, immediately affecting incarcerated youth. “The expectation is that many of these young men who are racialized as Black and Latinx will eventually succumb to a plea agreement, which typically occurs after spending a year, if not more, within the juvenile facility. During that time, they are exposed to various forms of violence and if/when they turn 18 and ‘catch a case’ in the facility, often, will be transferred to [an adult jail], which in turn places them at higher risk for exposure to violence.” Here’s where the serpent swallows its tail: After generations of unequal arrests of Black people for everything under the sun, with most of those arrests ending in quick convictions, many of the players in the criminal legal system — including cops, judges, prosecutors and even defense attorneys — have come to equate “Blackness” with “criminality.” Legal scholar Carlos Berdejó described the practice of “using a defendant’s race [an observable attribute] as a proxy for the defendant’s inherent criminality [an unobservable attribute].” In other words, the law has gotten so used to rapidly affixing the label of “criminal” to Black people that it assumes the Venn diagram between “Black” and “criminal” is a perfect circle. There’s no easy way to disrupt this process, but I believe it can be disrupted. The first step is to recognize the mechanism that enables the harm. For decades, the U.S. has been without a serious dialogue about basing an entire criminal legal system on backroom “deals” that are sure to end in convictions. It’s time we started one.

### Contention 5: Racism (Critical)

#### Plea bargaining is a racial hermeneutics of the self to construct racialized subjects who legally admit to the guilt of their non-humanity

Bragg 22 [Hunter Bragg, researcher at the Drew Theological School Graduate Division of Religion, 2022, “On Condemning Whom We Do Not Know: Confession of Sins, Plea Bargains and Apophatic Anthropology,” Political Theology, https://sci-hub.se/https://www.tandfonline.com/doi/abs/10.1080/1462317X.2022.2064096]/Kankee

“The deck was stacked against me” In November 1990, Michael Phillips, a 32-year-old African American man, pled guilty to the rape of a 16-year-old white girl at a motel in Dallas, Texas. Without investigating the charges, the public defender advised Phillips that if he took his case to trial, he would likely receive a life sentence because “no jury would believe a Black man over a white girl.”1 Unwilling to risk this outcome, Phillips took a plea bargain that reduced his sen- tence to twelve-years in prison. He later expressed the futility of insisting upon his inno- cence in the face of state institutions and actors convinced of his guilt: “In 1990, it felt like slavery was still going strong for me … The deck was stacked against me from Jump Street … ”2 It was not until 2014, twenty-four years after his conviction, that the Convic- tion Integrity Unit in Dallas matched DNA evidence to a different person and rec- ommended that Phillips be exonerated. The circumstances of Phillips’s case and the sentiment he expresses about it illustrate the astonishing failure of American jurisprudence to bring about an outcome resembling justice. Although we might evaluate this failure on any number of levels, I want to inquire into what emerges if we take seriously the council of the lawyer that Phillips should plead guilty because “no jury would believe a Black man over a white girl” and Phillips’s own recognition that “the deck was stacked against me.” These comments exemplify what is the case for the large numbers of Black criminal defendants who give up their right to a jury trial in exchange for a lesser charge or sentence. Moreover, they shed light on the performative capacity of legal confessions. As I will argue, Phillips’s guilty plea did more than convict him of a crime. It constructed a racialized criminal subject whose very essence was his criminality. Indeed, legal confessions throughout the criminal justice system – from those occurring in police interrogations, sentencing hearings, and parole board reviews – bring about a similar effect. In this essay, I focus on the most ubiquitous instance of legal confession in the American criminal justice system: the plea bargain. I criticize the American practice of plea bargaining by showing its per- formative capacity to construct a racialized criminal subject lacking full human status. However, rather than be rid of legal forms of confession, I seek to mobilize its performative force by showing how confession of wrongdoing can, when situated in the context of an apophatic anthropology, clear the way for a new kind of human being. In order to make these claims, I first examine how it became possible that a legal admission of wrongdoing came to delimit an entire subject. This requires understanding the role of Christian practices of confession in the emergence of the modern legal subject. Drawing on ancient and medieval Christian thinkers as well as upon the French philo- sopher Michel Foucault, I trace these movements to figure the American plea bargain as a secularized form of confession of sins concerned not simply with determining who has committed an illegal deed but with discovering a criminal with an essential relation to his crime. Any consideration of the performativity of plea bargaining must reckon with the racialized character of criminal justice in the United States and the near universal use of the plea bargain as a mechanism for adjudicating criminal cases. As is well known, criminal cases in the United States involve people of color to a degree disproportionate to their population share. 3 Studies further suggest that a defendant’s racial minority status restricts the favorability of the plea deal that the defense attorney can secure for her client. 4 These realities contribute to the furthering of symbolic connections between Blackness and guilt, whiteness and innocence. Sociologist Nicole Gonzalez Van Cleve details how this racialization carries with it the rhetorical and legal dehuma- nization of defendants. 5 The “mope” names low-level criminal defendants as immoral, unintelligent, and thus unworthy of receiving dignifying treatment and due process. As Van Cleve shows, while the figure of the mope is colorblind on its face, it nonetheless codes a Black criminal whose guilt can be assumed. For white defendants, inclusion in the category of the mope entails a betrayal of their whiteness, which is to say, their innocence. The performance of the plea bargain is central to the construction and dehumanization of the mope. I argue, therefore, that the plea bargain is a crucial mechanism in what Alexander Weheliye calls “racializing assemblages,” or the process by which human beings are sorted into the categories of fully human, not-quite-human, or non-human. If Christian theologies and practices of confession have been foundational for the for- mation and confinement of racialized criminal subjects, then Christian theology’s current task ought to be self-critical. That is, it ought to dispossess itself of its anthropological commitments and of the practices of confession that construct them in order to clear the way for new possibilities for thinking the subject and the legal system’s dealings with them. In the third section, I seek to develop an apophatic anthropology stemming from Judith Butler’s recognition of the performative power of confessions and from the Christian apophatic tradition. Apophatic, or negative, theology insists upon the final negation of every creaturely attempt to name God. This need not mean that one cannot say anything about the divine, but that in speaking of God, one must be cognizant of the ultimate failure of human language to refer to the divine. I seek to extend this nega- tive theological impulse to the realm of the creature, arguing for an apophatic anthropol- ogy and an apophatic confession that negates claims to a human being’s essence. By showing the resonance of this tradition with critical race theory’s epistemological frame- works, especially anti-essentialism, I trace the implications of an apophatic confession for the plea bargain. Finally, I ask how the kind of subject-construction that occurs in the plea bargain might be done away with and how a new role for confession in the American criminal justice system might be imagined. Scholars and organizers have shown that confession within the context of transformative justice has a role to play in the reparation of wrongs. It presents the oppor- tunity for reckoning with the wrongs one has committed, making reparation for them, and becoming a different kind of person in relation to those one has harmed. I suggest that this kind of transformative approach to confession resonates with my vision of apophatic confes- sion and is thus precisely what is needed in American uses of legal confession. Moreover, because the issue as I articulate it here is not simply about those who have broken the law but about the broader systems of power in which one breaks the law and is categorized as a criminal, I gesture toward the need for religious, communal rituals of confession that engage communities in performatively dispossessing themselves of prevailing anthropologi- cal assumptions and ways of being. By developing rituals of confession that seek to rid them- selves of self-possession in favor of relational notions of human being, a new vision of the human might be imagined. Condemning someone you do not know: Foucauldian avowal and criminal subjectivity My first task in this essay is to show that a major site of legal confession in American criminal justice, the plea bargain, needs to be understood as a secularized form of the Christian practice of confession of sins. Foucault’s genealogical work on avowal 6 in his lectures Wrong-Doing, Truth-Telling aids this task, first, because he provides an account of the “contamination” between religious and judicial practices of confession, and second, because he makes clear the contemporary criminal justice system’s funda- mental need for a confession from the accused.7 The transformation in the application and function of avowal that Foucault examines corresponds to shifting notions of the “discovery and formulation of the truth” of oneself, a process he calls the “hermeneutics of the self.”8 Foucault traces the shift in hermeneutical approaches from a Christian interpretation of an individual’s thoughts, intentions, and desires to a modern hermeneu- tics informed by psychiatry and criminology and concerned with interpreting a subject who embodies on a deep individual level the acts he commits. 9 According to Foucault, a Christian hermeneutics of the self was operative in Christian forms of penance from antiquity to the middle ages.10 The second-century theologian Tertullian exemplified what Foucault calls exomologesis, a non-verbal “publish[ing]” of oneself through external acts. Tertullian allowed Christians only one post-baptismal repentance, the content of which was primarily external displays of sorrow: lying in sack and ashes, fasting, weeping, and lying prostrate before priests and the godly. For Tertullian, such humiliating acts perform an outward “demeanor calculated to move [God’s] mercy.”11

#### Plea bargains are racial degradation ceremonies that preemptively assumes - but simultaneously reifies and constructs - essences of black criminality that is inscribed onto the racialized and criminalized subject. Confirmations of blackness’ criminal ontology are from the seemingly colorblind process that discovers the essence of blackness via confession. Arguments of efficiency are false pretenses to hide how the guilty verdict predetermined the assumptions guilt by virtue of blackness, making due process redundant

Bragg 22 [Hunter Bragg, researcher at the Drew Theological School Graduate Division of Religion, 2022, “On Condemning Whom We Do Not Know: Confession of Sins, Plea Bargains and Apophatic Anthropology,” Political Theology, https://sci-hub.se/https://www.tandfonline.com/doi/abs/10.1080/1462317X.2022.2064096]/Kankee

[Badinter] turned toward the jurors and said to them: “But in the end, the accused, of course, he acknowledged his crime. He confessed. But what did he tell you about this crime? What information did he give you about his crime, about the reasons for his crime, about who he is? You have no idea … He did not say anything. He did not want to say anything. He could not say anything. In any case, you, you know nothing about him” … he closed with this sen- tence: “In the end, can you condemn to death someone whom you do not know?”30 In this case, the first avowal, which established the guilt of the defendant for a particular crime, is not in question. It is the second avowal, the essentialization of the criminal subject, that is at stake. By asking the jurors whether they actually know who Henry is, Badinter questions whether a single confession can perform both tasks. It further shows the legal necessity for a confession to speak to one’s identity, since as Badinter implies, only saying what one has done leaves the legal process unfulfilled. This anecdote provides insight into Michael Phillips’s case as well. While Henry failed to provide a satisfactory double confession, Phillips’s false confession met both requirements: he both admitted his guilt and confirmed his criminal identity. His lawyer’s advice to take the plea deal because a jury is unlikely to “believe a Black man over a white girl” suggests that court actors, possibly even the lawyer himself, had already determined who Phillips was. His confession confirmed their suspicions and, as I will show in later sections, made him into the very criminal they thought him to be. The narrative I have told here is necessarily incomplete. For one thing, it focuses entirely on developments in Europe and not in England, where much of American crim- inal law derives. However, what this Foucauldian genealogy illustrates is the extent to which Christian confessional practices are implicated in the development of a confessing legal subject whose self-implication speaks not only of one’s actions at a given time and place but also, and more importantly, of one’s essence. This brief Foucauldian genealogy points out the fundamental need of criminal justice systems to identify a criminal subject as the object of punishment. What remains to be seen, however, is the way that the con- temporary American criminal justice system constructs racialized criminal subjects who are, as Sylvia Wynter puts it, “not-quite-human,” and for this reason, in need of punishment. 31 31 “Racializing assemblages,” “mopes,” and the “criminalblackman” “Racializing assemblages,” theorist Alexander Weheliye’s term for thinking race “not as a biological or cultural classification but as a set of sociopolitical processes that discipline humanity into full humans, not-quite-humans, and nonhumans,” illuminates the con- nections between race and the modern self-possessed human subject that is at the heart of legal confessional practice. 32 For Weheliye, drawing on Wynter, whiteness is never simply a marker of a biological given but a set of power relations that establishes who can claim full human status. Blackness, Weheliye says, operates as a limit concept that provides the contrast needed for whites to define themselves as fully human.33 As Wynter makes clear, this particular iteration of humanity, which she calls “Man,” entails, in part, a decision about the rational capacities of certain groups of homo Sapiens. “Man” figures indigenous Americans and enslaved Africans as “irrational,” “sub-rational,” or “savage” and consequently, as failing to attain to full human status.34 The emergence of race as a standard for what it means to be human is inseparable from moral and spiritual orders. Indeed, numerous scholars have noted the connections between the perception of Native Americans and enslaved Africans as less than fully human and the tendency to think of these groups as immoral and outside of Christian community. 35 As theologian Marika Rose shows, the modern senses of race and racism emerged within the Christian symbolic register of the purity of blood. Rose writes, “Those racialized others now ontologically outside the sphere of Christianity continued to be guilty, complicit, and vulnerable to the violent judgement of God; those within the sphere of Christianity and of whiteness were innocent, safe, and able to enact God’s jud- gement upon others in the name of their salvation.”36 The religious and moral symbolism attached to racial markers justified the rise of a racial capitalism that contributed to the further dehumanization of racial others. The sociologist Nicole Gonzalez Van Cleve describes how this moral order operates in a colorblind manner inside Chicago’s Cook County Courthouse. The “mope” names a person who offends a particular moral code held among the professionals in the court- room. Mopes are perceived to be disrespectful, lazy, and incompetent, and their alleged crimes – usually low-level infractions like drug-dealing, theft, or other nonviolent felo- nies – solidify this perception. While the label makes no explicit reference to race, it carries racial undertones, correlating the ethical failures of the mope with his lifestyle and capacity for humanity. Van Cleve repeatedly tells of court officials mocking defen- dants in Ebonics and commenting on their childlike capacity for reason.37 Without men- tioning race, criminal court proceedings presume the guilt of Black defendants and treat these defendants as if they were guilty not only of a particular crime but in their very person. Precisely because “mope” is a colorblind category, phenotypically white defen- dants who act like mopes are included in the category as well. Such behavior amounts to a betrayal of their whiteness and their innocence and an inclusion into the categories of Black and guilty. The supposedly colorblind figure of the mope enables us to see, then, how legal proceedings operate according to racialized figurations of criminals. Speaking of the criminalization of African Americans in particular, critical race theorist Katheryn Russell-Brown names this racialized figure the “myth of the criminalblackman.”38 We might ask what role plea bargains play in the perpetuation of these myths, since Van Cleve and Russell-Brown imply that the racism at work in these categories seems to be operative prior to the entry of a guilty plea. I suggest that plea bargains are the primary legal means by which Black men are drawn into the racializing assemblages that delineate who counts as fully human and who does not. While on its face, the plea deal is a confession of a particular crime, when it is undertaken within the context of the criminalization of Blackness, it performs a double confession similar to the one Foucault described. The confession functions as both an admission of guilt con- cerning an illegal act and a self-affirmation of one’s identity as a mope or a criminalblack- man. In other words, the confession of a crime in the form of a plea bargain performs the construction of the not-quite-human in accordance with the categories of the mope and the criminalblackman.39 Van Cleve’s observations are particularly vivid here. She describes the “ceremonial charade” of due process for mopes as “racial degradation ceremonies.”40 In these rituals, the mope is dehumanized rhetorically in the sense that he is often disrespected, insulted, and degraded by court officials. The mope is also dehumanized in the legal sense. He is often short-changed of the right to due process that is granted to all legal persons. Under the guise of courtroom efficiency, mopes are funneled through the court- room as quickly as possible without concern for due process or the details of their cases. This behavior is justified by court officials because the mope figures one without full pos- session of himself. Due process, one prosecutor told Van Cleve, is a “waste” because defendants are mentally incapable of understanding their rights. 41 This ritual charade provides a clearer sense of the dehumanizing performativity of the plea bargain and sheds light on the transformative process undergone by Michael Phillips and those like him. First, the current model of criminal justice remains tethered to the modern notion of the self that came about through Christian practices of confession. According to this model, we need not concern ourselves with whether Phillip’s guilty plea was true according to an external standard of evidence, since we have the truest form of evidence that there is: self-incrimination. This is the “steep price” of personhood that Weheliye names: the modern notion of the self, purportedly ascribed to every human being regardless of race, operates within a system of racialization that weaponizes one’s self-possession in order to revoke the very humanity one is said to possess.42 . Second, given the criminalization of Blackness and the legal system in which it oper- ates, confessions in the form of plea bargains bolster the racialized system of control. By pleading guilty, Phillips identified himself according to the category of the criminalblack- man that had already been constructed for him. A Black man entering into a plea bargain affirms the very myth of criminality that placed him in his current situation. In saying this, I do not blame the person who pleads guilty. The criminal justice system has greased the skids, so to speak, to operate as economically as possible while affirming pre- cisely what it already assumes to be true. Instead, what I hope to name here is the legal need for the (voluntary or coerced) participation of the defendant in their own performa- tive construction as a racialized criminal subject. Finally, a confession by the accused allows for the criminal justice system to maintain the veneer of colorblind neutrality. Once Phillips entered his plea, no charge of racism could be brought against the system since the accused himself has confirmed his guilt. But, set in the wider context of the figures of the mope and the criminalblackman, the plea bargain becomes visible as a crucial component of a racialized system that affirms the connections between Blackness, criminality, and the not-quite-human. Up to this point in the essay, we have seen that the function of confession of sins as it has moved from an ecclesial context to a judicial one has been to construct a particularly modern subject who is autonomous, rational and thereby capable of giving an account of one’s identity. Through the work of legal scholars and Black theorists, we have seen that this identity construction has an irreducibly racial character. What I will show in the remainder of the essay is that the demand to confess not only what one has done but one’s true identity is impossible to satisfy. Apophatic anthropology: the impossibility of giving an account of oneself

#### Identity construction leads to the internalized self-belonging of the once-external constructions that implicate our own sense of self. Our sense as subjects is defined by the external criminal identity construction, which we then internalize as self-possession, making us permanently racialized, criminal subjects via the legalized, yet coerced confession of our essence.

Bragg 22 [Hunter Bragg, researcher at the Drew Theological School Graduate Division of Religion, 2022, “On Condemning Whom We Do Not Know: Confession of Sins, Plea Bargains and Apophatic Anthropology,” Political Theology, https://sci-hub.se/https://www.tandfonline.com/doi/abs/10.1080/1462317X.2022.2064096]/Kankee

Finally, a confession by the accused allows for the criminal justice system to maintain the veneer of colorblind neutrality. Once Phillips entered his plea, no charge of racism could be brought against the system since the accused himself has confirmed his guilt. But, set in the wider context of the figures of the mope and the criminalblackman, the plea bargain becomes visible as a crucial component of a racialized system that affirms the connections between Blackness, criminality, and the not-quite-human. Up to this point in the essay, we have seen that the function of confession of sins as it has moved from an ecclesial context to a judicial one has been to construct a particularly modern subject who is autonomous, rational and thereby capable of giving an account of one’s identity. Through the work of legal scholars and Black theorists, we have seen that this identity construction has an irreducibly racial character. What I will show in the remainder of the essay is that the demand to confess not only what one has done but one’s true identity is impossible to satisfy. Apophatic anthropology: the impossibility of giving an account of oneself The defendant’s involvement in the construction of his own criminalized subjectivity through the practice of confession resonates with Judith Butler’s theory of performativity. Butler takes up the performative character of confession in her work Giving an Account of Oneself, claiming that every account of the self “enact[s] the very self I am trying to describe.”43 As we have seen, this performance of confession does heavy lifting in the criminal justice system, effectively constructing the not-quite human subject that it sub- sequently dehumanizes. Yet, in Giving an Account of Oneself, Butler provides philosophi- cal grounds for thinking about the human in terms other than self-possession. Her relational anthropology provides the basis for an apophatic anthropology that, I suggest, ought to be brought to bear on the practice of plea bargaining. What makes Butler a useful interlocutor in my exploration of plea bargaining is her positing “of a subject who is not self-grounding.”44 She insists that a fundamental exposure to an other is constitutive of and thus prior to any subsisting self. The subject can never be said to possess oneself since she is composed fundamentally of relations to an other. The notion that the self is grounded not in itself but in a prior rela- tionality means that one can never give an account of oneself – can never say who one is – without simultaneously depriving that account of the self-sufficiency and self-possession that purports to be at its core. 45 This is the case, Butler says, because the very norms one uses to account for oneself precede the time of one’s accounting. The linguistic and cognitive structures that make one intelligible as a self cannot be confined to the self one is. The moment I try to speak about myself in a way that distinguishes me from all others, I resort to a language that precedes me. Moreover, from infancy one finds oneself confronted by another who precedes one and without whom one would not exist. In Butler’s view, there is no prior subject who has access to the truest sense of the self. There is instead “an array of relations and processes” which are “implicated in the world of primary caregivers in ways that con- stitute [the self’s] very definition.”46 These observations, Butler claims, give the lie to any notion of a self-constituting and self-possessed subject. These primary relations open into a wider relationality that further precludes one’s ability to account for oneself. According to Butler, every attempt to account for oneself takes place in the “structure of address.”47 The account one gives of oneself is necessarily addressed to a you, an other, who receives – and subsequently interrupts – that account.48 Giving an account of oneself in an attempt to establish the self as an object of self-possession gives way to a dispossessive “unknowing about who [the self] is.” The other before whom I give my account, who constitutes me fundamentally and who is herself a mystery to me, ensures that I am a mystery to myself. Though Butler does not use the language of Christian apophasis, we see in her relational anthropology the potential for an apophatic anthropology with resources for negating the self-possessed subject. Theologian Catherine Keller folds Butler’s relational anthropology into her apophatic cloud, unfolding a theological ethics based on the undoing of the self. Drawing lines of connection between Butler, Whitehead, and process thought, Keller explores the reson- ance of Butler’s opaque self with a broader “apophatic entanglement.”49 Confronted with one’s embeddedness in language, one’s dependance upon primary relations, and one’s constant relations with the other, one discovers an apophatic core that simultaneously confounds one’s ability to speak about oneself and concerns one with every other (human and nonhuman). The undoing of the modern self gives way, Keller says, to a knowing unknowingness of oneself and the other and marks the possibility of being, acting, and knowing otherwise. The “agent-I is already an intra-active we,” Keller says, and precisely for this reason one is responsible for and account-able to the other. 50 Butler and Keller articulate with philosophical and theological rigor the failure of the self-possessed “I” to take full possession of itself. The self is implicated in a web of relations that make it impossible to determine what part of “me” is separate from “you” and from the array of systems and influences that shape “us.” From a legal stand- point Butler and Keller lead us to reconsider what exactly is being asked of the one who pleads guilty. The law presumes the accused is a self-subsisting “I” who is both the agent of particular acts and who has at his fingertips a history and a language that can be used to manifest the truth of the self. Butler and Keller suggest to us that this is precisely what one lacks. Thus, an apophatic anthropology that takes its cues from them recognizes that the accused is incapable of meeting the law’s expectations. Critical race theory provides a framework that, though not deriving from Butler’s rela- tional anthropology or Keller’s process theology, is surprisingly resonant with them and gives insight into the ways law might take up an apophatic anthropology. Critical race theory’s epistemological lenses – intersectionality and anti-essentialism – address the law’s failure to recognize that one’s identity cannot be reduced to a single characteristic such as race, sex, gender, class, or sexual orientation. By neglecting to recognize the always multiple characteristics that make up a particular person, the law essentializes legal subjects in ways that do injustice to their experiences of discrimination.51 In order to counteract this tendency, certain critical race theorists have emphasized the infinite number of factors that go into shaping one’s always fluid legal identity. For instance, Elvia R. Arriola’s intersectional model insists that “identity represents the confluence of an infinite number of factors,” which are perpetually in flux. 52 It is impossible, therefore, to speak in any meaningful sense of “identity” because “who I am” is constantly shifting in relation to my experiences. That is, I am always changing in relation to the human and nonhuman worlds in which I exist and to which I respond. Angela Harris captures this unnameability of the self in her essay on anti-essentialism. She writes, We are not born with a self but rather are composed of a welter of partial, sometimes contra- dictory, or even antithetical selves. A unified identity, if such can ever exist, is a product of will, not a common destiny or natural birthright. Thus, consciousness is “never fixed, never attained once and for all”; it is not a final outcome or a biological given but a process, a con- stant contradictory state of becoming, in which both social institutions and individual wills are deeply implicated.53 Though neither Arriola nor Harris write in the register of relationality, they gesture, instead, toward the notion of a self in process whose status as a particular kind of self remains always illusive and ever mysterious, both to the law and to oneself. This illusive- ness is central to what I mean by an apophatic anthropology. Any attempt to name the self must always be accompanied by a negation of that name. Confession, I am suggesting, is precisely this unnaming. If we take seriously the contributions provided by Butler, Keller, and critical race the- orists in the development of an apophatic anthropology, we may see the contradiction at work in plea bargaining. Though plea bargaining requires a modern subject who perfor- matively constructs his own racialized criminal subjectivity, from an apophatic anthro- pological perspective, a confession of this kind may undo that same subject. A confession by a self whose “constant contradictory state of becoming” is shaped in infinite relation to others – including in relation to the racializing assemblages that form communities, systems, and institutions in the United States – will performatively dispossess and unsay the confessing subject and his given essential identity. I will spell out in the next section the implications of this apophatic anthropology for the practice of legal confession. However, it may be instructive here to note that an apo- phatic anthropology does away with the need to create an essential criminal identity. Plea bargaining as it has come to function would have to be done away with since naming a criminal identity is precisely its goal. This would have had massive implications for Michael Phillips, since it would challenge both the pressure to plead guilty without trial and, more fundamentally, the very category of the criminalblackman into which Phillips’s lawyer (and, assuming his lawyer was correct, the potential jury) had placed him. An apophatic anthropology envisions a culture and a legal system in which the legal reality that “no jury would believe a Black man over a white girl” is unimaginable. Apophatic confessions

#### Coerced voluntariness allows the state to construct the now self-inscribed criminal identity, ex post facto “proving the truth” of their initial charges of a criminal personality via confession

Gocha 16 [Alan Gocha, lawyer with a J.D. from Georgetown University Law Center, 2016, “The Sanitization of Violence: Exposing the Plea Bargain Regime as a Tool for Mass Injustice,” Georgetown Journal of Law and Modern Critical Race Perspectives, https://heinonline.org/HOL/P?h=hein.journals/gjmodco8&i=317]/Kankee

E. Manufacturingof Consent In the vast majority of cases, the conditions of a plea bargain require defendants to confess and waive their right to appeal.2 4 ° This both legitimizes and totalizes the state's penal authority. The confession serves as a badge of truth, "definitive" proof that the state's accusations were correct. The waiver proscribes the possibility of a contradictory conclusion in the future,2 41 which is reminiscent of Foucault's concept of docile bodies.2 42 Defendants are not just subjected to the will of prosecutors; they are expected to assist in their own incarceration. "Consent" is used as a shield against criticism. Once the victim agrees to be the object of violence, perpetrators can justify their actions by arguing that if they acted unjustly, the victim would not have acquiesced. Plea-bargaining's reliance on the manufacturing of consent is exemplified by the Supreme Court's position that the constitutionality of a plea-bargaining should be judged on the basis of voluntariness.24 3 As discussed previously, the Court in United States v. Ruiz reasoned that although plea bargains are required to be voluntary, they do not necessarily have to be fair.24 4 This argument is facially irrational-how can something be voluntary when elicited through deceptive or unfair means?2 45 The clever twisting of the meaning of "voluntariness" is not without purpose; it allows the state to justify the violence of incarceration even in cases where the defendant is innocent. 246 247 Analysis proffered in Bordenkircherv. Hayes offers support for this proposition. In Bordenkircher, the Court dismissed the possibility that an innocent defendant may be coerced into a plea, reasoning that people are "unlikely to be driven to false self-condemnation., 248 What is the basis for this conclusion? The court, in a text- book example of circular reasoning, says, "the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary. '249 Put another way, the Court posits that plea-bargaining is constitutional because it is voluntary, and it is voluntary because it would otherwise be unconstitutional. 25 ° The language of voluntariness makes the plea bargain regime difficult to persuasively criticize because it further contributes to the misconception that innocent people do not plead guilty.251 Moreover, the Court's understanding of how defendants make plea bargain deci- sions is directly contradictory with mainstream economics-the very tool used to justify its existence.2 52 Most economic theorist take as an assumption that people are, more or less, rational actors. 253 According to this principle, defendants should make their determination whether or not to accept a plea based on the overall utility of the decision, regardless of their innocence. 254 Utility, in the plea context, is determined by weighing the risk and probability of an adverse finding at trial against the certainty of terms articulated in the plea offer.255 Given the vast structural disadvantages against defendants, coupled with the large penalty disparity between plea and trial sentencing, rational actor theory dictates that many innocent defendants will plead guilty.2 56 Disturbingly, there is strong evidence indicating that this is not uncom- mon. 2 5 7 One study found that nearly half of people would plead guilty to a crime they did not commit to avoid risking the massively disproportionate consequences of going to trial.258 Particularly troubling, if rational actor theory is correct, then racism in the justice system, actual or perceived, will increase minority defendants' willing- ness to accept less favorable plea deals.259 Disturbingly, when controlling for non- racial factors, this appears to be the case.260 111. CONCLUSION The plea bargain regime fuels the epidemic of mass incarceration through four processes of sanitization: (a) the misapplication of economic and utilitarian prin- ciples; (b) overemphasis on the minimization of physical pain and unpleasantness; (c) obfuscation of the act, pushing its view to society's periphery; and (d) the manufac- turing of consent. Similar to the virtual war in Star Trek's "A Taste of Armageddon," plea-bargaining creates the illusion of civility while in reality acting as a source of incalculable human suffering. The American plea bargain regime is an affront to human decency and traditional notions of fairness and justice. Incarceration is a violent act and should be treated accordingly-reserved as a measure of last resort, accompanied by significant substantive and procedural safeguards. Accordingly, this article calls for a critical re-examination of plea-bargaining and the search for possible alternatives. 261

#### Criminalization constructs blackness as morally and socially polluted, justifying the state’s retributive punishment for their sinfulness, which in a viscous cycle, reconstructs their criminal ontology

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American mass incarceration has been driven by many ideological factors, including the pernicious influence of theological conceptions of “penal substitutionary atonement.” Racial and religious ideologies have made America the most-imprisoned nation in the world, and have made our prisons unusually punitive, driven by cultural emphases on retribution. In this essay, I will consider the mutually-reinforcing ways in which atone- ment theology has acted in the service of racialized narratives of punishment and control – and explore the question: is it possible to construct a liberatory theology of sub- stitutionary atonement with the potential to undermine the retributive basis of mass incarceration, and of imprisonment in general? I will propose a framework for reading “substitutionary atonement” as an instance of divine intervention in human relationships of violence: as a way of recognizing the valid debt owed to victims of harm while rejecting the violence inherent in forms of retribu- tive/punitive justice that turn that debt back on the perpetrator of harm; and as a dem- onstration of “doubled divine solidarity” – solidarity with both the victims of harm and oppression and those who have harmed them – in a way that respects the real differences of power and culpability between them. This is an understanding of atonement not as a transactional divine-human interaction, but as divine reconciling action in response to human violence and oppression. As such it requires a human response: such doubled divine solidarity requires of us human solidarity with those who have been harmed and oppressed; solidarity which rejects retribution and punishment, while insisting on real reparations for harm and participation in transformative actions against oppression. This praxis is the result and reality of such an abolitionist vision of atonement, and is our participation in the divine atoning action which exposes the violence of retribution but does not deny the real debt in cases of harm, violence, and oppression. Satisfaction, punishment, and racial control Discussion of substitutionary/ “satisfaction” language in atonement theology usually begins with medieval theologian Anselm of Canterbury and Protestant reformer John Calvin. Where Anselm’s theology of satisfaction was concerned primarily with the necessary payment of debt to satisfy God’s honor impugned by sin (and, as Timothy Gor- ringe notes, to protect the social order represented by the divine cosmic order), 1 Calvin’s theology emphasizes legal punishment for sin which must be borne by someone. Gorringe summarizes it succinctly: “In Anselm Christ pays our debts; in Calvin he bears our pun- ishment.”2 He traces how such retributive theology reflects and is reflected in legal penal practice; similarly T. Richard Snyder identifies a “spirit of punishment” at play in Amer- ican Protestant theology tracing back to its emphasis on the fallenness of creation and the individualized nature of salvation.3 In the United States, penal practice cannot be separated from the history of white supremacy and racial control. Michelle Alexander has laid out the history of how mass incarceration since the 1960s was built up as a form of racial control, a “new Jim Crow.”4 Kelly Brown Douglas presents mass incarceration as an expression of American “stand your ground” culture designed to protect the “cherished property” of whiteness against purported threats from Black and indigenous people.5 Rima Vesely-Flad’s work is of particular interest; she draws connections between America’s Protestant history and its carcerality through the lens of “social pollution.” Historically, Vesely- Flad suggests, Blackness has been viewed as a kind of “social pollution” in the body politic; this is closely related to Douglas’ understanding of “stand your ground” culture as intended to preserve the public square for whiteness. Vesely-Flad goes further to explore how the view of Black people as socially polluted is then moralized into an understanding of them as “morally polluted,” so that harsh punishment and criminalization are perceived as a necessary response to such moral pollution. 6 Resistance against such racialized logics of punishment and criminalization has taken various forms: most pertinently, in the movement for prison-industrial complex abol- ition and the practices of restorative/transformative justice. These related movements present two distinct emphases that shed light on what atonement requires. First, aboli- tionists emphasize the social construction of crime and the need to think systemically about whose interests and power are served by police/prisons, and especially how police and prisons function to maintain racialized and capitalist hierarchies (see, for example, the work of Angela Davis and Ruth Wilson Gilmore). At the same time, restorative and transformative justice proponents (such as Howard Zehr, Danielle Sered, Creative Inter- ventions, and others, as well as Davis) focus on building the alternate ways of responding to harm that are necessary in order to, in Davis’ terms, “make prisons obsolete.”7 Both emphases are essential. Abolition requires a systemic viewpoint that accounts for the inequitable social realities affecting every act of harm and the societal construction of crime and punishment. But abolition also requires that we deal creatively with real harm and violence that occur – and the complex reality that each of us are both harmed and responsible for doing harm to others during our lives (sometimes at the same time), and that those who do harm were often themselves victims of violence first. 8 Ontologically, we are simultaneously victims and perpetrators of harm. The language of “victims” and “perpetrators” has been justly critiqued as losing the nuance that every person both does harm and is harmed in favor of a false binary; while recent restorative justice practice has tended toward language of “harmed party” and “responsible party” or similar, I am using the syntactically-shorter victim-perpetra- tor language for simplicity. But we must remember that “victim” and “perpetrator” are not characteristics of people but rather roles in a particular situation of harm; both can apply to each of us. This reality, that everyone has done harm and been harmed, is central to my theological anthropology and my abolitionist praxis, and indeed central to my argument here for the complex nature of divine solidarity in atonement. The multiplicity of our existence simultaneously as victims and perpetrators is an essen- tial element of the theological anthropology underlying my atonement theology. Nonetheless, such subjectivity cannot be constructed separately from the ways that racial dynamics affect who is constructed as criminalized or a “perpetrator” of violence and who is constructed as a “suitable” victim of violence. 9 Feminist and womanist theo- logians have raised objections to substitutionary atonement in part because of its reinfor- cing effects on racialized systems of punishment and control, in light of the societal imbrication of the identification of perpetrators of harm with the racialized construction of certain persons as “criminalized.” Nikia Smith Robert’s “liberation theology for lock- down America” emphasizes the role that Anselmian substitution plays in supporting racialized mass incarceration: Applied allegorically to the contemporary social context of the Carceral State, not Christ but Black bodies become the sacrifice for human sin. This is to say, in the feudal economy as in the Carceral State there is an analogous hierarchical relationship where lords can be under- stood interchangeably with dominant privileged society and serfs with the criminalization of the subaltern … . Hence, Anselm’s feudal cosmology of salvation and the U.S. criminal justice system have this in common: both are religious, retributive, and require the sacrifice of a lower class.10 For Robert, the liberating work of God is found not in atoning “systems of sacrifice” but in “creat[ing] disruptive spaces of resistance to forge community, restore personhood, overthrow oppressive structures of power and secure human flourishing.”11 Williams, meanwhile, resists notions of atonement that depend on making Jesus a “surrogate” for humans, instead emphasizing salvation through his “ministerial vision of right relationships.”12 Meanwhile, Rebecca Ann Parker and Rita Nakashima Brock identify substitutionary narratives of atonement as replicating abusive power dynamics, “cosmic child abuse.”13 Substitutionary atonement has formed part of an American Christian conceptual matrix encouraging harsh punishment and incarceration, in connection with a racialized conception of criminalization and “moral pollution.” As Robert notes, when the need for punishment is reified in God, those who are already marginalized – Black Americans – are the ones scapegoated in the name of such divinely-acceptable punishment. Can any- thing of this theological theme be salvaged for a liberatory theology? Constructing a reverse discourse Given the many harmful effects that “penal substitution” concepts have had on American penal practice, why try recovering any sort of substitutionary doctrine of atonement? Can substitution as a theme be saved? I believe it can; that it is possible to construct a “reverse discourse” (to borrow Foucault’s language) within the broad traditions of substitutionary atonement, to provide a theory of substitution as divine solidarity with both victims and perpetrators of harm, in a way that undermines the retributive logic of incarceration. Why bother? Why not let the concept of substitution go? I offer two arguments for the value of reclaiming such language in resistance against the way it has been used for oppression: First, the reality is that substitutionary language is still a dominant paradigm in the church and a source of comfort to many, in the concreteness of its promise of reconcilia- tion with God, illustration of the lengths God will go to for us, and God’s “affinity” with us in suffering (to borrow a term from Jon Sobrino).14 As long as “substitution” and the related “sacrifice” remain potent symbols in Christian thinking and ritual, new liberatory interpretations of them offer a way to couch concepts supporting abolition in familiar terms. On solely pragmatic grounds, engaging with such terms provides an avenue for persuasion that simply rejecting them does not. But more importantly, the hard questions about punishment, retribution, and forgive- ness raised by substitutionary theories expose real and important tensions in the work for non-carceral responses to harm. Mark Heim writes that the cross represents the truth that forgiveness is costly, even if the crucifixion is not understood as a precondition for divine forgiveness.15 He phrases it in psychological terms in his discussion of Anselm, suggesting that Anselm’s replacement of a human scapegoat with a divine sca- pegoat offers a way out of the psychological needs of victims for vengeance and the guilty to make infinite restitution.16 Fleming Rutledge couches her discussion of substitution in the resistance to “impunity”17 and what is owed to victims of harm. 18 Samuel Pillsbury similarly argues for the need for criminal punishment to represent the community’s rejection of the “moral disregard” underlying acts of violence. 19 Sered lays out the inter- personal debt owed to victims concisely: “It is my belief that when we hurt people, we owe something, and one of the things we owe is to face what we have done.”20 Violence and harm must be addressed. Something is “owed” to victims of harm, and those respon- sible for doing harm have the primary responsibility to address what is owed. My point here is not to argue for the necessity of criminal punishment, but rather to lift up the validity of the desire for retribution in response to harm: the sense that some- thing must be paid. Without such a recognition of the validity of victims’ anger and the debt owed them, theories of divine forgiveness can become coercive calls for victims to forgive without reparations. If God in Christ forgives the trespasses against God without cost, what right do human victims have to demand repayment of the interpersonal debt owed to them? This is not to say that restorative or transformative responses to harm must take the form of repayment or restitution. Often, restorative/transformative justice takes more creative forms of healing and transformation – especially where reparations or restitution are unobtainable (because of systemic biases) or impossible (as in cases of violence where the trauma cannot be undone). But to explore such creative forms of justice requires us first to deal honestly with the questions of debt and restitution, and the related desire for vengeance and retribution. I address these questions through the lens of atonement in order to lay the groundwork for further creative and communal acts of justice – justice that may transcend the conceptual logics of debt, restitution, and reparations, but cannot ignore them.21 The symbolic language of debt forgiveness holds an unavoidable place in the Christian theology of abolition, e.g., in Jesus’ proclamation of the coming reign of God at the begin- ning of his ministry (Luke 4:17–21) in which he declares that he has been anointed “to set the prisoners free” and to “declare the year of the Lord’s favor” – the latter a direct refer- ence to the traditions of the Sabbath and Jubilee years described in Leviticus 25 and Deu- teronomy 15.22 The rules surrounding the Sabbath and Jubilee years require the forgiveness of monetary debt, and relatedly the freedom of those who had sold them- selves into bondage. Griffith explains the Sabbath and Jubilee years as not only a law gov- erning monetary debt but more broadly as a politico-economic anamnesis of the primary liberating action of God, the exodus from Egypt, writing: “It was on the basis of God’s liberation of the slaves that a covenant was established with Israel, and it was also on the basis of that history of liberation that Israel was to observe the Sabbath and Jubilee. … The proclamations of liberty to the captives were concrete social responses to God’s lib- erating activity in the exodus of Israel from Egypt.”23 According to Griffith, during the Babylonian captivity this symbol of liberation from slavery was extended to the liberation of all prisoners, so that by the time of Jesus’ proclamation in Galilee, the Jubilee “year of the Lord’s favor” could be understood to involve the general freeing of captives as well as the forgiveness of monetary debts.24 In the modern case of those imprisoned for crimes – those serving what some call their “debt to society” – these two understandings of the “year of the Lord’s favor” coalesce: the Jubilee year is when those in prison are set free, even those who have incurred interpersonal debts (as opposed to monetary ones) through interpersonal harm, because captives are freed and debts forgiven in God’s Jubilee. Ched Myers and Elaine Enns similarly analyze the relational, not simply economic, consequences of the Sabbath/Jubilee traditions in their analysis of 2 Corinthians 5:18– 19: “The unilateral seventh- and forty-ninth-year ‘release’ from debt-bondage … is alluded to in God’s decision ‘not to count our trespasses against us’ (the explanatory addition in 2 Cor 5:19). Christ heralds the renewal of this divine economy of grace: the old ‘debt system’ is passing away.”25 For them, this divine practice of debt-forgiveness has immediate practical applications for how we deal with crime and harm: “The deeply engrained retributive logic of the domination system – the way we think ‘according to the flesh’ – stipulates that debtors must be imprisoned and offenders punished. In stark con- trast, God models in Christ the practice of victim-initiated reconciliation.”26 But applying the originally economic language of debt forgiveness to the interpersonal debt incurred by harm makes certain claims about the nature of the relationship between the parties. This is particularly challenging when debt is used to describe the human- divine relationship. Devin Singh has explored ways that the prevalence of debt language within atonement theories has the problematic result of “an incorporation of debt into the identity of God.”27 My reinterpretation of the concept of substitution here does not presume that the debt in question is our debt to God, but instead our interpersonal debts to one another as a result of harm and violence. This bears similarity to J. Denny Weaver’s proposal of sin as primarily being expressed through “distorted social relation- ships.”28 It also brings to mind the older “ransom” theory of the atonement – in which the debt paid by Jesus on the cross is a debt owed to the devil, not to God – rather than Anselmian views of “satisfaction” owed to God. Instead of a debt to the devil, though, I am proposing that substitution is a helpful symbol for expressing the divine interruption of the transfer of interpersonal debts that we owe to one another. As such, what I am offering here is a new atonement theology, not claiming an older Anselmian or Calvinist tradition of substitution that reifies God as “demanding” payment of debt or punishment. God does not demand debt or punishment, but, according to my theory, substitutionary language in atonement can be helpful in expressing how God intervenes in the world to transform interpersonal harm, violence, debt, and retribution. Of course, it is not as simple as the divine payment of our moral debts to one another. The challenge is how to hold the Jubilee tradition of forgiveness – a tradition that goes beyond monetary debt to also address moral/interpersonal/relational debt – in tension with the very real interpersonal debt of harm which requires reparations: to overcome debt without nulli- fying it. What I would propose, then, is that the concept of substitution in relation to the crucifixion offers a symbolic way to hold in tension the truths of divine and human forgiveness, which comes only at a cost, and the necessity for repayment of the interpersonal debt of harm, which should nonetheless not justify violent retribution (including the state violence of incarceration). I will turn now to consider the mech- anisms by which substitutionary concepts can undermine the basis of retributive systems: first, by engaging with Heim’s work on scapegoating violence in relation to the crucifixion and considering the applicability of his argument to retribution more broadly; and then by considering “substitution” through the lens of divine soli- darity with humanity. Scapegoating, retribution, and the transfer of debt Heim’s Girardian reading of the crucifixion offers a helpful starting place for attempting to reconstruct a substitutionary theory. Heim argues that the “problem” addressed by the crucifixion is the problem of scapegoating, as identified by René Girard: that in order to overcome the tendency for societies to erupt into uncontrolled retribution and violence, individuals are sacrificed as scapegoats, a violence veiled in sacred language and practice so that it is not seen as violence. Heim writes that Jesus’ crucifixion presents a view of scapegoating violence from the scapegoat-victim’s perspective – exposing it as violence, no longer veiled by sacrality – and Jesus’ resurrection shows God’s solidarity with every victim of scapegoating, overcoming sacrificial violence. 29 Heim suggests that the Bible, across the Old Testament and particularly in its interpretation of the crucifixion, offers an “ambivalent” perspective that “testifies to an ongoing struggle,” what he calls a “stereo- scopic” view of scapegoating – at times presenting sacrifice as “good” sacred violence that upholds the community but at the same time always maintaining an insistence on expos- ing its violence, for the sake of ultimately letting Jesus’ crucifixion both be recognizable as a sacrifice and exposed as violence. 30 Heim’s argument about the crucifixion as an exposure and destruction of scapegoating violence – a divine intervention in a particular form of human violence31 – has immedi- ate relevance to the question of incarceration because of the ways in which the American criminal punishment system functions as a tool of scapegoating violence. Robert ties this to the role of sacrifice in America’s religious history: “America requires a sacrifice for the Carceral State to function. Prisons are therefore needed to systemically produce delin- quents by disenfranchising, disqualifying and dehumanizing the least of these. This normalization of criminalization engenders a liturgy of punishment that essentially lega- lizes the sacrifice of Black bodies.”32 Heim himself admits the scapegoating potential of criminalization. 33 However, he maintains a distinction (which I do not think stands) between legal punishment of the guilty and scapegoating violence for the sake of social peace; from his perspective a crim- inal legal system offers another mechanism for interrupting the cycle of escalating retri- bution and mimetic violence.34 I think his view is too optimistic, and that the impersonal justice of the entire society – as opposed to interpersonal, communal restorative justice for harm – always has the “shape” of sacrifice because, as Robert writes, it always is willing to sacrifice marginalized populations “to restore law and order to safeguard the privilege and power of dominant society.”35 As Vesely-Flad has explained, the criminal legal system turns against marginalized people into “criminals” because they are viewed as “morally polluted,” not just because of actual guilt. Any system of criminalization will face the pressure to make criminals in response to perceived “moral pollution,” not simply as an objective response to actual guilt, and so any criminal legal system will tend toward scapegoating. A similar tendency toward scapegoating comes from Henri- que Carvalhos’ and Anastasia Chamberlen’s concept of “hostile solidarity” against those guilty of harm.36 Hostile solidarity produces solidarity among those punishing against those who have been found guilty – promoting social peace by punishing the guilty as scapegoats. In so doing, it produces a sort of moral/social pollution out of the fact of guilt for harm. Solidarity against those who are guilty makes them into a “pol- luted” class, suitable for scapegoating. This is the converse of the process described by Vesely-Flad whereby those constructed as “socially polluted” are then deemed “morally polluted” – instead, by the mechanism of hostile solidarity, actual guilt is turned into moral/social pollution promoting social solidarity against the guilty. Both tendencies push a legal system, even one intended to punish actual guilt, toward a system of sacred scapegoating violence. As Miroslav Volf puts it: “The tendency of per- secutors to blame victims is reinforced by the actual guilt of victims, even if the guilt is minimal and they incur it in reaction to the original violence committed against them.”37 For all these reasons, Heim’s interpretation of the “sacrifice” of the crucifixion as not sup- porting but rather exposing such violence is directly relevant to efforts to undermine mass incarceration. Systems intended to punish the guilty inevitably become sites of scapegoating. However, I would argue that Heim’s system can be extended further, to understand the crucifixion as undermining not only scapegoating as it appears in the modern crim- inal legal system but also the “sacred violence” of retribution in all its forms. In other words, I argue that there is something essential to the nature of retribution which makes systems of criminal punishment inevitably tend toward scapegoating violence. I return here to the question of debt. Above, I laid out the case, made eloquently by Sered, that the debt owed to victims of harm by those who have harmed them is real and must not be set aside.

#### Plea bargains commodification suffering as something to be bargained with reifies substitutionary atonement that fuels anti-black retributive sacrifices of black and brown bodies. The construction of black moral blameworthiness of punishment is part and parcel with BOTH the idea that their punishment makes whole white “victims” for the “harm” they suffered from blackness AND that harm debt is a right held transferable to the state to rectify those “wrongs” via the prison-industrial complex

Bowman 22 [Hannah Bowman, graduate student in the M.A. in Religious Studies program at Mount Saint Mary’s University, Los Angeles, and the founder and director of Christians for the Abolition of Prisons, 2022, “From Substitution to Solidarity: Towards an Abolitionist Atonement Theology,” Political Theology, https://sci-hub.se/https://www.tandfonline.com/doi/abs/10.1080/1462317X.2022.2038937]/Kankee

Above, I laid out the case, made eloquently by Sered, that the debt owed to victims of harm by those who have harmed them is real and must not be set aside. Retribution, however, is not the same as restitution or reparations. Retribution relies on the “fungibility” of debt: the key underlying concept of retribution is that the debt of harm owed to the victim can be transferred – in the form of punishment, the intentional infliction of harm – back onto the perpetrator. In retribution, the debt of harm, rather than remaining an unchangeable obligation from the perpetrator to the victim, instead becomes a commodity, a calculable and interchangeable “amount of suffering owed” which can be repaid through further violence and suffering on the part of another (the perpetrator). The connections to the sacred violence of scapegoating appear. In the Girardian sca- pegoating relation, what is owed or what “must be paid” to restore social peace is trans- ferred onto the scapegoat. The actual violence of the murder of the scapegoat is hidden under the veil of the sacred.38 Per Heim, the scapegoating sacrifice represents an erasure of the violence that threatened the social order, while the violence of the sacrifice itself is ignored. In retribution, it is similar: what “must be paid” is transferred onto the perpe- trator in the form of suffering. The actual violence of punishment – the fact that the imposition of suffering by state powers is an act of violence – is hidden under the sacred veil of “justice.” The symbols and rituals of courtroom procedure – themselves an expression of civil sacrality – hide the violence of judicial murder and incarceration. Even more directly, the invisibility of the suffering in prisons, because they are secretive, remote, and intentionally hidden from the public eye, hides the violence of punitive incarceration. Retribution and state punishment, like scapegoating, promise social safety while hiding the cost of the violence done by the state. The major difference between scapegoating and retribution is in the innocence of the victim. Heim protests that measured retribution against a guilty perpetrator can be defended, and that the scapegoating mechanism is only relevant where the guilt attribu- ted to the perpetrator is dissociated from the magnitude of their factual guilt. 39 I disagree, and suggest that the essential element in sacred violence is not the innocence (or at least, relative innocence compared to attributed guilt) of the scapegoat victim, but instead pre- cisely the “fungibility” of the debt of harm that allows for its transfer into further vio- lence – which is in effect in both Girardian scapegoating and retribution. The perpetrator may be actually guilty: but once the debt of harm is made fungible and trans- ferred back in violence against them, the stage is set for scapegoating. Understanding such debt as transferrable is the basis for its further transfer to a (perhaps innocent) sca- pegoat. Instead of trying to limit retribution only to the “sufficiently guilty,” I am suggesting, the sacrifice of God on the cross instead offers a way of interrupting every such transfer of the debt of harm, and cuts off retribution at the start. The concept of the “fungibility” of debt at play in retribution also raises the problem of using economic debt language to address social obligations. It is worth returning briefly to Singh, who presents the history of debt in penal theory as providing a sort of scape- goating transfer: he describes how debt to be repaid between parties in cases of harm was gradually replaced by debt paid to the sovereign authority through the penal process. 40 His response in general is to deconstruct the use of debt as a category for describing interpersonal obligation. I am suggesting here that instead of jettisoning such debt language, we jettison the move by which the “debt” of interpersonal obligation is constructed in economic terms as a fungible or transferrable commodity. Such an attempt to decouple the concept of “interpersonal debt of harm” from economic under- standings of debt is particularly urgent given the realities of the greater burden of debt for the poor and marginalized. My goal is to reach an understanding of interpersonal debt (as used by Sered, for example) that holds space for the necessity of restitution and reparations for harm while not upholding economic or retributive debt logics. I propose that the cross’s exposure of the violence of retribution provides one way to unsettle an economized, fungible understanding of interpersonal debt. Heim’s discussion of the crucifixion focuses on the passion narratives as presenting a scapegoating sacrifice from the scapegoated victim’s point of view, exposing the violence against the scapegoat. 41 Scapegoating and retribution are not identical, but I would use a parallel method to argue that the crucifixion also exposes retribution as sacred violence. Here is where the language of substitution becomes unavoidable. If Jesus is understood as a substitute for the guilty who are punished by retributive violence; if by “bearing the sins of the world” (cf. John 1:29) and “becoming sin for us” (cf. 2 Cor. 5:21) we understand him to be suffering the “just punishment” due to others, repaying the (real) debt of harm as it is transferred by retribution: if we posit these traditional assumptions, then Jesus’ suffering and its expression in the passion narratives unavoidably exposes the violence inherent in retribution. We cannot veil it in sacred narratives of justice or repayment. Once the debt of harm is constructed as a fungible commodity, able to be transferred by retribution, then “substitutionary atonement” means that God, in Jesus, is able to “take on” that transferred debt in place of the guilty party, and in so doing reveal the vio- lence of such a transference. Heim’s explication of the revelation of the crucifixion as the “sacrifice to end sacrifice”42 provides a mechanism for divine interposition, through sacrifice, into the transfer of debt in retribution. God’s substitution in Jesus reveals the similarity between retribution and scapegoating and the violence underlying both. My point is not that God must literally pay the debt of retribution in order for guilty parties to somehow avoid it. It is instead to suggest that God’s intervention in the atone- ment interrupts the transfer of the debt owed to the victim back onto the perpetrator in retribution; in a substitutionary model Jesus “steps in” and the debt is laid on him, and thereby the violence is made visible. Jesus, as scapegoat, takes the suffering which was described as “just payment of debt” by perpetrators onto himself, and thereby exposes it as the violence it is. The violence of Jesus’ death forces the question: is this violence wrong only because it happened to Jesus, an “innocent scapegoat”? Or would the violence also have been wrong if it were applied to the guilty party in retribution?43 I am offering a sort of proof by contradiction: If the debt of harm is in fact fungible and understood to be transferred in a form of “justice,” then it can also be understood to be transferred, by divine act, from the guilty party onto Jesus: but Jesus’ passion makes visible to us the extent of violence involved in such a payment of debt. When the debt is transferred to Jesus and “paid” by his suffering, we see it for the violence it is and reject such violence as effective payment. Therefore, we conclude that the debt of harm is not fungible; it cannot be transferred by suffering; further violence does not repay the debt. The divine revelation provided by the symbol of substitution interrupts the logic of retribution by which the debt of harm is turned back onto perpetrators. It exposes the violence of such logic. Reparations cannot be replaced with punishment. The abiding debt to victims cannot be satisfied with the violence of punishment or suffering on the part of perpetrators: instead, the interpersonal debt to victims is indelible until reparations and restitution are made. If sufficient reparations are impossible, the debt remains—although perhaps it can be transformed. Where then does atonement occur? Solidarity as a mechanism of atonement for victims and perpetrators

#### The naturalized construction of criminality with one’s essence is reified by carceral citizenship in which post-release convicts are treated as a less-than-human under caste permanently deserving of punishment

McGinnis 17 [Briana L. McGinnis, researcher of Political Science at McGill University, 2017, “Beyond disenfranchisement: collateral consequences and equal citizenship,” Taylor and Francis, [https://sci-hub.se/https://www.tandfonline.com/doi/full/10.1080/21565503.2017.1318759]/Kankee](https://sci-hub.se/https://www.tandfonline.com/doi/full/10.1080/21565503.2017.1318759%5d/Kankee)

Constructing unequal members: citizen or criminal? There is an expansive literature on the construction and meaning of citizenship in various contexts, a full review of which is beyond the scope of this project. For the purposes of this examination, I will employ a working definition of “citizenship” as the position that a person occupies in the political communities to which they belong, in relation to other members. This position is, in part, chosen or affirmed by the person, and in part consti- tuted intersubjectively. I use this definition, in part, because it recognizes the plurality of political communities to which a person might belong, and also because it emphasizes the relational nature of citizenship.5 This concept of citizenship is an expansive one, encom- passing legal citizenships, but also including less formal (but still vitally important) aspects of the experience of membership in a political community. This article critiques the pro- duction of one category (criminality) that can affect a person’s position in a significant and negative fashion. While being labeled a “criminal” is likely to distort a person’s experience of citizenship, I do not claim that being placed in this category displaces or eclipses other identities that also constitute the experience of citizenship. However, because this article is a critique of the separation of “criminals” from “citizens,” it will focus primarily on the significance of the criminal label. “Criminality” is an idea that is too often naturalized, a tendency critically examined in much of Foucault’s work (and in that of others building on his foundations) (Dilts 2012, 2014; Foucault 1995, 2004, 2010). Nonetheless, even relatively recent scholarship is given to employing the category of “criminal” as one that comes into being, unbidden, with the commission of an act forbidden by law. Casual references to “criminals” or “common criminals” appear in numerous prominent texts (Arendt 1993, 161; Honig 1993; Rawls 1971, 240, 270, 314–315, 575–577; Shklar 1993, 188). Richard Dagger, for example, asserts that “By stealing my property or robbing me of the use of an eye or arm, the criminal also leaves me less free to go about my life” (Dagger 2011, 48). Jeremy Waldron, similarly, refers to Locke’s depiction of “crooks” (Waldron 2002). This transformation from citizen into criminal, however, is not given. “Criminal” is not a natural kind, any more than “citizen” is; both categories are constructed. Collateral con- sequences aggregate people on the basis of what is perceived to be a common characteristic – “criminality” – but criminality is not an identifiable quality of any person. Rather, it is a construct that is produced and reified by policies like collateral consequences. Collateral consequences are particularly invidious producers of the category of “criminal” because they extend beyond conviction, beyond the period of punishment, and follow those subject to them back into the course of their “free” lives, sometimes for lengthy periods. By intruding into post-punishment life, they reinforce the idea that a person who has com- mitted a criminal offense is a fundamentally different kind of person from their fellows, one who simply deserves unequal treatment, regardless of how weak the justification for a particular restriction may be. One condition commonly held to legitimize coercion in a democratic society is that any harm inflicted or limitation placed on a member of the demos must be reasonably justifi- able to the person subject to it.6 Charles Larmore, for instance, argues that acknowledging that the person coerced is owed a justification is a necessary part of recognizing their indi- vidual worth (Larmore 1999, 608). Recognizing other citizens’ claims to justification can also be productive of a particular kind of equal relationship among community members one rooted in civic friendship (A. Lister 2013). Regardless, to coercively burden or restrict certain members of a polity without offering them sufficient, reasonable justification for doing so is to treat them unequally without good reason. In short, it is to treat them as if they inhabited a position inferior to those of their fellow members not similarly bur- dened or restricted. By placing legal limitations on some members of the polity without offering them a reasonable justification, communities that impose collateral consequences treat those subject to them as something less than equal members. Avishai Margalit posits that humi- liation can result only from human action, and that members of a particular society suffer humiliation when their polity (through direct actions or the creation of conditions) supplies them with reasons to feel that their self-respect has been injured by those actions or conditions (Margalit 1996, 9–12). Margalit’s definition of humiliation, because it emphasizes human action and relationality, is particularly well suited to conceptualizing political humiliation, and so it is the one employed in this article. The practice of imposing collateral consequences on former offenders produces a group of citizens who are not only liable to suffer substantial limitations on their abilities to enjoy the benefits and recognition of equal citizenship, but who also have good reasons to feel humiliated by this treatment.7 Collateral consequences of conviction reach many facets of the everyday experience of citizenship for those bearing them, but the next sections will focus on three aspects of citi- zenship as average Americans commonly experience it. I will first examine how certain collateral consequences strip citizens of their anonymity; registries single out certain par- ticularly unpopular citizens for public exposure, despite their terms of punishment having nominally concluded. I evaluate the justifiability of such policies by analyzing the disjunc- ture between the stated purposes of offender registries and their actual effects. Second, I will survey restrictions placed on what have been described as some of the core activities of citizenship and consider historical justifications offered for similar exclusions, why those justifications have been abandoned, and which possible reasons could sufficiently justify these atavistic policies in the current era. Third, I will consider a sampling of econ- omic restrictions placed on former convicts, situating these limitations within the context of equality of standing. Before delving into cases, I will give a brief account of how criminality and citizenship have been constructed in liberal political thought and in the Anglo-American legal tradition. The historical separation of “citizen” and “criminal”

#### Post-conviction civic disability seek to legalistically differentiate the homogenous ethical body politic from the racialized, second-class, the deviant and criminalized other

McGinnis 17 [Briana L. McGinnis, researcher of Political Science at McGill University, 2017, “Beyond disenfranchisement: collateral consequences and equal citizenship,” Taylor and Francis, [https://sci-hub.se/https://www.tandfonline.com/doi/full/10.1080/21565503.2017.1318759]/Kankee](https://sci-hub.se/https://www.tandfonline.com/doi/full/10.1080/21565503.2017.1318759%5d/Kankee)

Concluding remarks This article expands the scope of discourse about collateral consequences beyond disen- franchisement, examining the ways in which state-imposed marks of inferior membership separate criminal from citizen and humiliate former offenders, thus undermining the equality constitutive of democratic citizenship. Because each person inhabits a unique pos- ition in a multiplicity of overlapping socio-political networks, there is no single, paradig- matic experience of “citizenship” against which others can be judged (Young 1989). Forging a single, comprehensive vision of “full citizenship” has not been the aim of this article – nor do I claim that every person subject to collateral consequences will have an identical experience as a result. Rather, this article represents an attempt to identify and critique the role of seemingly benign, small-scale legal restrictions in the production and reification of an ever-growing category of criminalized citizens in the United States. The imposition of collateral consequences helps to produce and reify an essentialized, easily excludable group of second-class citizens. Collateral consequences project a past offense into the future, and by doing so efface the distinction between actor and act, treat- ing the transgression as symptomatic of a pervasive, underlying bad character. By treating criminalized citizens not merely as people who have committed offenses (discrete acts), but as a different type of person (a “criminal”), an implicit category of the “good citizen” is created in the negative space. Setting aside a category of “criminals” (like other attempts to exclude certain groups from full membership) reinforces a vision of what Iris Marion Young criticized as “undifferentiated citizenship,” or the idea that demo- cratic citizenship is characterized by uniformity, an image that artificially homogenizes the citizenry and reclassifies difference as deviance (Young 1989). One particularly insidious feature of this construction of criminality is that it is highly moralized, purporting to be based on the inherent moral character of the person subjected to unequal treatment. That moralization provides a smokescreen, allowing non-criminalized citizens to deny the importance of intersectionality and systemic biases, and to claim these distinctions are based solely in an impartial, individualized idea of desert. By presenting “citizen” and “criminal” as durable and mutually exclusive categories, collateral consequences undermine the equal standing of those subject to them. Collateral consequences are fundamentally incompatible with democratic politics. As this article has argued, they create a large and ever-growing class of criminalized citizens whose unequal treatment is not adequately justified, and whose polities subject them to humiliating conditions as a result. As illustrated here, there are strong grounds upon which to challenge the ostensible justifications for many of these restrictions, which are based as much (or more) on unsupported generalizations and essentialized depictions of criminality than on harm prevention or a reasonable public interest. Indeed, the very idea of collateral consequences rests upon the same generalizations. The production of a group of people who can be subjected to humiliating conditions and to whom unequal treatment need not be fully justified constitutes the creation of a form of second-class citizenship that is inimical to democratic equality.

#### Plea bargaining mass incarceration creates a black body politic with a state of bare life due to their racialized criminal identity, permanently destroying their economic and civic rights

Tyner 20 [Artika Renee Tyner, researcher at the University of Saint Thomas School of Law, 2020, “Iron Shackles to Invisible Chains: Breaking the Binds of Collateral Consequences,” University of Baltimore Law Review, https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=2074&context=ublr]/Kankee

B. Collateral Consequences The impact of incarceration is exacerbated by collateral consequences.131 Collateral consequences are hidden sanctions or civil disabilities that emerge automatically at the onset of a criminal conviction.132 They are referred to as “hidden” since they are not formally quantifiable in a sentence or imposed penalty.133 The reference to “civil disability” reflects the social impact of stigmatization associated with a felony conviction.134 Chief Justice Earl Warren noted: “Conviction of a felony imposes a status upon a person which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunities.”135 According to the National Inventory of Collateral Consequences of Conviction: Unlike the direct consequences of conviction, such as imprisonment and fines, the indirect — or collateral — consequences of convictions rarely play a prominent role in sentencing or plea negotiations and are often not discussed with the accused. These sanctions and disqualifications are automatically triggered by a conviction but are not part of the punishment set out by sentencing or a plea deal.136 The most commonly known collateral consequences are restrictions on voting 137 and firearm ownership.138 Collateral consequences also impact immigration status; thus, attorneys must inform clients during certain criminal proceedings about potential ramifications. Based on the Supreme Court’s ruling in Padilla v. Kentucky,139 “criminal defense lawyers must advise their noncitizen clients considering a guilty plea that they are likely to be deported as a result.”140 Despite the lack of awareness of collateral consequences for the general public and attorneys alike, the ramifications of collateral consequences are broad and expansive.141 These consequences lead to difficulty in gaining employment,142 restrict access to professional licenses,143 limit financial aid opportunities,144 and restrict access to public benefits.145 The National Inventory of Collateral Consequences of Conviction created by the American Bar Association serves as a key learning tool for gaining a deeper understanding about collateral consequences and their lingering impact.146 It is a national database with over 44,000 collateral consequences identified and analyzed.147 C. Hiring and Employment Becoming gainfully employed is one of the key exit points of the criminal justice system.148 Studies demonstrate that employment can reduce recidivism and promote community-building.149 Employment creates an opportunity for a formerly incarcerated individual to have a second chance at life by providing for themselves and their families.150 This in turn impacts upward mobility, wealth-building, and one’s overall quality of life.151 Joblessness has been identified as the single most important predictor of recidivism.152 Recidivism evaluates the rate at which an individual returns to the criminal justice system after being released from prison.153 An unemployed former offender is more than twice as likely as an employed one to reoffend.154 The potential for a brighter future for those who have been incarcerated is often ignored.155 People are stigmatized by their past.156 A felony conviction then becomes a looming, permanent “Scarlet Letter” that reads “F” for felon. However, this analysis overlooks the transformative power of a second chance. Fr. Gregory Boyle, founder of a comprehensive reintegration social enterprise called Homeboy Industries, best characterized the power of employment when he stated: “Nothing stops a bullet like a job.”157 His words serve as a reminder that job opportunities can disrupt the cycle of incarceration and promote safe communities.158 According to a 2017 ACLU report, “nearly 75 percent of formerly incarcerated individuals are still unemployed a year after release.”159 Managers and Human Resource (HR) personnel recognize that workers with a criminal record bring value and skills to the workplace.160 A nationwide study showed that more than 80% “of managers and 67% of HR professionals feel that the ‘quality of hire’ for workers with criminal records is as high as or higher than that of workers without records.”161 Additionally, a majority of workers in all roles are willing to work with employees who have criminal records.162 IV. RECOMMENDATIONS FOR POLICY CHANGES

#### AND, their racialized identity causes mass impoverishment and destroys black communities’ economies

Tyner 20 [Artika Renee Tyner, researcher at the University of Saint Thomas School of Law, 2020, “Iron Shackles to Invisible Chains: Breaking the Binds of Collateral Consequences,” University of Baltimore Law Review, https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=2074&context=ublr]/Kankee

III. THE IMPACT OF COLLATERAL CONSEQUENCES ON THE AFRICAN AMERICAN COMMUNITY’S ECONOMIC MOBILITY The future sustainability and vibrancy of the United States economy is contingent upon full workforce participation.102 This begins with cultivating the gifts and talents of each individual.103 It is further manifested through unveiling the limitless potential of innovation.104 The culmination of these elements is the very essence of the American Dream—the power to work, build, and create a brighter future.105 Unfortunately, the realization of this dream is unobtainable for many who have a criminal record.106 A criminal record can be a relentless and persistent impediment to employability, which negatively impacts an individual’s ability to contribute to the future of economic development.107 A criminal record can restrict one’s access to employment, higher education, and even professional licensure.108 An estimated “70 million Americans—one in three adults—have a criminal record,”109 which poses an active barrier to economic and social mobility.110 Acclaimed attorney and author of The New Jim Crow: Mass Incarceration in the Age of Colorblindness, Michelle Alexander, describes this experience as entering a parallel universe—“one that promises a form of punishment that is often more difficult to bear than prison time: a lifetime of shame, contempt, scorn, and exclusion.”111 This parallel universe creates a “tangled mass web of incarceration with far too many entry points into the criminal justice system and far fewer exit points.”112 A. The Financial Impact of Mass Incarceration on the African- American Community This tangled web of incarceration has a disparate impact on the quality of life experienced within the African-American community due to the over-representation of African-Americans in the criminal justice system.113 The conjoined forces of imprisonment and blackness produce waves of lifelong hardships for those who are imprisoned, their families, and the community at large.114 Mass incarceration has essentially evolved into a large cohort of a relatively permanent group of young male offenders and ex- offenders, who for the most part are unlikely to be contributing members of the work force in the foreseeable future.115 The career outlook for this group of men can be relegated to situations of under the table economics or other unscrupulous behavior; a felony record can temporarily disqualify employment in licensed or professional occupations, skilled trades, or in the public sector.116 Individual men that are qualified for professional positions are derailed.117 “Incarceration diverts offenders from career jobs through its effects on skills, social connections, and criminal stigma.”118 “Men in trusted or high-income occupations before conviction experience especially large earnings losses after release.”119 Obtaining and retaining long-term living wage positions are just some of the difficulties those with criminal records face.120 The impact of low paying, dead-end work has severe economic repercussions for the support of African-American families.121 “For example, a black 30-year-old high school dropout with no prison record will average nearly $9,000 a year . . . .”122 When the factor of jail time is added to the equation, “[m]en with prison records are estimated to earn about 30 to 40 percent less each year than similar men who have never been incarcerated.”123 The difference in earnings can be seen in hourly wages and racial comparisons; white former prisoners “experience virtually no wage growth from their starting wage of $10.61 an hour at age 25.”124 Layering in race, one sees that “[a] black man without a criminal record, at age 25, earns about the same wage as a white man with a criminal record—around $10.60 an hour.”125 This one cent difference may seem insignificant, yet over time the cumulative effect is demonstrated: “[h]ourly wages for white men, who are involved in crime but never go to prison, grow from $11.18 to $13.81 from age 25 to 35.”126 African- American men have different growth numbers: “Among black former prisoners, wages grow only a third as fast—just 5 percent from about $9.85 to $10.40.”127 Analyzing these hourly wages reveals that a one cent per hour difference at age twenty-five grows to a $3.41 per hour difference by age 35.128 This small hourly pay differential in wages over a ten-year period amounts to $65,472 that black families are short-changed.129 With the combination of difficulties in acquiring longer-term, living wage positions and maintaining salary growth over time, the earning potential for African-Americans who have been incarcerated is astronomically dismal.130 B. Collateral Consequences

#### Plea bargaining operates under a deception to commodify poor people of color for profit in private prisons

**Weil 12** [Danny Weil, writer for Project Censored and Daily Censored, 11-7-2012, "Widespread Use of Plea Bargains Plays Major Role in Mass Incarceration," Truthout, http://www.truth-out.org/news/item/12556-overwhelming-use-of-plea-bargains-plays-major-role-in-mass-incarceration]/Kankee

Plea bargains are also **essential** for stocking for-profit prisons with a steady supply of "customers" for their corporate shareholders. Plea bargaining both enlists and perpetuates the principles of mass production, deception and mendacity, which in turn are applied quite readily in the whole of our system of criminal "justice." Plea bargaining has also become an essential element of both mushrooming prison growth and the racially disparate state of American prison populations, with the gravity of the burden falling on the backs of blacks and Latinos. Without plea bargaining, the explosion in prison populations of color, especially those of for-profit prisons, **could never be possible**. In his paper, "The Problem With Plea Bargaining: Differential Subjective Decision Making as an Engine of Racial Stratification in the United States Prison System," attorney and sociologist Douglas Savitsky argues that: The bargains struck by Black defendants tend to be worse than those struck by similarly situated white defendants. There are several reasons for this. Black defendants are generally poorer, and they are thus less able to afford a competent defense. Second, Black defendants tend to be in a position of lower power than are white defendants. Additionally, and related, because prison has become such a large part of the life course in parts of the Black community, the costs to prison are perceived as being lower by Blacks than by whites. This perception puts Black defendants in a worse bargaining position. American Justice: The Cult of Efficiency and Deception The American judicial system has become one in which constitutional **rights and protections are sacrificed** through mendacity and deception **to appeal to a cult of judicial efficiency** and economy. The public has been lied to; plea bargaining does not make society safe or tackle the problem of crime itself. This is simply another necessary **illusion** that is funneled into the minds of the populace to rationalize the **commodification** of people for profit. The problem with all of this, as the late thinker Hannah Arendt noted in her New York Review of Books article "Lying in Politics," is that: "the trouble with lying and deceiving is that their efficiency depends entirely upon a clear notion of the truth that the liar and deceiver wishes to hide. In this sense, truth, even if it does not prevail in public, possesses an ineradicable primacy over all falsehoods." In reality, the current criminal justice system has little to do with public safety, truth-telling or avoiding falsehoods. Many of those currently incarcerated and languishing in for-profit or government prisons include nonviolent drug offenders and those accused of parole-violation technicalities, such as not having a job or missing a parole officer appointment. In reality, Americans are locked up for crimes, such as writing bad checks or using drugs, that would rarely, if ever, produce prison sentences in other countries. The United States incarcerates 2.3 million criminals. The number of people on lockdown in America is more than that in any other nation. The modern criminal justice system primarily serves the interests of the increasingly privatized and financialized prison-industrial complex, which includes, among others, "tough on crime" politicians, seedy bail bondsmen, Wall Street-traded for-profit prison corporations, the drug-testing industry, police and corrections officers, and parole and prison officers' unions. It is well known, or should be, that California's "three strikes and you're out" provision was promoted by corrections officers because **caging** humans is not only good for business, it is the fiduciary responsibility of the for-profit prison-industrial complex corporations. It is no surprise, either, that the primary defenders of the criminalization of marijuana are police and corrections officers' unions because this is the bread and butter of their professions.

### Contention 6: Rights Theory

#### Rights inalienable are and cannot be waived – plea bargains commodify rights and privileges and fragments the collective consciousness’ dedication to natural law rights and the common good

Schehr 24 [Robert Schehr, Professor at the Department of Criminology and Criminal Justice at Northern Arizona University and Co-Director of the Arizona Innocence Project at Northern Arizona University with a Ph.D. in Sociology from Purdue University West Lafayette, a M.S. in Sociology from Purdue University West Lafayette, an MLS Law from Yale University, and a B.A. in Labor Studies from the University of Illinois Springfield, 12-09-2024, "The Political Economy of Plea Bargaining", Taylor & Francis, https://www.taylorfrancis.com/books/mono/10.4324/9781003385103/political-economy-plea-bargaining-robert-schehr]/Kankee

How Did We Get Here? The political, economic, and cultural evolution from colonial America to the United States of America was generated by the historical confluence of natural law principles and English constitutionalism. As we will see, natu- ral law principles provided the ideological framework for the adoption of positive English common law and its emphasis on rights. The Declaration of Independence (1776) appeared nearly 500 years after William of Ockham (1287–1347) first introduced the idea of subjective rights. Originating with Roman law, in the 17th century references to the inalienability of rights (what the framers referred to as “unalienable” rights) can be found in the writings of English philosophers, as well as the French Huguenots. According to Edelstein, “During the eighteenth century, it was not uncom- mon for philosophers, such as Francis Hutcheson, and theologians, such as Richard Fiddes, to refer to our ‘unalienable rights’ or ‘the natural and inalienable rights of mankind’.”54 Later, we will be introduced to the physi- ocrats as they articulated the synthesis between natural rights, the inalien- ability of rights, the individualization of rights, and the liberty of contract as it manifests in the United States. Edelstein argues that until around 1750 there was little talk of subjective rights in France, but by 1750 French phi- losophers such as Voltaire, Rousseau, and Diderot were each dedicating their attention to justifications for a regime of individual rights protections. Along with the writings of John Locke (which appear to have had little influence upon late 17th- or early 18th-century French thinking), Thomas Jefferson would have at his disposal a prestigious epistemological herit- age to draw from when it came to writing the American Declaration of Independence. The second paragraph of the Declaration of Independence thunders with the pronouncement: “We hold these truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness.”55 As we have seen, by 1776 Jefferson’s pronouncement that life, liberty, and the pursuit of happiness were self-evident truths could lay claim to a long line of English and French philosophers and theologians. His argu- ment that “Men” possessed “unalienable rights” was comfortably consist- ent with 17th-century French and English political theory. The “truths” to which Jefferson referred flowed from Jefferson and his founding generation’s adoption of natural law principles. The first paragraph of the Declaration of Independence makes this clear: When in the Course of human Events, it becomes necessary for one People to dissolve the Political Bands which have connected them with another, and to assume among the Powers of the Earth, the separate and equal station to which the Laws of Nature and of Nature’s God entitle them, a decent Respect to the Opinions of Mankind requires that they should declare the causes which impel them to the Separation.56 Colonial Americans were not the primary audience for the Declaration of Independence. Rather, Jefferson’s document was a political manifesto meant to generate financial and military support from abroad in anticipation of war with England.57 At bottom, the Declaration articulated the justification for severance from England and was not an expression of the virtues that would constitute the republic. Regardless, powerful and historically ubiquitous references to “self-evi- dent truths” and “unalienable rights” remain animating principles of the collective American imagination. It is colloquially understood to mean that once declared, the government of the United States may not take rights away from its citizens; they are unalienable.58 But what if I also argue that while rights may not be taken away, they may equally not be given away? That is, generally speaking, rights only retain their efficacy if they are held in common. This idea commences with the Greek philosophers who, according to Fuller, “took it for granted that man as a political animal had to find the good life in a life shared with others.”59 Writing in the 13th century, Thomas Aquinas, perhaps the most influential natural law phi- losopher, addressed the question of why the people were required to obey the law. Assuming the laws are just, the first reason articulated by Aquinas pertained to a shared collective consciousness (what Emile Durkheim would later refer to as the “conscience collective”) that would manifest around normative adherence to law in the service of moral action. The sec- ond point made by Aquinas emphasizes the relationship between law and the common good, where “A just law is one which is consistent with the requirements of natural law – that is, it is ‘ordered to the common good’.”60 And furthermore, “Law is nothing else than an ordinance of reason for the common good, promulgated by him who has the care of the community.”61 In his powerful defense of natural law, Professor Finnis makes the follow- ing argument with regard to the prevailing principles guiding natural law jurisprudence: For those [natural law] principles justify the exercise of authority in com- munity. They require, too, that that authority be exercised, in most cir- cumstances, according to the manner conveniently labeled the Rule of Law, and with due respect for human rights which embody the require- ments of justice, and for the purpose of promoting a common good in which such respect for rights is a component.62 David Brooke contends that Finnis’s natural law articulation of the purpose of law is a more historically contemporary aspiration that “refers to an ideal potential use of law to unlock and promote the common good of society subject to law.”63 So, while the state through its various agents may not withdraw a right that has been awarded to all citizens of the United States (and non-citizens under the Fourteenth Amendment), the companion principle is the acknowl- edgment that citizens, by virtue of their being self-same as Homo sapiens, are also constituted by those rights protections; they signify our collective political, economic, and cultural DNA. Following Bailyn, and consistent with natural law jurisprudence (especially Aquinas, Kant, and Finnis), “the rights that constitutions existed to protect were understood in the early years of the period … to be seen as inalienable, indefeasible rights inherent in all people by virtue of their humanity.”64 To permit individual Americans the “right” to give away their rights would, in relatively short order, diminish their efficacy for the common good. If an offer of some benefit made by an agent of the state to a subject leads to the abdication of a right by that subject, the state has successfully commodified that right. The state actor has placed a “price” on a right in exchange for receiving some benefit. To summarize, we understand that as a general rule the state may not take rights away from us. However, it is my strong contention, one that, as we have seen, is shared by a long line of natural law theorists, that because rights constitute our collective agreement regarding how we organize our- selves in a republic, we may not abdicate our rights by willingly giving them over to the state, regardless of the offered benefit. So perhaps at first glance, paradoxically, while subjects possess a right, that right does not belong to them. This is because a right is part of a complex political, economic, and cultural code that provides a community (and a nation) with shared norms and values that are prerequisites to the survival of the republic.65 James Otis (1725–1783), a Revolution-era attorney and early defender of the Constitution and the Republic, draws a similar conclusion in reference to the slave trade. For Otis, a vocal critic of slavery, especially as it was to manifest in the Constitution, “those who every day barter away other men’s liberty will soon care little for their own.”66 Reference here to “bargaining away lib- erties” is precisely what occurs during a plea bargain – the commodification of rights – an exchange or bargain that produces an offer (from a prosecutor) and a benefit (for the defendant). In subsequent chapters, I will develop more thoroughly the notion, shared by both liberal economists and Marxist political economists but for signifi- cantly different reasons, that it was only under capitalism, where subjects were “free” to contract for labor as they saw fit given their interests, skills, and available work, that “moral and legal duty can reach its full develop- ment.”67 Unshackled by previous modes of production that normatively seg- mented labor and its opportunities for work beyond that of slave, serf, or indentured servant, under the capitalist mode of production white and most Northern black subjects were now able to freely move about seeking the work that most suited them and their needs. It was the ability of subjects to “freely” and privately contract for work that established the notions of exchange and reciprocity far beyond the economic sphere to include the legal sphere. After all, if subjects were the free-thinking, freely acting, reasonable, rational beings promised by the Enlightenment, their inherent autonomy should privilege subjective decision-making about all manner of political, economic, and cultural matters. As we will see, it is precisely this notion of Homo economicus (economic man) freely engaging in contractual relation- ships that frames prosecutors and defendants in a relationship of exchange in the context of the plea. The commodification of rights appears as a natural outgrowth of what the Marxist political theorist, Evgeny Pashukanis (1891–1937), referred to as the Commodity Exchange Theory of Legal and Moral Duty.68 For Pashukanis, and for liberal economists, since the foundation of American society was premised upon the capitalist mode of production where liberty of contract and exchange were paramount, that exchange-reciprocity would normatively affect legal and political institutions since “the legal subject is thus the legal counterpart of the agreement.”69 The normativity of transactional exchange in capitalism is fully present in the transactional nature of legal exchanges. Whether the criminal legal system ought to reflect this normativity of exchange is, however, another question entirely. This point was firmly expressed by Justice Harlan when he was confronted with the question in the 1898 case Thompson v. Utah70 – “Should defendants be procedurally able to waive their right to a trial by jury?” Consistent with natural law and preservation of the common good, Justice Harlan was emphatic in his objection. In this chapter, I argue for the historical relevance of the jury trial as a continuation of common law practices that were established in England by the Magna Carta in 1215 and later the English Bill of Rights in 1689. In the American republic, the jury trial was considered so central to the creation and survival of the American republic that it is included in both the Constitution (Article III §2) and the Bill of Rights (Fifth, Sixth, and Seventh Amendments). What we find in both England and the United States (as well as each of the colonial constitutions prior to the Revolutionary War) was a clearly articu- lated commitment to transparency and fairness in the administration of jus- tice. This was important for a number of reasons, the most obvious of which was that a jury of common people would determine both law and fact in any criminal case,71 thereby serving as a public check on the authority of the state. The second reason that trial by jury was considered imperative was that it was considered to be the most publicly transparent way to educate citizens of the United States on the centrality and legitimacy of the rule of law. Since juries were responsible for deliberating over all manner of civil and criminal cases, merely serving on a jury would enhance one’s worldview and understanding of public affairs. Moreover, Amar makes the point that judges would embrace trials as an opportunity to educate jurors, as well as the lay public, on the meaning and purpose of the law. Finally, it can be argued that serving on a jury “was in part an intermediate association designed to educate and social- ize its members into virtuous thinking and conduct.”72 Immediately, it must occur to the curious reader that I have not yet addressed perhaps the most important question relating to the founding gen- eration’s commitment to trial by jury in criminal cases: Are there rights, such as those located in Article III §2 of the Constitution, and the Fifth, Sixth, and Seventh Amendments, rights that, in the case of Article III §2 language mandate trial by jury in all criminal proceedings, that are so central to a republic that it cannot endure as a republic without them? For example, is the application of executive prosecutorial power manifest in the ability to charge, indict, prosecute, and convict of such a magnitude of importance that transparency in the application of that power is vital to the legitimacy of the criminal legal system? Asked a bit differently, is it possible for a repub- lic to be true to its promise if the criminal legal system operated in virtual secrecy? Clearly, our English and founding-generation American ancestors were of the belief that there were rights so important that they were con- sidered “unalienable”; the jury trial was one of those rights. It appears that for our ancestors, our republic could not flower under conditions of opaque administration of justice. Transparency in the criminal legal system was imperative. Beginning with the Magna Carta (“The Great Charter”) and ending in 1930 with the Patton v. United States case,73 the trial by a jury of 12 was considered a vital and normative aspect of criminal procedure.74 For 715 years, our English and American ancestors understood and acted legisla- tively (i.e., positively) to affirm the centrality of trial by jury. Most important for my purposes is that Justice Sutherland’s opinion in the Patton case raises the specter of the “waiveability” of rights. That is, in the 81st paragraph of the Patton opinion, Justice Sutherland attempts to simultaneously articulate the nation’s commitment to trial by jury in criminal cases while claiming that defendants have the right to waive their jury trial rights: Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact-finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addi- tion to the express and intelligent consent of the defendant. Important, the concept of waiveability does not appear in the Constitution or the Bill of Rights. But as we saw in Chapter 1, the Patton opinion and the language applied by Justice Sutherland to justify the constitutionality of waiving rights will appear in the 1970 case, Brady v. United States.75 It is the Brady case that constitutionalizes plea bargaining procedure. In the following sections of this chapter, I will introduce the origins of trial by jury, along with its natural law justification. A few questions guide this inquiry. First, why was trial by jury considered so essential in England, the colonies, by both the Federalists and Anti-Federalists, and to the framers of the Constitution? Second, what are rights and why are they important? What is the difference between a right and a privilege? Are there rights so essential to the legitimate functioning of a republic that they may not be waivable? What, if any, are the arguments stemming from a commitment to personal autonomy and efficiency that provide justification for rights waiv- ers? Do rights pertain solely to a subject, or are they held by the people in common, or both? How are they affected by the liberty of contract doctrine? Does the constitutional permission to waive the right to trial by jury through administration of a plea bargain pose a threat to our republic? As we make our way through these questions, perhaps the reader can consider the magnitude of power constituting prosecutorial authority and whether, as it relates to plea bargains, appropriate checks on that power exist as a procedural matter. It will come as no surprise that, in my esti- mation appropriate checks on prosecutorial power are far too few and too weak, especially given the constraints imposed by Federal Rule of Criminal Procedure Rule 11, which prohibit judges from knowing the facts of the case under consideration, thereby having to rely solely upon the prosecutor’s, and to a lesser extent the defense attorney’s, intent. A Brief History of the Jury Trial

#### Natural law implies unconditional, un-commodifiable and principles of rights, meaning plea bargaining is antithetical to the common good and universal law

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Natural Law and the Centrality of Rights In this final section of Chapter 4, I want to briefly introduce natural law principles in a more formal way to properly contextualize the meaning of rights. This is important because it is my contention that Article III §2, and the Sixth Amendment providing for the right to trial by jury in all criminal cases, signify positive rights that help to ensure transparency in the admin- istration of justice. I also find myself in agreement with our ancestors that trial by jury serves to provide a common law check on executive, legislative, and judicial authority, while serving to educate Americans on the rightful application and centrality of the rule of law in our republic. Natural Law Natural law has inspired the juridical organization of Western civilizations at least as far back as ancient Greece. Natural law jurisprudence is guided by the belief that “there are objective moral principles which can be discovered by reason.”110 The presumption is that there are moral truths that transcend time and culture, and it is these truths that ought to form the foundation of law. For Professor Finnis, the most recognized 20th-century natural law the- orist, the basic forms of good are: life, knowledge, play, aesthetic experience, sociability, practical reasonableness, and religion.111 Each of these goods can only be realized in “a community of human beings for only in communal life are there conditions for the pursuit of basic goods.”112 Seeking to avoid ancient references to the “will of God,” Finnis seeks guidance from Aristotle and Aquinas. For him, “the normative conclusions of natural law are not based on the observation of human or any other nature but rather on a reflective grasp of what is self-evidently good for human beings.”113 Finnis’s list of seven goods is, in his view, self-evident goods, goods that are mani- fested across all cultures. What follows is a brief introduction to a few of the essential natural law philosophers, namely, Cicero, Aquinas, Locke, Blackstone, Kant, and Finnis. This is by no means presented as exhaustive of the complexity of their work, but rather is provided here solely as a way to realize through their own words the similarity of emphasis upon the categorical impera- tive (Kant), that just law is moral law, and that all law must be equitably shared by the common in order for human beings to attain Finnis’s basic forms of a good life (see above), and for there to be criminal legal systemic legitimacy. It was the Roman Cicero (106–43 BC), likely influenced by the Stoics, who generated the most widely recognized expression of the principles of natural law. True law is right reason in agreement with nature; it is of universal appli- cation, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. And it does not lay its commands or prohibitions upon good men in vain, though neither have any effect on the wicked. It is a sin to try to alter this law, nor is it allow- able to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for he is the author if this law, its promulgator, and its enforcing judge.114 Most relevant in this passage is Cicero’s advancement of the morality of law. Since law was inspired by the Gods and comprehensible to Homo sapiens through the application of right reason, all unjust laws must in fact not be considered genuine law. This is because “for Cicero moral purpose was an essential feature of law.”115 The most historically influential of the natural law philosophers is Thomas Aquinas (1225–1274). Unlike Cicero, who expressed a thesis of divine law settled once and for all, Aquinas’s articulation of natural law was far more nuanced. For starters, Aquinas understood that there could be a distinction made between the divine and the human as manifested in law. For example, “Aquinas’s basic arguments about the nature of law, and about the rela- tion of law with morality, are not dependent on particular views about the sources or substantive content of that morality. If there can be a secular morality antecedent to human laws and concrete institutions, the basic principles of the natural law tradition can be considered even apart from their location within the traditions of Catholic theology.”116 Application of the Thomist expression of natural law to human law requires us to assess the moral reasons for adopting and applying that law. This is because “the natural law tradition has always argued that human ‘positive’ law derives its moral authority [and, I might add, systemic legitimacy] from its deriva- tion from principles of (God-given) natural law.”117 From Aquinas’s Summa Theologica, we receive the following: Thus, … Law is nothing else than an ordinance of reason for the common good, promulgated by him who has the care of the community. Just as in the speculative reason, from naturally known indemonstrable principles we draw the conclusions of the various sciences, the knowledge of which is not imparted to us by nature, but acquired by the efforts of reason, so too it is that from the precepts of the natural law, as from com- mon and indemonstrable principles, the human reason needs to proceed to the more particular determination of certain matters. These particular determinations, devised by human reason, are called laws. The force of a law depends on the extent of its justice. Now in human affairs a thing is said to be just from being right, according to the rule of reason. 118 It was the “higher law” tradition inspired by John Locke119 that was influ- ential upon the framers of the Constitution. This higher law tradition, flow- ing as it does from Aquinas, pressed the importance of moral foundations for just law. In his statement relating to the state of nature, Locke directly references our collective responsibility to each other in preservation of the common good. Like Rousseau, Locke provided a theory of the social con- tract, one that would preserve personal property rights. As it pertains to our concern in this chapter – whether a subject should be free to relinquish rights – Locke’s response oozes with natural law principles consistent with the promotion of moral law. But though this be a state of liberty, yet it is not a state of licence (sic): though man in that state have an uncontroulable (sic) liberty to dispose of his person or possessions, yet he has not liberty to destroy himself, or so much as any creature in his possession, but where some nobler use than its bare preservation calls for it. The state of nature has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, not one ought to harm another in his life, health, lib- erty, or possessions: for men being all the workmanship of one omnipo- tent, and infinitely wise maker; all the servants of one sovereign master, sent into the world by his order, and about his business; they are his property, whose workmanship they are, made to last during his, not one another’s pleasure: and being furnished with like faculties, share all in one community of nature, there cannot be supposed any such subordi- nation among us, that may authorize us to destroy one another, as if we were made for another’s uses, as the inferior ranks of creatures are for our’s.120 From Locke, we are able to discern vaguely referenced natural law principles that influenced the framers of the American Constitution, but not in the way that historians have traditionally interpreted it. Specifically, the framers were far more influenced by Locke’s emphasis upon the protection of individual liberty (especially to procure and retain property) and his well-known artic- ulation of the right to rebel against an oppressive sovereign ruler.121 Locke writes directly about mutual obligation to adhere to natural law through the application of reason. He emphasizes that human beings have no right to extinguish their lives or hurt others since we are all products of the divine, each deserving of respect.122 Finally, like the Greek and Roman philosophers, and Thomas Aquinas, Locke situates the administration of just law within the context of the common good. Following Edelstein, “Locke offered a way to step back from English constitutionalism and discuss the foundation and origins of all governments. In this regard, while his own account of rights was something of an obstacle, Locke helped the colonists frame their consti- tutional rights within a broader theory of government.”123

#### Plea bargains repudiate universal law and reduces humans to utility maximizing machines destroying the dignity of persons by conditioning the law based on individualistic utility, and not the common good of natural law

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In addition to an American revisionist interpretation of John Locke’s First and Second Treatises of Government,124 English jurist and cataloger of com- mon law, William Blackstone (1723–1780), was familiar to and influential over the founding generation of Americans. Blackstone was committed to the argument that for law to be just, it must be moral. An immoral law was no valid law at all (this view was originally articulated by Augustine). For Blackstone, as with all advocates of natural law, “once it becomes clear that things like constitutions and statutes and regulations and court cases are but the realization of a higher law, then it is a mistake not only when statutes enacted by fallible human beings try to enforce what is not moral, but also when they fail to enforce what is moral.”125 In his Groundwork of the Metaphysics of Morals, Immanuel Kant (1724–1804) applies a methodology that identifies three unique historical periods leading to the transition from common cognition to philosophical moral rational cognition.126 It is in this work that Kant presents us with themes that in time would come to encompass much of the Western con- sideration of morality and law, especially as applied to the evolution of and support for human rights law.127 For example, Kant argues that “every human being is an end in himself or herself, not to be used as a mere means by others; that respect for your own humanity finds its fullest expression in respect for that of others; and that morality is freedom, and evil a form of enslavement.”128 For our purposes I wish to emphasize the Kantian com- mitment to viewing all human beings as ends in themselves, one consistent with natural law principles, that enables states to generate laws consistent with the moral dictates of human thriving. For Kant, “a human being and generally every rational being exists as an end in itself, not merely as a means for the discretionary use of this or that will [a critique of utilitarian- ism], but must in all its actions, whether directed towards itself or also to other rational beings, always be considered at the same time as an end.”129 With regard to the duty to act consistently with the categorical imperative of universal practical reason, Kant declares that consciousness of our col- lective humanity is antecedent to experience; it is an innate feature of our practical reason. the ground of all practical legislation lies objectively in the rule and the form of universality, which (according to the first principle) makes it capable of being a law (or perhaps a law of nature), subjectively, however, in the end; the subject of all ends, however, is every rational being, as an end in itself …: from this now follows the third principle of the will, as the supreme condition of its harmony with universal practical reason, the idea of the will of every rational being as a universally legislating will.130 Finally, and with due recognition that this presentation of Kant’s theory is woefully simplistic but is presented here for his emphasis upon the collective duty to commit to moral law, Kant argues that a human will “universally legislating through all its maxims” is suited to the categorical imperative so long as “it is founded on no interest and can thus alone, among all possible imper- atives, be unconditional; or better still, by converting the proposition, if there is a categorical imperative (i.e., a law for every will of a rational being), then it can only command to do everything from the maxim of one’s will as one that could at the same time have as its object itself as universally legislating.131 To summarize, for Kant certain maxims generating freedom may be uncov- ered through practical reason. Inasmuch as these maxims are fundamental to human beings regardless of their cultural experiences, adhering to leg- islative initiatives seeking to promote collective well-being is a categorical imperative; a responsibility that each human being has to themselves and to each other. I present Kant’s work here because he extends the depth of our understanding of natural law, human will, and duty to obey categorical imperatives given their ubiquitous constitution of the human experience. It is my contention that the trial by jury, commonly held by our English and early colonial American ancestors, appeared as a categorical imperative, a duty of every member of the commons to see to it that laws be properly administered, and that the authority to create and administer law was suf- ficiently balanced by common law commitments to justice. As the trial by jury was established by no specific private or public interest seeking to gain power for themselves or others like them, but rather, as a procedural check on expressions of irrational authority impeding the realization of freedom, the trial by jury appears to meet Kant’s definition of a categorical impera- tive. Service is to rational universal legislation determined through practical reason and grounded upon a commitment to human will, duty, and mutual respect. The final natural law theorist that I will present has already been intro- duced, John Finnis. Originally published in 1979, in Natural Law & Natural Rights Finnis articulated a contemporary vision for natural law attorneys and legal scholars. Finnis draws his inspiration from Aristotle and Aquinas, and as such has produced a more nuanced vision of natural law than the car- icatures of natural law produced by positive law theorists beginning in the 18th century with Jeremy Bentham’s caustic quip that natural law was “non- sense on stilts.” As with Aristotle and Aquinas, Finnis contends that human beings possess an innate sense of the common good. In direct response to 20th-century positivists, Finnis argues, consistent with the position I have taken in this book thus far, that If one could ever rightly choose a single act which itself damages and itself does not promote some basic good, then one could rightly choose whole programmes and institutions and enterprises that themselves damage and do not promote basic aspects of human well-being, for the sake of their “net beneficial consequences.”132 And as if referring directly to the imposition of the plea bargaining procedure, It only remains to note that if one thinks that one’s rational responsibility to be always doing and pursuing good is satisfied by a commitment to act always for best consequences, one treats every aspect of human personal- ity (and indeed, therefore, treats oneself) as a utensil. One holds oneself ready to do anything (and thus makes oneself a tool for all those willing to threaten sufficiently bad consequences if one does not cooperate with them).133 Plea bargaining is premised on systemic needs for efficiency and predict- ability, with the consequence being certainty of conviction. A subject who commits to authoritatively justified yet questionable acts that violate basic human values to promote system stability will, according to Finnis, facili- tate locomotion toward the diminution of human rights. This is because justice demands a set of elements crucial to its realization. For Finnis, those elements are: 1) other-directedness, one’s relations and dealings with other persons; it is “inter-subjective” or interpersonal; 2) duty of what is owed or due to another, and correspondingly of what that other person has a right to; and 3) equality, proportionality, or equilibrium or balance.134 Finnis con- cludes his remarks by saying that, “The requirements of justice, then, are the concrete implications of the basic requirement of practical reasonableness that one is to favour and foster the common good of one’s communities.”135 This admittedly brief exploration of natural law principles is meant to provide context for the final section of this chapter, one that I have reserved for discussion until the proper context had been established. At issue in this book is the political economy of plea bargaining. My argument is that the trial by jury signifies a categorical imperative, a legal technology so impor- tant to the legitimate functioning of the criminal legal system that without it the republic has returned to the opaque administration of justice that existed prior to its emergence in the 14th century and was the reason for it. As we have seen, the framers considered the right to trial by jury so important that it is the most often presented of the rights in the Constitution and the Bill of Rights, and it was the first right to be agreed upon at the 1787 Constitutional Convention. We have also learned that the idea of unalienable or inalienable rights emerged from natural law principles, principles requiring that all law be moral and attentive to the common good. It is from the philosophical framing of natural law that the idea of rights emerges. This is the issue to which we now turn our attention. Rights

#### Rights construct the subject. To bargain away your rights is self-objectifying and destroys personal dignity by decreasing your status as a subject, thereby removing your rights to commodify your rights

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Defining Rights To begin, we must differentiate private from public law. From the litera- ture referenced thus far, it should be clear that the overriding concern for Enlightenment legal philosophers and theologians was essentializing private subjective rights under law. This was important because the protection of subjective rights under positive law demonstrated the utmost respect for human autonomy, especially as it manifested in the procurement and pres- ervation of private property (Locke’s primary concern). And while there is ongoing dispute over whether claims to natural law “rights” antecedent to law are oxymoronic since “rights” have no normative systemic existence without reference to law (e.g., Bentham and Kelson), the idea that human beings as human beings are constituted by pre-juridical “human rights” (Kant) and that, under the preservationist regime, those rights must be for- mally acknowledged and protected under the color of law remains power- fully animating. This is because, as New York politician and slave trader, Philip Livingston (1716–1778), claimed, “Legal rights are those rights which we are entitled to by the eternal laws of right reason; they exist independent of positive law, and stand as the measure of its legitimacy.”150 As should be familiar, Livingston’s reference to “right reason” conjures up references to Aristotle, Aquinas, and Kant. These more general references to natural law rights signify the framers’ acknowledgment that in order for positive law to operate within a natural law framework, a clear statement of what Max Weber called an “ideal type” must be formulated and adopted. What rights, expressed at the most general level, should be adopted by the framers and the nation and that would be expressive of our innate natural law rights? The answer: the right to life, liberty, and property. Once articulated, as in the Preamble to the Constitution, the framers were free to construct positive laws that more specifically led the country toward the realization of the prin- cipled ends. It was through the adoption of a constitution, a document that would outline the limits of state power, that public law served to advance the normative interests of the common in civil society. Consistent with private law, a “right” is a legal technology that in mod- ern legal theory bestows a special status upon individuals, one that enables “one person to impose an obligation upon another person.”151 Importantly, the notion of “personhood” is a legal construct, one that must establish its juridical meaning in opposition to public law and the common good. As Menke makes clear, “the modern form of rights does not exist because there are autonomous subjects, but autonomous subjects exist because the modern form of rights does.”152 Reminiscent of the position I took at the opening of this chapter – while a person is constituted by subjective rights, those rights do not belong to the subject – Menke elaborates upon this point: Subjective rights are modes of authorization that confer normative power. In other words, subjective rights are subjective not because a subject has them, but, precisely to the contrary, because they produce the subject. For to be a subject means precisely to be an authority of capacities and oppor- tunities, an authority of power. Subjective rights are subjective because they subjectify.153 While private law has as its modus operandi the equality of individuals engaged in contractual exchanges under the protection of law, public law is guided by constitutional principles addressing concerns of the common good. Here, equality among individuals is not assumed. This distinction is similar to the physiocratic emphasis upon subjective natural rights to pri- vate property gained by way of a competitive market, with recognition that economic instability, class position, and the cultural distribution of skills and opportunities will invariably produce significant hardships for many, thereby requiring an ideological and juridical commitment to ameliorating their suffering through public law. To summarize, the United States of America adopted a synthesis of natural rights and positive law, where natural rights provided the ideological frame through which positive law would operate. While popular understanding situates John Locke as the social contract theorist of greatest influence upon the framers’ adoption of a preservationist rights regime, as has been demon- strated, this view is incorrect; Locke articulated a transfer of rights regime. Rather, it was the physiocrats, William Blackstone, James Otis, and John Dickinson, among others, who would provide the foundation for preserva- tionism in the republic. It was Otis, though, who would reframe the framers’ understanding of Locke, especially his well-known expression of the right of people to overthrow an oppressive sovereign, that Americans would find most appealing in Locke’s theory. Rights signify an obligation to act. Whether we are discussing private or public law, where rights exist, they do so to provide the subject with juridical protection, protection that is horizontal in the case of private law (contractual relationships between two or more people) and vertical in the case of public law, where there is an acknowledgment that political, eco- nomic, and cultural resources are inequitably distributed, and where rights administered through a system of law should be applied to ameliorate that inequity. \*\*\* The right to trial by a jury of 12 commences in the West in 1215 with the Magna Carta (“The Great Charter”). It is premised upon a natural and com- mon law articulation of the sovereignty of the people to check the power of the executive, legislative, and judicial branches of government. Consistent with Kant, I contend that trial by jury, as it appears in Article III §2 of the Constitution, and the Fifth, Sixth, and Seventh Amendments, signifies a categorical imperative grounded in public law that was and remains neces- sary to protect the people, cloaked with natural rights, from the authoritar- ian whims of the powerful. Moreover, since natural rights may never be taken from a subject given their origin in human reason and mutual respect, because rights do not belong to the subject (in fact, the subject is constituted by those rights), those public rights necessary to the preservation of liberty for the common in civil society are not commodified personal goods that can be contracted away. Rather, public rights like the right to trial by jury sig- nify an essential element for the preservation and flourishing of our republic under law. Epilogue.

#### Plea bargaining not constitutional - power imbalances mean the choice is coerced and made under duress, nullifying it being a free contract

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And does anyone take seriously the Court’s reference to “rehabilita- tive prospects”? What, exactly, did it have in mind? While the 1970s may have been flush with rehabilitative enthusiasm, that is certainly not the case in the second decade of the twenty-first century. While not a plea-bargaining case, Chaffin v. Synchcome provided the Court with the opportunity to once again emphasize, just as it had in the Brady, Parker, and Alford line of cases, that a threat of harsher punishment in no way infringes upon the assertion of a defendant’s constitutional rights. 131 Put another way, discouraging defendants from exercising their Fifth and Sixth Amendment rights is not uncon- stitutional. Inspired by Brady, the Chaffin Court said, “Although every such circumstance has a discouraging effect on the defendant’s assertion of his trial rights, the imposition of these difficult choices was upheld as an inevitable attribute of any legitimate system which toler- ates and encourages the negotiation of pleas.” 132 Here, the Chaffin majority acknowledged that the emperor stands naked before us, but as is so often the case, threw its hands up and simply rationalized its decision by casting it in the shadow of the three cases preceding it. A more pernicious assertion appears just a few paragraphs later: The criminal process, like the rest of the legal system, is replete with situations requiring “the making of difficult judgments” as to which course to follow. . . . Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not, by that token, always forbid requiring him to choose. 133 Here laid before us is the rub of this Article: a right is not some- thing that you can negotiate away even if you want to—that would be a privilege. A right is superior to a privilege because, even when we are not sophisticated enough to fully appreciate its meaning, and for the culture as a whole, it is still there to protect us. You can neither give a right away, nor can it be taken away. The Court’s emphasis on the ability to “choose” one’s rights is dangerous in a democracy as it erodes the protective web necessary for the realization of personhood under law. The decade of the 1970s closed with two decisions—Corbitt v. New Jersey134 and Bordenkircher v. Hayes.135 In Corbitt, the Court reaf- firmed its decisions in Brady, Parker, and Alford—that the threat of an enhanced sentence if convicted at trial would not constitute a viola- tion of the defendant’s Fifth, Sixth, and Fourteenth Amendment rights.136 But it was the Court’s 5–4 decision in Bordenkircher137 that produced the most dramatic effect on post-Brady plea jurisprudence. As with nearly all the preceding plea cases, at issue was the question of voluntariness. 138 Defendant Hayes, charged with producing a forged document, faced between two and ten years in prison. 139 The prosecutor offered him five years pursuant to a plea. 140 If the defen- dant rejected the plea, the prosecutor threatened to charge him as a habitual offender, which carried a life sentence. 141 Hayes rejected the plea offer and was convicted at trial where he was sentenced to life in prison.142 The Supreme Court decided that, in holding out the likeli- hood of enhanced charge and sentence if convicted at trial, the prose- cutor had not acted inappropriately. 143 Citing Blackledge, the Court retreated to existing plea practice to rationalize its decision: “Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important com- ponents of this country’s criminal justice system.” 144 Once again af- firming the contractual nature of the plea, the Court stated: To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort. . . . But in the “give-and-take” of plea bargaining there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution’s offer. 145 Continuing, the Court addressed the voluntariness inherent in the plea with a tortured and failed logic: “Indeed, acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any no- tion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process.”146 As with nearly all of its 1970s plea jurisprudence, the Court “doth protests too much, me thinks.” 147 Of course, it is the constitutionality of plea-bargaining that is at issue and, through explication of the 1970s case law regarding pleas, it is clear that the Court struggles to balance the structural demands facing prosecutors (increased caseload, re- source pressures) with what appears to be the authoritative promulga- tion of trial rights appearing in the Fifth and Sixth Amendments. The Court hypothesizes that when pleas are knowingly and voluntarily en- tered, they do not violate the Fifth and Sixth Amendments. This ap- peal to argumentum ad ignorantiam is a fallacy of formal logic. It presents the proposition as true because it has not yet been proven false. Thus, the Court assumes what must be proven, which is the is- sue that all Court decisions before the 1970s had severely criticized. In the excerpted paragraph immediately above, the Court also re-em- phasizes the contractual nature of the plea bargain, refusing to view the resulting “deal” as unconstitutional since it was the product of a legally binding contract. But in what is perhaps the Court’s most bra- zen affront to the Bill of Rights, it stripped away the veneer of consti- tutionality to explain: “It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as consti- tutionally legitimate the simple reality that the prosecutor’s interest at the bargaining table is to persuade the defendant to forego his right to plead not guilty.” 148 As a party to the adversarial system and one whom is facing serious structural pressures to quickly resolve cases, this would be an under- standable admission emanating from a prosecutor. But for the Su- preme Court to articulate it is simply astonishing. For what the Court admits to, takes it far afield from the statement of prosecutorial ethics outlined in Berger v. United States, where Justice Sutherland delivered the opinion of the Court.149 Through its affirmation of prosecutorial pressure to induce a plea by dissuading defendants from exercising their right to trial, the Bordenkircher Court lost all perspective, and in doing so, it recklessly disfigured the balance of power in adversarial due process. The decade of the 1970s ended with the constitutionality of plea- bargaining firmly in place as the Supreme Court met legal challenges to the voluntariness of the plea with indifference. Moreover, the Court had taken to referring to the plea-bargaining process in the terms of contract law. While not fully formed, it was clear that the Court treated the resolution of criminal cases via plea negotiations as similar to two equitable parties engaging each other at the bargaining table. This would have deleterious consequences for subsequent chal- lenges to plea-bargaining as violating the doctrine of unconstitutional conditions. Since the decade of the 1970s, there have been a few landmark cases. In 1995, in United States v. Mezzanatto, the Supreme Court ruled on the constitutionality of plea waivers where the waiver per- tained to the ability of the state to use inculpatory statements made during plea negotiations at trial. 150 In 2002 in United States v. Ruiz, the Supreme Court returned to its 1970s enhancement of prosecutorial authority in plea negotiations by deciding that there is no constitutional requirement for the state to disclose impeachment evidence prior to entering into a plea negotiation. 151 Most recently, on the same day in March of 2012, the Supreme Court rendered two decisions that caught many court watchers by surprise. In Missouri v. Frye and Lafler v. Cooper, the Court held that defendants have a right to effective assistance of counsel in plea settings. 152 These decisions are remarkable because, while they signify the first time that the Su- preme Court acknowledges the right to competent counsel for defend- ants engaging in a plea bargain, they do not pave the way for changes to plea-bargaining more generally.153 In fact, Alschuler refers to the two decisions as “Two Small Band-Aids for a Festering Wound.” 154 This brief historical time-line indicates that for most of the Supreme Court’s history, while never suggesting that plea-bargaining was ille- gal, it remained suspicious and concerned about the extent to which the plea setting induced coerced confessions. That all changed begin- ning in 1970 with the Court’s inspissated interpretations of the Fifth Amendment and the doctrine of unconstitutional conditions. There are exceedingly plausible, though unsatisfactory, explanations as to why in the next Section. 155 IV. THE D OCTRINE OF U NCONSTITUTIONAL C ONDITIONS AND P LEA W AIVERS

#### Constitutional law is based on due process, not contract law. Contract law citizenship means that unconstitutional conditions can be applied in any contract with the state, meaning all rights are conditional and can be de facto abolished via duress

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It is at this point that the Author must return to Justice Sutherland’s 1930 decision in Patton v. United States, as it is an important deviation from Thompson v. Utah and all previous settled law on the issue of rights waivers. 247 As previously established, the influence of liberal economic theory postulated citizens as “free agents” who were able to buy and sell their rights consistent with perceived benefits. This con- tract model of rights was at odds with historical precedent but pro- vided a powerful ideological device necessary to remedy systemic challenges facing the administration of high caseloads. The courts viewed plea waivers not as a usurpation of constitutional protections, but as a way to enhance efficiency. Criminal defendants were “free” to choose the path that most suited their interests as manifested in a set of prosecutorial offers and an assessment of the risk of conviction at trial. 248 But is this constitutionally permissible? The literature ad- dressing unconstitutional conditions and rights waivers is dense and controversial.249 However, at the risk of marginalizing the contention that plea-bargaining is unconstitutional, the Author wants to provide at least a modest critique of the liberal-economic framing of homo economicus and the Randian250 notion that American citizens engage the state as individuals (free thinking, free acting, reasonable, ra- tional) who are fully self-contained, autonomous units that are “free” to engage state authority in a bargaining transaction as if (a) homo economicus possessed equitable power and authority and (b) homo economicus was possessive of the authority as a self-contained bearer of rights to negotiate those away. 251 As demonstrated below, neither is the case. The Constitution is a law. 252 As such, neither the state nor any other public or private institution may alter the law; that can only be done through the consent of the people. 253 The Constitution does permit the government to place conditions on benefits, but it also re- quires the consent of the governed to do so. Conditions constituting plea negotiations distort the meaning of consent. In his 1918 opinion for a unanimous Court in Union Pacific R. Co. v. Public Service Com- mission of Missouri, Justice Holmes made clear the Court’s concerns that consent through coercion registers an impermissible and uncon- stitutional condition on a benefit. Justice Holmes stated: Were it otherwise, as conduct under duress involves a choice, it al- ways would be possible for a State to impose an unconstitutional burden by the threat of penalties worse than it in case of a failure to accept it, and then to declare the acceptance voluntary, as was at- tempted in Atchison, Topeka & Santa Fe Ry. Co. v. O’Connor. On the facts we can have no doubt that the application for a certificate and the acceptance of it were made under duress. . . . It always is for the interest of the party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called.254 The constitutional presumption of consent was of “the governed” as a whole, especially when regarding a matter of fundamental rights. But in the buckled, Alice in Wonderland, hegemonic philosophy of consent that permeated liberal, economic jurisprudence beginning in the early 1900s, consent came to be synonymous with one lone defen- dant engaging the state in the marketplace of rights trading, an ideo- logical position that was firmly ensconced in plea jurisprudence following Brady v. United States in 1970. When the government offers a charge or sentencing reduction in exchange for (meaning with the “consent” of the defendant) the abdication of Fifth and Sixth Amend- ment protections, it does so in violation of the Constitution. Consent under these circumstances confers a power to the government that the Constitution denies to it. 255 Justice Harlan, in Thompson v. Utah, and Justice Sutherland, in Frost v. Railroad Commission of California, as- serted a similar sentiment about the common law, that the govern- ment “may not impose conditions which require the relinquishment of constitutional rights.” 256 While the facts of Frost pertain to the right of the Frost brothers to use state roadways to carry goods, the princi- ple guiding Justice Sutherland’s opinion is apropos of pleas: Having regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition, which the carrier is free to accept or reject. In reality, the carrier is given no choice, except between the rock and the whirl- pool,—an option to forego a privilege which may be vital to his live- lihood or submit to a requirement which may constitute an intolerable burden. It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal constitution, but to up- hold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold . . . . But the power of the state in that respect is not unlimited; and one of the limita- tions is that it may not impose conditions which required the relin- quishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel the surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence. 257 Forgetting for a moment that it was this same Justice Sutherland who, only four years later (in 1930), would author the precedent-set- ting majority opinion in Patton v. United States, an opinion that set the foundation for all subsequent state claims legitimating the constitu- tionality of plea-bargaining by adopting the “defendant as free agent capable of bargaining away individual constitutional rights for pur- poses of expediency” principle of due process, his antecedent reason- ing in Frost demonstrates what was known and accepted at common law and in the Articles of Confederation, the Declaration of Indepen- dence, the Constitution, the Bill of Rights, the opinions of the federal courts, the state and federal legislatures, and among legal philoso- phers up to that time. Simply put, the state could not condition a privi- lege on the abdication of a constitutional right. Or as Justice Holmes would have it, presentation of a condition on a constitutional right would amount to duress and would necessarily force a defendant into choosing from among the “lesser of two evils.” Still, the juxtaposition of the Frost and Patton opinions is hard to ignore, especially since Justice Sutherland’s about-face in Patton fore- tells what would become an all too frequent occurrence at the Su- preme Court starting in the 1970s—intellectual dishonesty for purposes of political and institutional expediency. It is worth returning to United States v. Vanderwerff, the recently decided by the United States District Court for the District of Colo- rado opinion where Judge Kane bookends the early nineteenth-cen- tury opinions referenced above with his own statement regarding the dubious legality of pleas. 258 Mr. Vanderwerff was charged with three counts of receiving and possessing child pornography. 259 During plea negotiations, he agreed to plead guilty to Count 2, and the state agreed to dismiss Counts 1 and 3. 260 However, “the proposed plea agreement contained a waiver of Mr. Vanderwerff’s statutory right to appeal any matter in connection with his prosecution.” 261 It was the matter of the appellate waiver that was in dispute before Judge Kane.262 But as is clear from his opinion, he contextualizes the appel- late waiver issue in the broader framework of the “dubious” constitu- tionality of plea-bargaining before narrowing his focus to the matter before the court.263 Prioritizing efficiency at the expense of the individual exercise of constitutional rights applies to the guilty and the innocent alike, and sacrificing constitutional rights on the altar of efficiency is of dubi- ous legality . . . . A rational defendant, even if innocent, may plead guilty to a lesser offense in order to minimize the risk of prosecution.264 He then narrowed his focus to specific reference to appellate waivers: “Indiscriminate acceptance of appellate waivers undermines the abil- ity of appellate courts to ensure the constitutional validity of convic- tions and to maintain consistency and reasonableness in sentencing decisions.”265 There are two remaining problems regarding the presumption of consent: (a) the government cannot rely on consent to do what it can- not legally do and (b) the government relies on the use of force to generate the consent that it needs to do what it legally cannot do. 266 With regard to the former, by definition, requiring defendants to sign plea waivers as a condition on a benefit, like the right to appeal sup- pression motions, 267 unfair sentences,268 or the withholding of excul- patory evidence, manifests as a powerful government manipulation of the adjudication process through an apparent procurement of consent. Once again, supporters of waivers rely upon established principles of contract law to legitimate the constitutionality of plea waivers. In par- ticular, plea waivers are viewed as a mutually beneficial agreement. 269 Constituting case law in this area is the assumption that only contract law, not criminal due process, can assure an equitable and fair out- come based on principles of free and unfettered negotiation. And, as is consistent with liberal economic assumptions about homo economicus, to limit the opportunity for a defendant to lay claim to a benefit would be to limit that defendant’s freedom to bargain. 270 Con- trary to Judge Kane’s framing of plea waiver’s in Vanderwerff, in United States v. Wenger,271 the Seventh Circuit Court of Appeals vali- dated plea waivers by suggesting that (a) defendants benefit when they are given the choice to negotiate their charge and sentence and (b) eliminating plea waivers would jeopardize the entire plea pro- cess.272 In general, however, the federal courts of appeal are striking often disparate positions with regard to plea waivers making any ref- erence to uniformity of opinion moot. 273 For example, both United States v. Raynor and People v. Butler hold that appeal waivers are per se invalid because “the waivers violate due process, conflict with the public interest, and cannot comport with contract law require- ments.”274 At least one court has held that plea waivers are unconsti- tutional and violate the principles of contract law because it is apparent that the two parties to the bargain are in no way equals and the waiver cannot be knowing and voluntary. 275 In addition, to threaten defendants with harsher punishment if con- victed at trial (the trial tax) is tantamount to a use of legal force that by no measure of reasoned consideration can be viewed as “consen- sual.” Because the conditions on benefits in plea settings rely upon a distorted and, in the Author’s view, intellectually dishonest interpreta- tion of consent by ignoring the power imbalances existing between defendants and prosecutors, and because of the force that is available to prosecutors to severely restrict or eliminate liberty, plea-bargaining amounts to an unconstitutional condition that violates the Bill of Rights. 276 Specifically, “[i]t therefore is crucial that the role of con- sent as a mechanism within the government’s authority should not ob- scure the problem of whether consent can cure what the government does outside its constitutional authority.” 277 Defenders of the consti- tutionality of plea-bargaining build their support upon a house of cards by conflating defendant’s consent of rights waivers as a prophy- lactic for constitutional violations. As long as there is consent, then there is no need to be concerned about the usurpation of rights and subsequent liberty restrictions. To reiterate a point made earlier but in a different context, pre-political constitutional rights serve not as the sole possession of homo economicus, but as “spheres of freedom legislated by the people as legal limits on government.”278 Limitations on assertion of government authority reside in the domain of legis- lated legal constraints, not contractual relationships. 279 VI. CONCLUSION In a July 5, 1852 speech delivered to the Rochester Ladies’ Anti- Slavery Society, Frederick Douglas said, “America is false to its past, false to its present, and solemnly binds herself to be false in the fu- ture.” 280 Douglas was obviously speaking about the blemish of slav- ery, but he might as well have been addressing plea-bargaining. The Author initiated this Article with a reference to the well-worn fable made famous by Hans Christian Andersen. The Author sug- gested that it was absolutely crystalline that the system of plea-bar- gaining in the United States appears nakedly before us as an institutional mechanism for enhancing an out-of-control criminal-jus- tice system. In order to establish plea practice as constitutional, the Supreme Court was forced to employ a juridic discourse that shifted from the language of due process found in criminal law, especially the protections afforded by the Fifth and Sixth Amendments, and toward contract law where defendants were “free” to negotiate away their rights. This legal maneuver is akin to the Bush Administration’s use of the term “enemy combatants” rather than “prisoners of war” be- cause the latter would have invoked Geneva Convention protec- tions.281 The Supreme Court applied an entirely novel standard to the adjudication of criminal cases, and it rationalized its decision as being based on the need for efficiency. Post-1970 Supreme Court decisions, as the Author revealed in Section III, generated legitimacy for the plea system by referencing its 1970 precedent. Reasoning by circulus in propando, plea-bargaining was considered constitutional because it existed, and it existed because it was constitutional. Since the late 1960s, the Court has failed to address the constitutionality of pleas forthrightly without shifting the narrative away from due process and toward contract law. The reason for this, the Author contends, is be- cause the Court’s rationale would not bear the weight of 500 years of Common Law, U.S. constitutional mandates, and opinions of the Court extending to 1930. With the deftness of the magician’s slight of hand and the invocation of rhetorical deception, the Court disappears criminal procedure and due process afforded by the Constitution to all who are facing the loss of liberty and in its place returns an entirely new rhetorical device—the law of contracts. Those who participate in the proliferation of legal narrative justify- ing and rationalizing the plea system, the Author argues, are analo- gous to the vain king who, naked before all observers, continued despite what was obviously transparent to rationalize his conviction. The Supreme Court, prosecutors, judges, and even defense attorneys turn to rationalization from legitimate plea practices. They have to because, as demonstrated in this Article, neither our Common Law heritage, our founding documents, colonial and state constitutions, nor Supreme Court decisions until 1930 permitted plea waivers on constitutional grounds. Each of these federal and state institutions turned to our founding commitment to natural law and natural rights as constitutive of our philosophical understanding of personhood and liberty. As demonstrated, the Fifth and Sixth Amendment rights were considered by most to be natural rights and, as such, were inalienable. What explains this philosophical shift? It appears that it was the need for increased efficiency with regard to case litigation. But how did this happen? Do rights trump privileges with regard to the administration of pleas? Or put another way, Does our pre-political commitment to preservation of personhood under the law, with all its attendant quali- ties of liberty, freedom, and security, eclipse institutional demands for efficiency? Remember that until 1930 the Supreme Court issued opin- ions that emphatically ruled in the affirmative. Starting in 1930 with Patton v. United States, however, the Supreme Court did a dramatic about-face and shifted the course of plea jurisprudence. 282 Why? Be- cause the dramatic increases in criminal caseloads meant increasing demand for prosecutorial and judicial efficiency. But there remains a cart-and-horse problem. Why were there so many cases putting nearly insurmountable pressures on the legal system? Where did and do they come from? The problem of enhanced prosecution was and still is a direct by-product of legislative decision-making. The more legislators at the state and federal level define behaviors as criminal and in need of prosecution, the greater the resource pressures con- fronting law enforcement, prosecutors, defense attorneys, and the courts to investigate and adjudicate them. Is it really that simple? By saying so, the Author is at risk at being labeled incompetent and stu- pid. Clearly, by drawing attention to this simple fact, the Author pro- claims that the emperor stands naked before us. There really is not any need for plea-bargaining if there are fewer cases to litigate. How is it that all other Common Law countries manage to get by with a plea regimen that is the inverse of ours, and yet still manage to gener- ate quite orderly civil society? Finally, is the Author arguing for the elimination of plea-bargaining, or a kinder, gentler, more constitutionally viable version of it? Realis- tically, the Author joins Langer in calling for a directed-verdict stan- dard. 283 Increased discovery coupled with more nuanced acknowledgement of the ways in which human beings actually process and understand information, along with a modified adversarial due process may ameliorate some of the more pernicious aspects of plea- bargaining. These and a host of other questions remain to be ex- plored, but those will have to await another day. For now it is enough to say that, as presently implemented, the usurpation and direct in- ducement to gain convictions by encouraging defendants to abdicate their inalienable rights is a threat to personhood and liberty in the United States of America.

#### Abdicating rights is unjust per unconstitutional conditions and coerced contract – you cannot give up your rights to have rights, especially not under threat of punishment. The aff causes a race to the bottom to destroy democracy removing rights’ inalienable status

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History is replete with examples of those who refuse to accept the hypocritical or the unjust. 33 It is the role of the disputant, the rebel, the clever, and the truth-seeker to unmask the Emperor. Their dispu- tations are juxtaposed to the normative platitudes offered up by judges, lawyers, and politicians who recycle well-worn phrases like, “efficiency and necessity,” “voluntary contract,” “free will,” “rational actor,” “presumption of innocence,” “due process,” “public policy,” “just result,” and “voluntary waiver of rights.” Each concept is an empty signifier that must be infused with meaning. 34 As a matter of legal currency, it is the Court’s responsibility to provide us with that meaning.35 With regard to plea-bargaining, the Court has donned the cloak of the weaver and has seen fit to provide a rationalization for plea-bargaining that is driven by the effects of heavy case loads while scurrilously masquerading as defenders of constitutionally protected rights. As Justice Kennedy explained in Frye, “To note the prevalence of plea bargaining is not to criticize it. The potential to conserve valu- able resources and for defendants to admit their crimes and receive more favorable terms at sentencing means that a plea agreement can benefit both parties.” 36 In both Lafler and Frye, the Supreme Court spuriously situated plea-bargaining as an equitable contract, one where defendants often “game the system.” 37 To which Alschuler has remarked, “This process . . . benefits both parties only in the sense that a gunman’s demand for your money or your life benefits you as well as the gunman.”38 True, the fortunate defendant in a plea context receives a benefit, but only after having been threatened with far har- sher punishment upon prospective conviction at trial (a topic ad- dressed in greater detail in Section III). Anyone seriously suggesting that choice exists in this context is at a minimum naive, and at worst manifestly dishonest. To those critics who claim that eliminating or severely restricting plea-bargaining would significantly reduce the benefits accruing to de- fendants, the Author joins the staff at the University of Pennsylvania Law Review who wrote in a Comment in November of 1968 that, Ruling out bargained pleas, however, will not prevent the prosecu- tor from gratuitously using his discretion to reduce indictments. Furthermore, the real focus should be on changing the laws, not on perpetuating a system that may erratically alleviate their effect. While in some cases the prosecutor may be stuck with unrealistically aggravated charges not reducible under the proposed rule, he will soon learn to make well advised decisions about which charges to prosecute. A system freed of plea bargaining would eventually be more beneficial to defendants because the constitutional rights to trial could be exercised in an atmosphere that is in fact free. 39 The editors of the Pennsylvania Law Review were barking up the same constitutional tree as asserted in the following pages. They were correct in 1968, and their assessment of plea-bargaining is even more prescient now. The juridical legitimacy of plea-bargaining rests upon a house of cards. Court decisions over the course of the last century signify a disingenuous intellectual darting between the solid colonnades of sub- stantive and procedural law established by the United States Constitu- tion and the Bill of Rights. Careful not to advance too near to these pillars of due process for fear of weakening the foundation on which plea-bargaining rests, the Supreme Court has seen fit to sediment a practice of inducements through plea offers that leads to the abdica- tion of defendants’ constitutional rights. At stake is the integrity of the Constitution, the Bill of Rights, the Judiciary, the Jury, State power and hegemony, and whatever still remains of an American sense of personhood under the law. This is because rights are inti- mately associated with freedom. 40 According to Lakoff, human rights, like those expressed in the Constitution and the Bill of Rights, are intimately tied to our common sense of freedom. 41 These rights are inalienable. They can neither be given away, nor can they be taken away. Justice requires freedom. Only those who are free to exercise their rights to proper defense can experience justice. The inability to exercise the rights guaranteed by the Constitution and the Bill of Rights (in criminal matters, the Fifth and Sixth Amendments) leads to atrophy and quite possibly the practical elimination of those rights as experienced in everyday adjudication settings. When the powers of the state overbear the will of its subjects, freedom no longer exists. Lakoff puts it this way: “[A] threat to free will is a threat to freedom, the imposition of a dangerous worldview without public awareness. When free will itself is threatened, that is the ultimate threat to freedom.” 42 The institution of plea-bargaining is structured as a power imbal- ance that tests the mettle of those who succumb to it. And, as the Author will demonstrate in subsequent publications on this topic, our cognitive decision-making skills, 43 cultural capital, and habitus, 44 posi- tion us differently relative to the authority of the prosecutor in a plea setting, thereby threatening our free will decision-making. Critics may contend that the preservation of free will is precisely the point of plea-bargaining. That is, by permitting defendants to engage in a contractual negotiation of a plea, they are at liberty to determine their own course of action. In this scenario, the plea-bargaining pro- cess enhances free will. However, this assumption is incorrect. The structural conditions constituting the plea negotiation remove any semblance of neutrality and equitable bargaining conditions, thereby making pretense to “free will” nakedly ideological. One additional point is necessary. Lakoff’s use of free will requires that human be- ings are provided conditions that level the playing field relative to those in power. Human rights do this, and they enable us to deter- mine from within the protective web of rights the path that most en- hances our liberty options. However, plea-bargaining usurps those inalienable rights guaranteed by the Bill of Rights to protect the pow- erless from the overzealous application of state power. While power imbalances have always constituted the exercise of state authority,45 with plea-bargaining, the subject confronting prosecutorial authority has fewer constitutional protections than those who would exercise their right to trial. And despite pretenses to liberal-economic notions of equity among adversaries freely engaging in the negotiation of a contract, without rights protections a defendant is clearly not “free” to engage prosecutors on equitable adversarial grounds. As a constitu- tional matter, the magnitude of the plea-bargaining practice threatens American ideals of freedom and fails to produce justice. This Article seeks answers to two sets of questions: First, whether the doctrine of unconstitutional conditions should apply to plea-bar- gaining. Second, whether the Supreme Court’s rationale for the con- stitutionality of pleas, that a plea is a contract that is constitutional if it meets the knowing and voluntary criteria, is correct or appropriate. With regard to the first question—those that apply to unconstitu- tional conditions—the following questions appear germane. First, “Are the Fifth and Sixth Amendment rights inalienable?” If they are inalienable (“unalienable” in the Declaration of Independence), then they can neither be taken away by the state, nor can the rights holder give them away. So in a plea-offer context, no matter how attractive the inducement offered by the state, a defendant does not have the right to give away her rights—they are immutable. Second, “Does the Due Process Clause found in both the Fifth and Fourteenth Amend- ments provide the procedural pathway necessary to challenge the con- stitutionality of pleas?” The Author thinks that the answer is yes, but getting to yes requires some work. Third, “When a suspect engages the state upon arrest, does the presumption of innocence prevail?” It is supposed to, but given what we know about the plea-bargaining process, the Author is not convinced that it does. 46 This is an ex- tremely important question because the prosecutor’s presentment at a Grand Jury is these days a fait accompli—it is a done deal for the state.47 That means that it is really not that difficult to obtain an in- dictment, even if the suspect is innocent. The practice of plea-bargaining in the United States has institution- alized upside-down justice. It serves as a dubious substitute for a sys- tem of law that was plainly established in the Constitution and Bill of Rights to preserve personhood and the balance of power. A plea bar- gain requires the defendant to relinquish her Fifth and Sixth Amend- ment Rights. 48 Following Lithwick, the Fifth Amendment was the American juridic response to abolishing conventional inquisitorial practices in the Brit- ish Courts of the Star Chamber and High Commission (1487–1641). 49 In each, inquisition induced involuntary confessions by requiring de- fendants to testify to any and all questions put to them, practices that often resorted to torture as a means of prevailing upon the recalcitrant to speak. 50 Recognizing the excesses of these courts, eighteenth-cen- tury English common law adopted the principal of nemo tenetur seip- sum accusare, which stipulated that no man should be required to testify against himself. 51 The principal of nemo tenetur seipsum ac- cusare was adopted by nine of the founding colonies prior to the es- tablishment of the United States.52 The significance of the Fifth Amendment lies in “protecting the innocent inarticulate defendant, who might be made to look guilty if subject to crafty questioning from a trained inquisitor.” 53 Given what we know about contemporary sus- pect interviews and despite the Supreme Court’s decision in Miranda v. Arizona, 54 it is apparent that over the course of the last two centu- ries, but since the 1970s in particular, the spirit and profound protec- tion afforded by the Fifth Amendment has been defiled by those who value expediency over protecting personhood and preserving the bal- ance of power. For the Framers, trial by a jury comprised of one’s peers was funda- mental to the formation of a democratic state, so much so that it ap- pears in both the Constitution and the Bill of Rights. Article III of the Constitution states that, “The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.” 55 The Fifth Amendment is important here too, since it provides presentment to a grand jury, and due pro- cess of law. 56 The Sixth and Seventh Amendments to the Constitution further clarify Article III.57 It is pretty clear that the Framers viewed a trial by jury as fundamentally important with regard to questions of fairness and equity. However, as discussed below, what was clear from our founding until 1898, when Justice Harlan’s majority opinion affirmed the unconstitutionality of waiving a jury trial, 58 would by 1930 become an anachronism. 59 III. THE P LEA -BARGAIN C ASES

#### Neg cards are group think bias to legitimate the system that cannot be justified, desiring the innocent to plead guilty for expediency and utility over justice thereby destroying personhood and rights

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In 1837, Danish author Hans Christian Andersen penned The Em- peror’s New Clothes, based on a Spanish fable dating to the fourteenth century. 8 In The Emperor’s New Clothes, Andersen tells the tale of an emperor who was something of a dandy. 9 He loved new and ostenta- tious garments, and he would spend countless hours fancying his like- ness before a mirror. 10 One day, two swindlers approached the emperor with an extraordinary offer. “[T]hey knew how to make the finest cloth imaginable. Not only were the colors and the patterns extraordinarily beautiful, but in addition, this material had the amaz- ing property that it was to be invisible to anyone who was incompe- tent or stupid.” 11 The Emperor’s New Clothes transgresses time and aptly captures our current approach to plea-bargaining. Regardless of who the insti- tutional actor is—the police officer, prosecutor, probation officer, de- fense attorney, judge, or the United States Supreme Court—each participates in a fraudulent charade masquerading as justice. And, as explained in this Article, each of these actors is responsible in varying degrees for propping up this unworkable and unconstitutional system, largely through a proliferation of intellectual dishonesty. For each, in its own way, senses that the plea-bargaining process requires a firm suspension of disbelief and a commitment to never publicly admit what is known to be true for fear of being labeled incompetent or stupid. Each actor believes as a matter of faith that plea-bargaining is necessarily driven by case-management, resources, and time pres- sures. And while that is most certainly true, the more penetrating question relates to whether any of these pressures sufficiently war- rants usurpation of our personhood and suppression of the substantive and procedural rights guaranteed by the United States Constitution. Colorado Federal District Court Judge Thomas Kelly Kane addressed this question on June 28, 2012, when he rejected a plea agreement that required the defendant to waive his right to appeal. 12 Judge Kane de- clared: “Prioritizing efficiency at the expense of the individual exercise of constitutional rights applies to the guilty and the innocent alike, and sacrificing constitutional rights on the altar of efficiency is of dubi- ous legality.” 13 Judge Kane has exposed the Emperor. His opinion unveils the irra- tional, unconstitutional, utilitarian, substantive, and procedural ratio- nalizations primarily found in case law that are called upon to justify plea-bargaining. And he is not alone. In a May 2014 interview, Man- hattan Federal Judge Jed Rakoff was quoted as saying, “The current [plea] process is totally different from what the founding fathers had in mind.” 14 Judge Rakoff proposed greater involvement of junior judges in the plea process as a way to ameliorate prosecutorial over- reach.15 His proposal stems from the recognition that “prosecutors armed with harsh mandatory minimum sentences [would be] less able to bully defendants.” 16 Under Judge Rakoff’s plan, junior judges would hear evidence and make plea recommendations. 17 In two Supreme Court decisions from March 2012, the Court ac- knowledged the ubiquity of pleas. 18 In Lafler v. Cooper, Justice Ken- nedy admitted, “[C]riminal justice today is for the most part a system of pleas, not a system of trials.” 19 And, as Justice Scalia writing in the dissent explained, the Supreme Court has “elevate[d] plea bargaining from a necessary evil to a constitutional entitlement.” 20 This Article aims to expose the imperious practice of plea-bargaining for what it is—a cynical and intellectually dishonest institutional remedy for an unwieldy judicial system that has knowingly rationalized the practice to facilitate expedient resolution of ever-increasing caseloads. The plea system is so distorted that former criminal defense attor- ney turned legal academic, Josh Bowers, makes the astonishing claim that “plea bargaining may be the best way for an innocent defendant to minimize wrongful punishment.” 21 Gross systemic failure at the point of crime-scene investigation (arrest bias), and prosecutorial charging decisions (charge bias, dismissal aversion, trial bias), are cou- pled with defendants’ process costs (e.g., waiting, pecuniary loss, in- convenience, and uncertainty), lead Bowers to conclude that, “[i]n low-stakes cases plea bargaining is of near-categorical benefit to inno- cent defendants, because the process costs of proceeding to trial often dwarf plea prices.” 22 In an essay replete with remarkable brow-fur- rowing statements, Bowers asserts, “If it is normatively appropriate for the innocent to plead guilty in low-stakes cases, and rational— albeit normatively problematic for reasons unrelated to guilt and in- nocence—for the innocent to plead guilty in high-stakes cases, then the system must provide effective avenues for innocent defendants to plead guilty.” 23 To which Bowers offers “regularization and systemic acceptance of a common—though neither uniform nor conventionally welcome—underground practice: permitting innocent defendants to offer false on-the-record admissions of guilt.” 24 Because our criminal justice system is so deplorable and injurious to the point where de- fendants’ process costs outweigh the harm accrued from taking a plea, Bowers would rather see his innocent clients plead guilty than to ex- perience the degradation, humiliation, and systemic violence that would accrue by seeking an acquittal at trial. 25 The Author finds Bow- ers’s recommendations to be fundamentally flawed and an indication of just how desperate lawyers and legal academics have become. Ours truly is a Sisyphean effort to render justice from this swelling encum- brance characterized by systemic expediency and intellectual dishonesty.26 Recently an exasperated Professor Albert Alschuler, responding to the Supreme Court’s decisions in Lafler and Frye, concluded, “Now, however, the criminal justice system has gone off the tracks, and the rails themselves have disappeared.” 27 The system has become so bro- ken according to Alschuler that “the time may have come for criminal justice scholars to abandon the search for ways to make the criminal justice system fair and principled. The principal mission today should be to make it less awful.” 28 With great admiration for Alschuler (and a thorough understanding and more than a little angst-ridden commis- erating with his palpable discontent), so long as human beings make decisions, they can, through reasoned argument, be influenced to make proper decisions. In steadfastly maneuvering to create a “less awful” criminal-justice system, we may just bump headlong into sys- temic change. However, in order for that to happen, we will have to unearth the tracks that have long gone missing and avoid careening into the ever-intensifying whirlpool. 29 To that end, the Author joins Professor Stephanos Bibas, who in response to Bowers’s anguished recommendation, said the following: It is awfully tempting to give in to the punishment assembly line, to make it speedier and more efficient and surrender any pretense of doing justice. But our conscience cannot brook that. We must fight; we must continue to proclaim our commitment to exonerating the innocent, however inconsistent we are in pursuing that in practice. 30 One of the reasons for systemic stasis is the prevalence of groupthink; the rationalizations for it signify a strong human ten- dency. Besides, plea-bargaining benefits defense attorneys, prosecu- tors, and quite often defendants.31 But the Author joins the late Christopher Hitchens in his contention that: It is true that the odds in favor of stupidity or superstition or un- checked authority seem intimidating and that vast stretches of human time have seemingly elapsed with no successful challenge to these things. But it is no less true that there is an ineradicable instinct to see beyond, or through, these tyrannical conditions.32

#### Efficiency causes the sacrifice of rights at all costs

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As we saw in Chapter 1, the United States Supreme Court has firmly estab- lished the constitutionality of criminal felony plea bargaining premised upon the right of each autonomous defendant to bargain away their Fifth and Sixth Amendment rights protections in pursuit of a charge and sentence reduction. So long as the plea procedure meets Rule 11 and case law guide- lines establishing the factual basis, knowing and intelligent, and voluntary prongs, the resulting agreement, the bargain, will be considered structurally sound and constitutional. The legal frame presented to the defendant will manifest as “form contracting” since, while there will be some room for charge negotiation depending upon a host of factors generated by offices of probation and provided to the court for review prior to issuing sentence, the substance of the frame has already been established by local county attorney office priorities and the legislature in each state. “It’s Good To Be Inefficient.” At the root of the justification for plea bargaining is that it is an extremely efficient way for the courts to manage overwhelming caseloads. As we have seen, plea cases are disposed of post indictment without the resource pressure imposed by trials. Operating in a normatively procedural way, prosecutors, defense attorneys, judges, and defendants participate in an adjudication procedure that finds its origins in the economics of efficiency where primary emphasis is placed upon maxi- mizing utility through the vehicle of time management and resource scarcity. The model is predicated upon the factory system and its utilitarian applica- tion of rigid managerial oversight, predictability of outcome, preservation of scarce resources, and reproduction of system stability. All are ostensibly laudable goals insofar as power and control are concerned, as well as a kind of system stability emerging from the cultural satisfaction resulting from the conviction of a defendant for crimes committed against the community. But what if I argue that sometimes the most efficacious way is not the most efficient one? Consider the process of knowledge production. There is, in my experience, simply no substitute for the discipline and hard work necessary to deeply learn a subject. Reading, writing, and arguing consti- tute an often chaotic, non-linear process that moves through fits and starts without necessarily producing anything resembling knowledge production. Every adult knows that their youth-inspired life plans were so much fantasy since life resembles bumper pool – we direct our actions toward a specific set of goals when we are suddenly confronted with an obstacle requiring us to switch gears and move in a different direction. We do this throughout our lives often without realizing it until we are much older and can look back at the crooked path we’ve taken. This experience is captured by the Yiddish expression, “Der mensch tracht, Un Gott lacht.” Man plans, and God laughs. At most universities in the United States, students are provided with structural inducements to graduate in the most efficient way possible. This can mean that students are guaranteed that their tuition will not increase throughout their four-year pursuit of a baccalaureate degree as long as they are making progress toward completion. Of course, changing one’s mind regarding their major area of study, especially if they are a few years into its completion, is clearly not efficient since the student is “wasting their time” and “wasting their money.” Or it may mean that promising undergraduate students can start a graduate degree while still working toward the com- pletion of their undergraduate degree. In some situations, students are so motivated to graduate that they routinely register for the maximum credit hours permitted (at our institution, it would be 19 credit hours per semester or six courses). Isn’t it a good thing if a student can graduate a semester early? Universities are replete with procedures like these meant to enhance the efficient completion of a four-year degree, including the requirement that academic departments produce “career-ready” curricula meant to prepare students for post-baccalaureate employment. Such initiatives devalue the Humanities and Social Sciences since they tend not to be directed at produc- ing specific skills translatable to the contemporary labor market (as if any academic discipline can accurately predict labor market needs five or more years in advance). What efficiency means in each case is the completion of the degree in as short a time as possible, at the lowest price possible, and with skills that are immediately translatable to the labor market. Or con- sider the now-nationwide university and college commitment to no longer hiring tenure-track PhD faculty, relying instead upon non-tenure-track year- to-year contracts. It is certainly efficient from the perspective of the univer- sity as a corporate entity since it provides annual flexibility with regard to resources allocated for instruction. If the market crashes, as it did in 2008, and again in March 2020 with the arrival of COVID-19, having the flexibil- ity to fire non-tenure-track faculty improves institutional fiscal health and flexibility. But what the move to non-tenured faculty also does is produce less institutional commitment from those faculty, less direct engagement with their academic discipline, and less published research, not to mention working under the constant threat of dismissal and being relatively deprived of any institutional power (this is especially relevant for non-white, female, and non-binary academics). In short, the most efficient (i.e., linear) path is an ideological construct that assumes perfect knowledge about alternatives and the ability to control all externalities that may intercede upon our plans. Life is messy precisely because it is constituted by an infinite number of subjective and objective variables replicated over seven billion people on the planet. But perhaps the most important reason for human beings to confront the neoliberal demand for efficiency is that it fails to attend to the human need to manage time in ways that are determined entirely by them, and for the purpose of realizing their species essence. Sometimes people do organize their lives in as efficient a way as possible given externalities. And sometimes, as with experiences that take place in civil society where people live most of their lives, efficiency is unlikely to prevail. A traditional lover of baseball has no concern with effi- ciency. Prior to the 2023 season, baseball had no time limitations. A game would last as long as it was necessary to determine a winner. Consistent with a more efficient management of time, Major League Baseball introduced pitching and hitting time clocks to reduce the amount of time per game. Prior to the changes, a typical game would last roughly three hours. Cricket is an even less efficient game, lasting on average seven and a half hours per day for five days. What is special for those of us who love baseball or cricket is the opportunity to relax into a game. Baseball moves at a quicker pace than it used to, but it still provides ample time for casual conversation and contemplation of the action on the field. In each game it is time that is privi- leged most. As I discussed in the previous chapter, all Homo sapiens must grapple with impending death. As far as we know, Homo sapiens is the only species that is aware of mortality. In short, our time on Earth is the most precious gift we have. And while it may be argued that spending our time efficiently is consistent with memento mori, what it typically amounts to in a capitalist society is frantic multitasking in order to stay alive. \*\*\* In this chapter, I have deconstructed the language of contracts as applied by the United States Supreme Court to plea bargaining to demonstrate that the criminal legal fetishization of individual autonomy and efficiency, as contex- tualized within the liberty of contract doctrine, serves state interests in gov- ernmentality toward enhanced social control. Through the application of social science, neuroscience, and neurophenomenology, I sought to demon- strate the woeful inadequacy of the concept of “autonomy” (“free will”) to properly justify either pleas or contracts (whether public or private). Finally, since the Court introduced the private law of contracts (and not merely by analogy) to the adjudication of felony criminal indictments, it only seems appropriate that the conditions under which plea bargains are procured should be scrutinized consistent with the law of contracts and improperly obtained assent. In each of the areas of misrepresentation, duress, undue influence, and unconscionability, there are serious concerns relating to the procurement of plea bargains that, under private law and statute, would void those bargains. However, to facilitate assessment of the totality of cir- cumstances leading to a plea agreement, we need a more thorough record of discovery and far greater judicial review of substantive inculpatory and exculpatory evidence. Finally, basing my argument on the preceding information, it is my con- tention that plea bargaining violates the unconstitutional conditions doctrine (Chapter 8) and that it leads to the commodification of rights protections. Through the application of Foucault’s emphasis upon governmentality as efficiency, and his analysis of law as but one institution existing among others available to facilitate the realization of dominant cultural power, in the next chapter I present, as Marx did before me with regard to surplus value (see Chapter 5), the surplus power that exists whenever law is imposed upon a set of political, economic, or cultural conditions. Specifically, the law systemically presents as a detached apolitical and objective superstruc- tural institution89 responsible for enhancing the likelihood of liberal democ- racy.90 However, as with surplus value, surplus power as expressed through law signifies the hidden expression of dominant cultural capitalist inter- ests and values.91 The law’s rhetorical expression of “efficiency” in private, administrative, and public law serves as surplus power, a seemingly benign yet hegemonic expression of dominant cultural interests. As explained by Grewal and Purdy, “[I]n practice, neoliberal policies are always distributive decisions, yet ones in which distributive choices get couched in the neutral- sounding language of efficiency, liberty, and responsibility, or the pragmatic language of ‘what works’.”92 Efficiency manifests as a core principle in neo- liberal capitalist states through hegemonic expression of the view that strong property rights and private contracting rights are the best means to increase overall welfare, with the sole justification for polit- ical intervention being to “correct market failures.” The second premise is another version of market fundamentalism, based on the belief that strong property rights best protect the equal freedom and dignity of indi- viduals, so that a commercial social order governed by the market is the most decent society that is possible to achieve.93 In the spirit of unmasking (Mannheim), Grewal and Purdy’s application of political economic critique to neoliberal expressions of efficiency exposes the surplus power operating through ideology and hegemonically constructed legal narratives. Specifically, here Grewal and Purdy conclude by making a point similar to my own, The way a series of constitutional doctrines have coalesced around a vision of personal liberty that centers on individual choice in spending, consumption, and self-expression, in disregard of the legally constituted structural setting in which these choices take place. In this kind of analy- sis, the concept of neoliberalism ties together the operational effects and ideological predicates of a series of judgments that work in different doc- trinal areas, such as free speech, equal protection, and substantive due process …. Neoliberal constitutional doctrines have recently extended market-modeled liberty into areas of law where other versions of liberty have previously been important.94 Having established the liberty of contract doctrine in Chapter 5, and then having applied contract law to the plea here in Chapter 6, we are left with one final substantive analysis that will complete our political economic cri- tique of the plea – governmentality. Neither economic markets, nor the con- struction of Homo economicus, nor the creation of slavery could appear absent the theoretically, conceptually, and empirically central role played by the state and civil society.

#### Plea bargaining alters SCOTUS unconstitutional conditions precedent making all rights waivable if the government offers a benefit – the weakened doctrine allows coerced rights violations for poor folk under the guise of “consent,” destroying equal rights

Levine et al. 24 [Kay L. Levine, professor of Law and Associate Dean for Researchat Emory University School of Law, Jonathan R. Nash, Robert Howell Hall Professor of Law and C0-Director of the Center on Federalism and Intersystemic Governance at Emory University School of Law, and Robert A. Schapiro, Dean and C. Hugh Friedman Professor of Law at University of San Diego School of Law, 2024, “The Unconstitutional Conditions Vacuum in Criminal Procedure,” Emory Law Scholarly Commons, https://scholarlycommons.law.emory.edu/cgi/viewcontent.cgi?article=1224&context=faculty-articles]/Kankee

v. the impact of criminal procedure exceptionalism in unconstitutional conditions analysis In its own case law over the past century, the Supreme Court has asserted and admired the unconstitutional conditions doctrine’s breadth as a shield for constitutional rights. In Koontz, for example, the Court stated: We have said in a variety of contexts that “the government may not deny a benefit to a person because he exercises a constitutional right.” . . . Those cases reflect an overarching principle, known as the un- constitutional conditions doctrine, that vindicates the Constitution’s enumerated rights by preventing the government from coercing people into giving them up.347 This Article has demonstrated the emptiness of such language, as the Court has not applied this principle in an “overarching” fashion. Instead, the Court has consistently ignored the principles underlying the unconstitutional conditions doctrine when deciding challenges raised under the Fourth, Fifth, and Sixth Amendments by those suspected of or charged with crimes. The doctrine is a selective shield, not the broad protector of constitutional rights that the Court purports to embrace. What is more, offering the doctrine’s protection on this selective basis cannot be justified by pointing to the features of the legal system in which it operates. Features of the social and political landscape in which the Justices hear cases are more likely to blame for the pattern we have identified. In this final substantive part of the Article, we turn our attention to the det- rimental impacts caused by the Court’s decision to withhold the doctrine’s pro- tections from people accused of crime. We begin by considering the doctrinal impact, exploring in more detail how a thorough unconstitutional conditions analysis can shape the outcome of a criminal procedure case. While we gestured to that effect in Part III, in Section V.A we dive deeply into two cases from the lower federal courts, Lebron v. Secretary, Florida Department of Children & Fami- lies348 and United States v. Scott,349 to show how thoughtful judges have assessed criminal procedure inquiries using the doctrine. We then turn in Section V.B to the impact on the populations who have been deprived of access to the uncon- stitutional conditions doctrine. We consider the divisions the Court has created between rights and rightsholders in the United States—without good reason— and the impact of these divides on the polity. A. The Doctrinal Impact: Swapping Exceptionalism for Inclusion in the Criminal Procedure Docket What would an unconstitutional conditions analysis look like in the criminal procedure space? The Supreme Court would not have to look far to find some excellent examples from the lower courts. The Eleventh Circuit opinion in Lebron v. Secretary, Florida Department of Children & Families scrutinizes mandatory, sus- picionless drug testing of people on welfare using the unconstitutional condi- tions doctrine.350 The Ninth Circuit’s opinion in United States v. Scott offers a similarly robust and critical assessment of the legality of drug testing as a pretrial release condition. At issue in Lebron was the authority of the State of Florida to require TANF applicants to submit to suspicionless drug testing as a condition of receiving wel- fare benefits.351 First the court considered whether mandatory, suspicionless drug testing of this population was a constitutionally reasonable search under the Fourth Amendment’s special needs exception.352 If so, the Florida program did not infringe on any right, thus precluding the argument that the tradeoff of rights for benefits was an impermissible, unconstitutional condition. But after careful review of the Supreme Court’s drug testing precedents, the Eleventh Cir- cuit concluded that Florida’s program was not a constitutionally reasonable search,353 thus triggering a deeper look into the coercive nature of the tradeoff imposed by the Florida statute. The State asserted that it could exact consent from the TANF population by statutorily conditioning the receipt of welfare benefits on submission to search.354 The Eleventh Circuit firmly rejected that claim. It concluded that any such argument was “belied by Supreme Court precedent, which has invalidated searches premised on consent where it has been shown that consent ‘was granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right.’”355 According to the Eleventh Circuit, Florida’s statutory requirement amounted to a demand, rather than a request, for consent, because, by this statute, “the State conveys a message that it has the unfettered lawful authority to require such drug testing—period. But it does not . . . .”356 In other words, a statute cannot impose a scheme of implied consent that subverts, or circumvents, constitutional analysis of coercion.357 After holding that there was no operative consent imposed by the statute, the Lebron court compared the burden on the TANF recipients’ Fourth Amendment rights to that experienced by plaintiffs alleging First Amendment violations caused by other rights-for-benefits schemes. Reviewing these precedents, the Eleventh Circuit observed that a state “could not place the burden on taxpayers to attest that they did not advocate the overthrow of the government in order to receive . . . a tax exemption” nor “force an individual to choose between ‘follow- ing the precepts of her religion and forfeiting [unemployment compensation] benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.’”358 The court distinguished Wyman v. James on the basis of the state action complained about; that case involved a physical home search of a welfare recipient but did not concern drug testing, which the court noted is governed by a different body of “well-established prec- edent” requiring a court “to balance the competing government and individual privacy interests.”359 Drawing insight about the limits to state-imposed coercion from these case outcomes in other doctrinal areas, the Lebron court concluded that Florida’s statute “unconstitutionally burden[s] a TANF applicant’s Fourth Amendment right to be free from unreasonable searches.”360 A second example of unconstitutional conditions analysis in the suspicion- less drug testing context comes to us from the Ninth Circuit. In its 2005 opinion in United States v. Scott,361 the court considered the constitutionality of a state court condition that required a pretrial detainee to submit to suspicionless drug testing as a condition of his release.362 The court asserted that “[t]he right to keep someone in jail does not in any way imply the right to release that person subject to unconstitutional conditions—such as chopping off a finger or giving up one’s first born.”363 The only conditions the government can impose as a con- dition of release are constitutional conditions, the court declared.364 The government first argued constitutionality based on consent,365 premised on the tradeoff of rights for benefits that is at the core of unconstitutional con- ditions analysis. But the court rejected the government’s claim that Raymond Lee Scott had “willingly consent[ed]” to the drug testing in return for the right to “sleep in [his] own bed[] while awaiting trial.”366 Consent derived from a pre- trial release condition of this type, without more, was insufficient in the court’s view. “Pervasively imposing an intrusive search regime as the price of pretrial release, just like imposing such a regime outright, can contribute to a downward ratchet of privacy expectations[,]”367 the court warned. The Scott majority then compared the pretrial release condition to conditions imposed in other kinds of bargains with the state, observing that contractors doing business with the government can be required to sign a limiting clause,368 and that welfare recipients can be required to submit to search-like home visits as a condition of receiving benefits.369 But the fact that these conditions were found to be constitutional was not dispositive of the issue here. The majority noted that, in prior Supreme Court jurisprudence,370 an employee’s assent to a previously imposed drug-testing term as a condition of employment was “merely a relevant factor”371 in determining the strength of his or her privacy interest at the time of the drug test; assent alone did not cause the privacy inter- est to evaporate. Only assent to a condition that is reasonable can have that ef- fect.372 Hence, any drug-testing condition in the pretrial release context must survive a reasonableness analysis. To assess the reasonableness of the condition imposed on Mr. Scott, the Ninth Circuit focused on the germaneness of the condition, considered in light of the problem it was meant to address. While it did not use the term germane- ness, it found the connection between the condition and the asserted govern- ment interest to be flimsy, rather than substantial [T]he connection between the object of the test (drug use) and the harm to be avoided (non-appearance in court) is tenuous. One might imagine that a defendant who uses drugs while on pretrial release could be so overcome by the experience that he misses his court date. Or, having made it to court, he may be too mentally impaired to participate mean- ingfully in the proceedings. These are conceivable justifications, but the government has produced nothing to suggest these problems are com- mon enough to justify intruding on the privacy rights of every single de- fendant out on pretrial release. And it has produced nothing to suggest that Nevada found Scott to be particularly likely to engage in future drug use that would decrease his likelihood of appearing at trial.373 The court acknowledged that a pretrial release condition might be justified in a particular defendant’s case based on specific concerns about flight; it might also be justified more generally by a legislative finding.374 But the state made no showing on either ground. It thus failed to convince the court that the search of Mr. Scott pursuant to the condition was reasonable. These examples demonstrate that unconstitutional conditions analysis is possible in the criminal procedure docket and often leads to more carefully rea- soned analysis than reflexive reliance on warrant exceptions or privacy catego- ries. If the Supreme Court were to adopt this approach, it would bring its crim- inal procedure jurisprudence into conversation with constitutional jurisprudence in First Amendment, Takings, and Spending Clause contexts, leading to more victories for at least some people facing accusations of criminal conduct. Even where victory at the individual case level did not result, future defendants would have a deeper well of arguments on which to draw for future litigation and the Supreme Court would be forced to confront its disparate treat- ment of different rightsholders. B. The Symbolic Impact: Swapping Exceptionalism for Inclusion in the Population of Rightsholders The Supreme Court’s inconsistent application of the unconstitutional condi- tions doctrine has a profound and disparate impact on various rightsholders. Koontz emphasized that the doctrine is intended to provide a buffer for citizens from undue coercion by local, state, and federal institutions of government.375 The Court’s cases, though, extend this protective shell only to certain classes of rightsholders, while leaving others exposed and vulnerable. As exemplified by its rigorous use of the unconstitutional conditions doctrine in the takings context to protect landowners from regulations, the Court has steadfastly used the doctrine to safeguard property and other forms of wealth. Other unconstitutional conditions cases focus on the ability of the government to leverage its influence through grants of money,376 but the primary recipients of this form of government largess are states and organizations. When monetary benefits instead flow to indigent individuals, the Court has resisted using the unconstitutional conditions doctrine to address concerns about the regulatory burden imposed by government programs. While lower courts have invoked the unconstitutional conditions doctrine to protect vulnerable citizens from forced waiver of their Fourth, Fifth, and Sixth Amendment rights, the Supreme Court has not “ask[ed] the [unconstitutional conditions doctrine] question”377 even when explicitly invited to do so. Even in the employment context—in which the Court has applied the doc- trine—it offered protection for the right to earn income rather than for nonmon- etary rights, such as the ability to engage in political activity. Thus, federal offi- cials seeking to garner honoraria for speaking engagements won protection from restrictive rules,378 while mint worker George Poole, who wished to engage in political organizing on his own time, lost.379 As we noted in Part III, the Court’s application of the unconstitutional con- ditions doctrine to areas of criminal procedure would not necessarily translate into easy victories for people charged with or convicted of crimes. Elastic stand- ards already baked into criminal procedure doctrines,380 such as reasonableness, may drive the same ultimate result for a particular litigant as analysis grounded in the unconstitutional conditions doctrine. But sometimes a litigant will win using the unconstitutional conditions doctrine, as the Lebron and Scott decisions discussed herein have shown. In particular, for defendants concerned about the coercive nature of plea bargains offered by the government, careful use of the unconstitutional conditions doctrine should lead courts to question terms that insulate the prosecution from judicial review,381 create significant disparities in sentences between those who plead guilty and those who go to trial for the same offense,382 or appear peripheral to the core bargain. And for those who do not prevail on their unconstitutional conditions claim, the basis of the loss still mat- ters. The Court’s repeated tendency to handle criminal procedure questions as an isolated subset of cases, rather than in the context of analytical frameworks of unconstitutional conditions, may have drained the well from which future liti- gants can draw when looking for arguments to raise in new cases. For example, returning to United States v. Knights, recall that the United States argued to the Ninth Circuit and to the Supreme Court that the challenged probation condition—submission to suspicionless searches—related closely to the main purpose of probation (keeping a close eye on probationers to readily identify signs of illegal behavior). In the language of the unconstitutional con- ditions doctrine, this condition would survive the test for germaneness, said the United States, contrasting it to a condition that limited the free speech or free exercise rights of this population.383 But rather than upholding the condition on this narrow ground, the Court declared that probationers as a class have a lesser expectation of privacy in their persons and belongings, and thus that Mark James Knights had no basis to complain about what happened to him.384 This holding is far more expansive than an unconstitutional conditions-based holding would have been, and it has significant implications for probationers subject to searches in other contexts or to other sorts of probation conditions. Consider Riley v. California, for instance—the 2014 case in which the Court declared that privacy interests in digital containers (cell phones and laptops) re- main robust even following arrest, and thus require officers to obtain a warrant f they want to conduct a search.385 If probationers have a lesser expectation of privacy than everyone else, can their cell phones be searched incident to arrest, without a warrant? Likewise, does the curtilage of the home of a probationer receive less protection than the curtilage of non-probationers, whose homes are protected from warrantless searches by the Florida v. Jardines’386 trespass doc- trine? With respect to the second kind of expansion, courts have routinely vali- dated a range of probation conditions—like requiring permission to marry387— that would surely raise questions about germaneness in the unconstitutional conditions context if Knights had followed that line of analysis. In short, the un- necessary breadth of the Court’s holding in Knights could be, and mostly likely has been, used as a gateway to justify further dilution of rights for the probation population even in areas where the Court has embraced a bolder conception of privacy in recent years. What is more, an unconstitutional conditions analysis in criminal procedure cases would require the Court to confront critical questions when assessing the tradeoff of rights for benefits in certain contexts. When applying the unconsti- tutional conditions doctrine in the context of takings, for example, the Court has expressed concern about the coercive effects of government demands; it has em- phasized the importance of germaneness and proportionality in regulatory re- quirements. The Court has also cautioned that because of the broad government discretion involved, individuals and businesses applying for land-use permits are “especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits.”388 If the Court were to apply the unconstitutional conditions doctrine to plea bargaining or other areas of criminal procedure, it would have to ask whether, when presented with a plea deal or probation option, a person accused of a crime might experience government coercion akin to that facing a person seeking a zoning variance. It would have to examine the germaneness and the proportionality of the requirement the government wants to impose. It would have to consider whether the demands of the prosecutor’s office or crim- inal court judge are comparably “extortionate” to the demands of the zoning board.389 Maybe the Court would ultimately conclude that the level of coercion is smaller in the criminal court context than in the land use context, but its com- parison would have to be explicit—perhaps even explained. All cards would have to be on the table. And reversion to important policy goals served by the criminal legal system would not be sufficient. Invoking a memorable phrase from the Sixth Circuit, “The guaranties of protection afforded by the Constitution are most vital where the temptations to abandon them in favor of attractive policy goals are most seductive.”390 Coercion is far from a uniform or monolithic concept; behavior that counts as coercive in one setting might not amount to coercion in another.391 As ob- served by Philip Hamburger, “[O]ne needs to recognize a complex spectrum of economic, personal, and other pressures to accept conditions, and an equally complex range of personal circumstances and psychology in which different per- sons feel the same pressures differently.”392 The point here is that the Court’s willingness to engage in a detailed examination of coercion in the speech, exac- tions, or conditional federal spending contexts but steadfast refusal to do so in the criminal procedure context is both indefensible and ironic, in light of the longstanding refrain that criminal law (and procedure) systems require excep- tional attention to the government-rightsholder relationship.393 This claim is premised on the idea that, due to the distinctive nature of criminal punishments, more—not less—should be required of the government when using this branch of the legal system to regulate behavior.394 The incorporation cases make the ar- gument even more forcefully: these rights are fundamental prerequisites to an ordered system of justice.395 Surely “the legal question as to when a condition comes with constitutionally meaningful pressure”396 is just as important, if not more so, in the criminal procedure realm as in these other contexts. To quote Guy-Uriel Charles, “whether there are any constitutional limits to the extent of the renegotiations” of constitutional promises that are embedded in the Fourth, Fifth, and Sixth Amendments is a question the Court must answer, rather than dodge.397 And yet in criminal cases, the Court seems instead to cling to senti- ments such as the following, drawn from Justice Scalia’s dissenting opinion in Mitchell v. United States: “Our hardy forebears, who thought of compulsion in terms of the rack and oaths forced by the power of law, would not have viewed the drawing of a commonsense inference as equivalent pressure.”398 Given this sentiment, one feels compelled to ask how our hardy forebears would have re- garded permit conditions on beach house construction projects.399 Lastly, the unconstitutional conditions framework requires courts to assess candidly the weight of the individual’s interest in his or her constitutional rights.400 As we discussed in the prior section of this Article, the individual seek- ing protection from criminal sanction would seem to have an extraordinarily strong interest in retaining the citadel of privileges and rights that the Constitu- tion provides. These are, to borrow from Justice Jackson, “really significant things.”401 Unlike privileges or rights granted in the property or employment context, the Constitution’s offerings to a person accused of crime lack easy quan- tification, but that is because they are priceless. One might even surmise that for generally indigent groups, such as criminal court litigants or welfare recipients, a constitutional right often means the most—because it is all they have.402 In re- jecting a challenge on unconstitutional conditions grounds, the Supreme Court would have to address, explicitly, why the rights of the accused are worth less to them than the rights of property owners are to them, or why the burden imposed on equally important rights is more justified in the criminal procedure context than in the employment context.403 The Court’s existing criminal procedure opinions evade this question entirely, and thus fail to meet the burden of ex- plaining criminal procedure exceptionalism in this area. We believe that those accused of or charged with crimes are at least as de- serving of the doctrine’s protections, if not more so, as the civil plaintiffs who currently hold favored status. Consider that most actors who enjoy protections from the unconstitutional conditions doctrine are transactionally sophisti- cated—state governments, White House employees, and many property owners surely fit this description—or are at least familiar with the transaction that leads to the invocation of the doctrine. For example, a government employee likely understands that she enters into some agreement about the terms and conditions of her employment when she joins the government’s payroll; the property owner who applies for a permit to build a beach house understands that the zoning board has authority to raise concerns about the size and impact on surrounding properties. In contrast, at least some people in the criminal legal system are likely to be less sophisticated, and almost surely less sophisticated about the kinds of transactions they are likely to confront in that system,404 and this deficit is not the unconstitutional conditions vacuum in criminal procedure 1483 cured by the Sixth Amendment’s promise of representation, for the reasons dis- cussed in Section IV.A. In previous work,405 we have urged state courts to adopt their own state con- stitutional doctrines of unconstitutional conditions. Even if the U.S. Supreme Court refuses to acknowledge the application of the doctrine in the area of crim- inal procedure, we hope state courts will develop their own robust doctrines of unconstitutional conditions and apply them to criminal procedure issues. Here, as elsewhere, state courts might take the lead in demonstrating the feasibility and importance of this approach. Given the primary role of state courts in adju- dicating criminal cases, widespread invocation of state unconstitutional condi- tions doctrines in state criminal cases would go a long way toward offering ap- propriate protection to criminal defendants in the United States, thus vindicating the rights of those most vulnerable—even if the U.S. Supreme Court continues to ignore their plight. conclusion By applying the shield of the unconstitutional conditions doctrine to protect property rights and other forms of wealth but denying it to those facing criminal charges, the Supreme Court has abdicated its responsibility to protect both large portions of the Constitution and large portions of the population from the coer- cive exercise of governmental power. If it is the responsibility of the courts “to breathe the breath of life into constitutional rights . . . in the very face of con- travening legislation,”406 the Court has failed in this regard when it comes to some of our nation’s most vulnerable residents. In refusing even to acknowledge the unconstitutional conditions issues presented in the criminal procedure con- text, the Court has ducked the profoundly important question of why certain segments of society deserve protection from government coercion through tradeoffs and others do not. Not “ask[ing] the [unconstitutional conditions] question”407 in its criminal procedure cases has led the Court to render the Fourth, Fifth and Sixth Amendment rights considerably more porous, and thus weaker, than the rights protected by other amendments.408 This is far from a settled question, as Justice Jackson’s comment reveals. The availability of the unconstitutional conditions doctrine could have an impact on the development of doctrine in other areas where government largess is selec- tively distributed. Consider, for example, warrantless government searches of passengers riding mass transit. For decades, travelers have grown quite accus- tomed to searches of their person and baggage before boarding airplanes. But in recent years governments have extended this practice to people using local transit options such as buses and subways. If riding public transit is regarded as a privilege rather than a right, and if searches of one’s body and backpack are predicated only on implied passenger consent409—implied simply from the de- cision to ride rather than walk—the unconstitutional conditions doctrine could play a role in determining the validity of such searches.410 We should also take a hard look at recent programs that require people ac- cused of crime to provide a DNA sample to receive a dismissal of charges or a favorable plea deal. The most notorious of these programs, currently run by the District Attorney of Orange County, California, has been dubbed “spit and acquit.”411 DNA tradeoff programs extend the coercive bargains that we have long seen in the plea bargaining context, as they require a person who wants a deal to yield not just Fifth and Sixth Amendment rights but Fourth Amendment privacy rights as well. Is this not a form of “dragooning,” leaving people with “no real option but to acquiesce”?412 What is more, at least in Orange County this tradeoff is being required of people who are charged with very minor crimes, not of those charged with serious offenses. Some interview subjects even assert that the Orange County District Attorney is filing these cases just to obtain DNA samples.413 Surely our Fourth Amendment deserves better. In between searches and pleas we can observe thorny pretrial issues too. Over the past two years, for example, certain trial courts have required people being detained pretrial to accept a COVID vaccine to be released on bail or on their own recognizance pending trial. 414 We have considered the intersection of COVID prevention practices with the unconstitutional conditions doctrine in another article.415 Here, we mention this practice for its particular relevance in the world of criminal procedure. The Fourth Amendment insists that pretrial release conditions must be designed to help achieve one of two goals: to assure the person’s continued appearance at court hearings or to protect the community from further crime. Pretrial release contracts conventionally include terms like “stay away from the victim” or “check in with this administrator once a week.” The COVID vaccine is certainly connected to community safety, but to a differ- ent sort of community safety than the criminal courts typically safeguard. Re- quiring a person who has been charged with a crime to submit to a medical in- jection as a condition of being released back into the community, when all other concerns about flight and future criminality have already been addressed (and when other types of citizens can get exemptions for religious or health reasons), could be a deeply problematic move by the government. Forced vaccination ar- guably amounts to a violation of privacy and bodily integrity—perhaps even greater than that required for a blood draw.416 And justifying this heavy-handed practice under the guise of “consent” does not solve the problem. Consent in these circumstances is no less problematic—no less coercive—than the sort of consent that has been used to justify probation and parole terms for decades, premised on the idea that these populations are cloaked in a lesser expectation of privacy than adults whose freedom is fully intact.417 Whether the Court will address these questions remains to be seen. Strong headwinds generated by decades of jurisprudential friction and the Court’s seemingly unshakeable commitment to criminal procedure and criminal defend- ant exceptionalism caution us to be realists. But we urge the Court to embrace the unconstitutional conditions doctrine as a valuable tool of constitutional anal- ysis in its criminal procedure docket. If it were to do so, the Court would begin the process of restoring the Fourth, Fifth, and Sixth Amendments to their right- ful place in the Constitution and would honor its stated commitment to equal justice under law.

#### Plea bargaining is like Stalinist Russia

Ivsan 17 [Inga Ivsan, Associate at Black, Srebnick, Kornspan & Stump with a J.D./LL.M from the University of Miami School of Law, 4-1-2017, “To Plea or Not to Plea: How Plea Bargains Criminalize the Right to Trial and Undermine Our Adversarial System of Justice,” North Carolina Law Review, https://archives.law.nccu.edu/cgi/viewcontent.cgi?article=1770&context=ncclr]/Kankee

Plea bargains are replacing trials in modem criminal cases at an astonish- ingly fast pace. Statistics confirm that approximately 97%2 of all federal criminal cases subject to minimum sentencing guidelines resolve in plea agreements between defendants and prosecutors.3 Once rare and disfavored by judges, plea bargains are now universally used with too much judicial participation via a "partnership with the prosecution. Trial lawyers are evolving into "plea lawyers."' Jury trials are seen primarily in the movies. The plea mentality has even manifested itself in civil litigation: the number of civil cases going to trial in federal courts has declined from 11.5% in 1962 to around merely 1%.6 What explains this recent phenomenon? Severe sentencing guidelines and mandatory minimum sentences have armed prosecutors with the near unilateral power to compel a defendant to forego the jury trial and instead enter into a plea agreement. Such unchecked discretion in the hands of prosecutors effectively criminalizes the defendant's exercise of his right to a jury trial. Moreover, the prosecutorial authority to compel defendants, especially those charged with white-collar crimes, into plea bargains has fundamentally converted the adversarial system of criminal justice into an inquisitorial legal system. Plea bargaining is not an acceptable substitute for jury trials. Trials rely on the adversarial process to seek out the truth, expose corruption, and pro- tect individual rights. The presence of a jury acts as a constitutional safeguard, shining a light on the actions of prosecutors and judges. By con- trast, plea bargaining operates more like an inquisitorial system in which the prosecutor assumes the dual role of fact finder and ultimate decision- maker, selecting who to indict, what charges to bring, and what sentence to impose. While trials seek to discern guilt from innocence, the plea bargain seeks to expedite the case, relieving the prosecutor from the burden of con- ducting a trial or meeting the evidentiary burden required for conviction. Unlike trials conducted in open court, plea bargaining is conducted in se- crecy. Plea bargaining is not necessarily bad in and of itself, but its extreme overuse raises concerns about the U.S. criminal justice system.7 The plea- bargaining process does not afford any constitutional or ethical protections.' For example, suppose police obtain evidence illegally, without a warrant. Prosecutors would prefer to keep a case built on warrantless evidence out of court rather than have the illegal police conduct exposed at trial.9 A de- fendant arrested on the basis of illegally obtained evidence, and facing the threat of significant jail time, may be pressured to accept a plea agreement without having had any opportunity to review evidence meaningfully.'o Modern plea bargain practice encourages a defendant to admit guilt to a lesser offense on questionable evidence, and accepts a lesser punishment in exchange for sacrificing the defendant's Sixth Amendment right to trial. As the Fifth Circuit once observed, "[j]ustice and liberty are not the subjects of bargaining and barter."" The current criminal justice system adopts bar- gaining as naturally as if the Founding Fathers had indeed incorporated it into the Sixth Amendment.12 While plea bargains originally were used as a practical compromise be- tween an overburdened prosecutor and a defendant of certain guilt, modern- day plea bargains resemble one-sided contracts of adhesion 3 favoring a prosecutor too often holding insufficient evidence14 gainst a criminal de- fendant, particularly a white-collar defendant, who is reasonably and under- standably unwilling to risk being sentenced to purgatory under current sen- tencing guidelines." A rational defendant, particularly in federal court, cannot risk refusing a prosecutor's plea offer: prosecutors punish those who reject plea agreements by stacking additional charges' 6 and, particularly in the cases of white-collar crimes, rely on sentencing guidelines that take into account the size of the financial loss without any requirement that the de- fendant be found to have intended the loss.' 7 On average, the defendant who turns down a plea offer and is later convicted receives a sentence three times longer than under a plea agreement." Combined with a growing list of vague and poorly drafted statutes defining various crimes, prosecutors can target individuals and coerce them into plea bargains by promising to drop charges against family members' 9 and freezing assets.20 By punishing the defendant with a sentence three times longer if convict- ed at trial, modern day plea bargaining does not entail the same degree of "voluntary" and "intelligent choice" made by the defendant as authorized by the Supreme Court in Brady v. United States.2' While acknowledging the utility or impossibility of getting rid of plea bargains in the modem criminal justice system, this article stresses the unconstitutional effect of the unchecked discretion enjoyed by prosecutors when coupled with incredibly long sentences for those who risk conviction at trial, especially in complex white-collar criminal cases. The enormous disparity in sentencing resulting from this practice effectively criminalizes the defendant's right to trial and fundamentally alters the adversarial legal system. First conceived as a con- venient procedural tool of expediency, modem plea bargain practice has supplanted trials altogether, severely punishing those few who dare exercise their Sixth Amendment right to trial.2 2 This article proposes a practical so- lution, one borrowed from the business world, to restore parity between prosecutors and defendants charged in complex cases popularly associated with white-collar crime. Totalitarian societies, such as those envisioned by George Orwell in the novel 1984, rely on an inquisitorial legal system in which the government has absolute, unfettered discretion to selectively punish anyone and every- one.23 Orwell grew up in the Soviet Union, where an inquisitorial-style ju- dicial system sought to maximize government power at the expense of indi- vidual rights.24 The government enjoyed immense discretion to apply vaguely-written laws to political opponents and other disfavored individu- als. 25 Even today, countries such as Iran continue to exploit such prosecuto- rial mechanisms to suppress freedom of discourse.2 6 The sad irony is that, while the United States may have won the Cold War, its legal institutions have gravitated toward resembling the inquisitori- al system of its vanquished foe. In a true Orwellian twist, no citizen of modem American society can possibly know all of his or her individual legal obligations. For example, the Internal Revenue Code, inclusive of criminal and civil statutes, comprises 73,000 pages of fine print.27 With over 5,000 federal criminal laws on the books, one legal scholar has deter- mined that the average person unknowingly commits three felonies every day. 28 Doctors accepting Medicare payments, directors of publicly-traded companies, and tax lawyers, among other white-collar professionals, often operate in perpetual fear of the regulation state. Should their behavior at- tract the interest of a prosecutor, the prosecutor may find some crime, such as obstruction of justice or conspiracy, to threaten in order to gain coopera- tion.2 9 Thus, under the current system of plea bargaining, the adversary legal system is being severely undermined and an innocent individual is sacrificed for the pretense of the public good and its insatiable need to regu- late every aspect of individual life. As the hero in Arthur Koestler's Stalin- ist critique novel Darkness at Noon, pleads, "I plead guilty to having rated the question of guilt and innocence higher than that of utility and harmful- ness. Finally, I plead guilty to having placed the idea of man above the idea of mankind."3 0 II. THE PERVERSION OF PLEA BARGAINING AND UNDERMINING THE ADVERSARY SYSTEM

### Contention 7: Coercion

#### Plea bargaining cements dominant groups social hegemonic power

Schehr 18 [Robert Schehr, Professor at the Department of Criminology and Criminal Justice at Northern Arizona University and Co-Director of the Arizona Innocence Project at Northern Arizona University with a Ph.D. in Sociology from Purdue University West Lafayette, a M.S. in Sociology from Purdue University West Lafayette, an MLS Law from Yale University, and a B.A. in Labor Studies from the University of Illinois Springfield, 7-1-2018, “Standard Of Proof, Presumption Of Innocence, And Plea Bargaining: How Wrongful Conviction Data Exposes Inadequate Pre-trial Criminal Procedure,” California Western Law Review, https://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=1646&context=cwlr]/Kankee

The purpose of this article is to advance questions seemingly so obvious that they largely go without comment in published legal scholarship. For example, one could ask: What is the standard of proof required for conviction via plea bargain? When compared to the constitutionally mandated requirement that prosecutors must meet the burden of proof beyond a reasonable doubt to convict at trial, does the criminal procedure leading up to plea negotiations represent an unconstitutional deviation both in principle and in practice? Should there exist a pre-trial presumption of innocence?9 In the absence of a pre-trial presumption of innocence and with the low standard of proof required for indictment, is it likely that a significant number of accused but innocent suspects may be wrongfully convicted? For reasons articulated below, I do not believe that the criminal procedure leading up to plea negotiations satisfies the Supreme Court’s high standard for felony conviction, because these procedures lack a presumption of innocence. It is this presumption of guilt that generates fertile ground for law enforcement and prosecutors to procure convictions via grand jury indictments where only probable cause is the standard of proof to indict. To convincingly develop my argument, I am going to request that my readers suspend their disbelief. Since the 1970s, plea bargaining has become so ubiquitous that much about its procedure has attained an essentialist quality that takes for granted the requisite standard of proof in criminal cases. At issue in this article is whether it is conceptually and procedurally efficacious to frame plea bargaining within the context of standards of evidence sufficiency, also referred to as “standards of proof.” When taken together, institutional rationales and the implementation of plea bargaining have been established as legal norms reaching hegemonic status. That is, nearly all criminal justice practitioners, as well as victims and offenders, view the institutionalization of plea bargaining as an immutable matter of fact.10 Whether it serves systematic efficiency interests by saving resources, or by dispensing justice with greater speed and efficiency, plea bargaining exists for all actors as the normative mechanism through which felony cases are prosecuted. I quite intentionally invoke Antonio Gramsci’s11 conceptualization of hegemony to introduce a theoretical level of complexity. In doing so, I hope this will move our discussion away from one that is exclusively doctrinal and internal to administrators of justice in order to locate plea practice in a system- reproducing context. Specifically, Gramsci defines social hegemony as possessing two aspects: 1. The “spontaneous” consent given by the great masses of the population to the general direction imposed on social life by the dominant fundamental group; this consent is “historically” caused by the prestige (and consequent confidence) which the dominant group enjoys because of its position and function in the world of production. 2. The apparatus of state coercive power which “legally” enforces discipline on those groups who do not “consent” either actively or passively. This apparatus is, however, constituted for the whole of society in anticipation of moments of crisis of command and direction when spontaneous consent has failed.12 Colloquially, we may define hegemony as rule by consent, backed up by the threat of coercion. Actions taken by the Supreme Court, Congress, and the Judicial Conference in the 1970s, as they pertained to setting the foundation for plea bargaining, have generated consent from bureaucratic actors administering justice (e.g., law enforcement, prosecutors, defense attorneys, judges), defendants, and from the public more generally. Invoking the concept of hegemony tips my hand as one who views the proliferation of plea bargaining as being on par with enhanced social control.13 After all, plea bargaining takes place in private, requires renunciation of fundamental rights protections,14 and proceeds following indictment based upon the second lowest standard of proof.15 Included is the fact that when presenting evidence before a grand jury, prosecutors need not concern themselves with Federal Rules of Evidence nor the presentation of exculpatory evidence and can reconvene a grand jury as frequently as necessary until finally procuring an indictment.16 What emerges is a portrait of state power that bears a striking resemblance to the fifteenth-century Star Chamber;17 hardly the epitome of due process in a democracy. Viewing pleas through the lens of hegemony, a taken-for-granted normative acceptance of an undernourished system of due process emerges where public consent has been manufactured through a series of significant legal and political maneuvers. Furthermore, we cannot forget the potential threat of coercion should a defendant reject the plea and elect to pursue trial. This threat is leveraged by the fact that that the defendant will confront a “trial tax”18 if convicted and as a consequence, suffer a far graver punishment.19 With this in mind, plea bargaining then manifests as a “legal-rational”20 mode of hegemonic state power.21 Recognition of this fact appears in European human rights law where plea bargaining in exchange for downward departures in sentencing “may violate the presumption of innocence” because the incentive of a reduced sentence may be at odds with the presumption.22 As my argument develops in the following pages, it will be helpful to keep this emphasis on hegemony in mind. Since the 1970s, the scales have tipped heavily in the direction of pleas following indictment as opposed to establishing proof beyond a reasonable doubt at trial before triers of fact. Given the pervasiveness of plea bargaining, we must step back and deconstruct existing criminal procedure leading to indictment prior to commencement of plea negotiations. This will allow us to discern whether the standard of proof, upon which rests determination of the quantum of proof necessary to indict, is a signifier that is comprehensive enough to generate a conviction in a criminal case. II. S TANDARD OF P ROOF

#### Prosecutors coercively threaten capital punishment as a bargaining chip to secure guilty pleas, increasing life without parole

Chapman 25 [Ronald Chapman, Federal Trial Lawyer with a L.L.M from the Loyola University Chicago logo J.D. from the Cooley Law School, and a B.A. in Philosophy from Oakland University, 7-23-2025, "DEATH DEALERS: THE BRUTAL REALITY OF DEATH PENALTY NEGOTIATION", No Publication, https://ronaldwchapman.substack.com/p/death-dealers-the-brutal-reality?utm\_source=%2Finbox%2Fsaved&utm\_medium=reader2]/Kankee

Death as Leverage The Supreme Court’s 1968 decision in United States v. Jackson warned that conditioning life or death on a citizen’s willingness to demand a jury could be unconstitutionally coercive. Prosecutors quickly discovered a workaround: announce the intention to seek death, wait for the terror to ripen, then exchange mercy for a guilty plea. Legal scholar William W. Berry III calls the modern result “mandatory LWOP by threat of execution,” a system that equips prosecutors with a punishment they rarely intend to carry out but cannot resist wielding as a hammer.  It works because defendants understand the odds. Over 95 percent of felony convictions in America are secured through plea bargains.  Put an executioner behind that bargain and the risk calculus changes dramatically: confess and live, or roll the dice and maybe die. Kohberger’s deal was only the newest, most celebrated example. Since 2018 the Death Penalty Information Center has tracked more than two hundred capital indictments that ended the same way—death notice filed, guilty plea entered, death notice withdrawn. The swap happens so often that veteran defense lawyers keep a shorthand for it: “death‑qualified leverage.” The Price Tag We Hide Defenders of capital punishment sometimes answer the leverage critique with dollars: if a plea avoids the high cost of a death trial, is that not fiscal prudence? Yet the math cuts the other way. Even attempting to secure death balloons expenses. An Indiana study found that a capital prosecution and its direct appeal cost counties more than ten times what a comparable life‑without‑parole case would. California’s own internal audit put statewide death‑row expenditures north of $4 billion since reinstatement in 1978—thirty times the price of permanent incarceration, with only thirteen executions to show for it. In other words, we lavish money on a punishment we then bargain away for free. Human Error, Human Cost Since 1973, 200 people in the United States have been exonerated after receiving death sentences. That is an error rate intolerable in any human institution, let alone one that extinguishes life. The same randomness that sends a Georgia killer to life and a Floridian to death also steers innocent defendants onto gurneys. Missouri executed Marcellus Williams last September even as DNA evidence questioned his guilt and prosecutors asked for a reprieve. Cases like his invite a grim thought experiment: how many of those 200 exonerations would have lived had they, like Kohberger, been offered life for the magic word “guilty”? The View from Abroad Globally, America now keeps unsavory company. Only fifty‑odd nations retain capital punishment in law, and a far smaller cadre actually carries it out. China, Iran, Saudi Arabia, Egypt and Iraq dominate the annual execution charts; the United States is often the lone Western democracy on the list.  The same moral instinct that prompted Canada, Australia, the entirety of Europe and most of Latin America to abandon the gallows has not left American hearts—polls show support for death drops below fifty percent when jurors are offered life without parole plus restitution—yet habit and politics keep the practice alive. The Extortion Problem Extortion is defined as obtaining something of value through threats. When the state brandishes execution to obtain a confession, the line between legal plea bargaining and extortion blurs. The prosecutor’s threat is lawful, but its psychological force is absolute. Families desperate for closure, counties wary of budgets, judges eager to clear dockets—each has incentives aligned against the lengthy capital trial the Constitution supposedly guarantees. Still, the plea deal’s efficiency masks its violence: we leverage the fear of death to secure a result we publicly claim is second‑best. Toward Abolition with Accountability Critics of abolition often ask, “What about the worst of the worst?” The Kohberger sentences answer: life without the possibility of release, served in the isolation of a maximum‑security unit, is punishment enough to satisfy even Idaho’s conservative electorate. It incapacitates, acknowledges gravity, and—crucially—allows for correction if the justice system errs. Add mandatory restitution funds for victims and periodic judicial review, and LWOP can carry a weight the death penalty only mimics. America abolished the stocks, the lash, and the gallows‑pole not because crime disappeared but because our sense of justice matured. If a punishment so irrevocable can be traded away on a Tuesday morning for the price of a guilty plea, it is no longer punishment at all. It is a bargaining chip—and bargaining chips belong in casinos, not courtrooms.

#### Stats prove that prosecutors threaten death to secure a deal

Subramanian et al. 20 [Ram Subramanian, director of the Brennan Center’s Justice Program and former editorial director of the Vera Institute of Justice with an undergraduate degree from Wesleyan University, a master's degree in international affairs from Columbia University, and a law degree from the University of Melbourne Law School, Léon Digard, psychotherapist and criminology research with a PhD from the University of Cambridge in Criminology, Melvin Washington II, public policy professional and researcher at the Vera Institute of Justice with a MPP from UMich, and Stephanie Sorage, Analyst at Corporate Insight with a master’s degree in psychology from CUNY, 09-2020, “In the Shadows: A Review of the Research on Plea Bargaining,” Vera Institute of Justice, https://vera-institute.files.svdcdn.com/production/downloads/publications/in-the-shadows-plea-bargaining.pdf]/Kankee

The impact of death penalty sentences Fears about the coercive nature of plea bargaining are perhaps most pronounced in cases in which prosecutors have the option to pursue a death penalty conviction. Critics note that when taking cases to trial that may result in a sentence to death, people may be more likely to accept a plea deal that they would otherwise have rejected—due either to the harsh terms of the sentence and/or their factual innocence.42 The threat of the death penalty is used as leverage by prosecutors in bargaining, and both prosecutors and defense lawyers agree that the specter of a death penalty puts prosecutors in a uniquely strong position.43 Although analysis of actual cases is hampered by a relatively small sample to draw from, the quantitative studies suggest that the option to pursue a death penalty has a significant effect on plea bargaining. One such study conducted a natural experiment capitalizing on the 1995 reinstatement of the death penalty in New York State to analyze changes in case outcomes before and after the law change.44 The study found that people charged in murder cases were 25 percent more likely to plead guilty to their charges following the law change, regardless of whether the prosecutor had explicitly filed a notice to pursue the death penalty in the case.45 The reintroduction of the death penalty, the researchers concluded, made people less likely to be offered a charge reduction (typically the more advantageous type of plea offer) and more likely to take a sentence deal—suggesting that prosecutors did indeed have—and use—greater power in plea bargaining.46 A study from Georgia produced similar results.47 The study looked at eight years of murder cases from across the state that met the criteria necessary to be tried as capital cases. The researcher compared the outcomes of cases in which prosecutors pursued the death penalty with those in which they did not, using sophisticated statistical techniques to control for a variety of case characteristics. They found that, all else being equal, people charged in murder cases were approximately 20 to 25 percentage points more likely to plead guilty when faced with the death penalty.48 Put another way, the study suggests that when prosecutors actively pursue a death penalty, people in an additional two out of every 10 cases are deterred from going to trial.49 These findings have been supported nationally. A comparison of 33 counties—some with the death penalty, some without—found that, when the death penalty was available, 19 percent of first degree murder cases were resolved with a guilty plea leading to a prison sentence of more than 20 years; in counties without the death penalty, this was true for only 5 percent of cases.50 This large difference in outcomes remained statistically significant even when controlling for other case characteristics. In pleading guilty to a life sentence, people are relinquishing their right to appeal, the chance of an acquittal, and the possibility of a shorter sentence; avoiding the death penalty is used as a “substantial incentive” to encourage people to make this otherwise unappealing decision.51 Legal characteristics

#### Plea bargains allow Foucauldian exploitation of innocent suspects to falsely confess – interrogators exploit their disciplinary control to make plea bargains their savior

Dunning 10 [Eric Dunning, researcher at the University of Alabama, 7-1-2010, “Wrongful Incarceration: A Foucauldian Analysis,” Journal of Theoretical and Philosophical Criminology, https://scholars.indianastate.edu/cgi/viewcontent.cgi?article=1026&context=jtpcrim]/Kankee

The State v. The Body – Controlling the soul of the accused: False Confessions False confession can be one of the most problematic aspects of wrongful conviction, for it brings a palpable cognitive dissonance that can be distilled down to one question: Why would anyone confess to something they did not do? For many, the same many that find themselves on a jury, a false confession is an inconceivable notion, as “only the guilty confess” is a social construction laden with an almost inexorable power. False confessions encompass not only psychological, emotional and physical aspects, but also the institutional power of the state, as well as the “rightness” of state power as perceived by the innocent. Obtaining a confession is one of the most important aims of police interrogators, as an estimated 80% of cases are solved by a confession (Conti, 1999). Confession evidence is considered to be the most damaging form of evidence at trial (Underwager & Wakefield, 1992; Wrightsman & Kassin, 1993; Zimbardo, 1967) as well as serving to relieve doubts of judges and jurors (Driver, 1968; Reik, 1959; Schafer, 1968, Nietzel & Fortune, 1994) Currently about 25% of the over 240 wrongful convictions overturned by DNA evidence in U.S. have involved some form of false confession (The Innocence Project, 2010). This problem has an ignoble history as Bedau and Radelet (1987) discovered that in 49 of 350 wrongful convictions, the foremost cause was a false confession brought about by coercive interrogation. Tracking back even further, Munsterberg (1908), in his book, On The Witness Stand, discusses false confessions where, “in some instances the confessing person really believe themselves guilty” (p.146). All the above should remind us that false confessions are not a new phenomenon, however, in better understanding them, an appreciation of the power dynamics and disciplinary forces at play is necessary. A complete examination of the multi-variant nature of false confessions is beyond the scope of this paper, however, some pertinent issues can be addressed. In the arena of false confession, coerced-compliant and coerced-internalized confessions are where the Foucauldian framework finds the most fertile soil. Coerced-Compliant Confessions Coerced-compliant confessions occur when a suspects confesses, despite knowledge of their innocence, due to extreme methods of police interrogation (Gundjonsson, 1992; Kassin, 1997). These types of confessions are usually the result of: threat/intimidation, use of force, diminished capacity (i.e. mental impairment, exhaustion, etc.), ignorance of the law, or devious interrogation techniques (i.e. false claims of incriminating evidence). Although not particularly intricate, the power-knowledge constructions in these types of confessions are efficient, as they are the direct use of the Foucauldian concepts of isolation, control of time and the body to deconstruct the suspect’s knowledge (i.e. I am innocent) into a knowledge that serves the power implementations of the state (i.e. I confess). For individuals isolated in an interrogation room, the lack of knowledge about judicial procedure is an area ripe for an interrogator to “help” the docile suspect through the use of plea bargains, as seen in the case of Marcellius Bradford (IL), who 17 at the time, and with the help of the Cook County State’s Attorney’s office, pled guilty and implicated three other innocent men in the rape and murder of Lori Roscetti. The Foucauldian framework of isolation/solitude creates a pressure, “with maximum intensity…that provides an intimate exchange between the convict and the power that is exercised over him.” (p.237). In using isolation as a pressure tactic by which to observe/control the suspect, the state also provides the one option by which to relieve that pressure, in which the suspect is “trained” to comply - via a plea bargain. There have been many cases of juveniles; the mentally disabled, etc. confessing to crimes, however, for those outside this category, isolation must be augmented by: (1) a distortion of knowledge and (2) an introduction of new knowledge to explain the suspect’s claims of innocence. These two augmentations give the suspect a means by which to acquiesce to the demands of the state, a prime example of the Foucauldian diversification and infiltration of power in which the state works with the body of the suspect, not against it, as seen in the case of Danial Williams (VA), “Williams, who was exhausted and had not eaten since breakfast at around 9am, maintained his innocence for the first ten hours as he was interrogated by three different detectives. He agreed to take a polygraph, and was falsely told that he failed.” (Leo & Davis, 1999) The “knowledge” given to Williams was not the misconduct by the detectives, but rather that some machine, controlled by agents of the state, had ascertained that his body…had failed his soul. In essence, his body, under the disciplinary forces of the state, could not contain his guilt any longer. Now, with confession in hand, the state institutes as variety of disciplinary forces that ensure that the confessor will be treated harshly at every stage of the investigative and trial process (Leo, 1996). The confessor is more likely to be incarcerated prior to trial, charged, and most importantly, pressured to plead guilty in the courtroom. Confessions are so prized by the state because, in the words of former U.S. Supreme Court Justice William Brennan, “no other class of evidence is so profoundly prejudicial” (Colorado v. Connelly, 1986:182). The power-knowledge granted by confession permeates every aspect of the case. Poor witness identification, which would never be admitted, becomes corroborating evidence (Castelle & Loftus, 2001), police close the investigation and make no effort to pursue exculpatory evidence (Leo & Ofshe, 1998), prosecutors charge the highest number/types of offenses available (Cassell & Hayman, 1996), defense attorneys pressure clients to accept lesser charges to avoid a jury trial (Nardulli, Eisenstein & Fleming, 1988), it establishes an irrefutable presumption of guilt among justice officials, the media, the public and jurors (Leo & Ofshe, 1998) and judges are less likely to suppress even highly questionable confessions (Givelber, 2000). Foucault’s conceptualization of the state power manifested through juridico-economic means is also evident as judges tend to punish defendants more harshly for their claims of innocence, viewing it as a cost to the state in time, effort and resources (Leo, 2008). The coerced- compliant confession calls us back to the “public spectacle” of torture, as all parts of the carceral system - prosecutors, defense attorneys and judges play a role in marking and investing the body of the confessor so that it may emit the signs of deviance, and reaffirm the power of the state, when brought before a jury. Confessions are overwhelming in their disciplinary power, especially coerced ones, which are extracted by the most intimate forms of discipline on the body (i.e. stress, fear, deprivation, threat, etc.). The coerced-compliant confession is a judicial broadsword, yet there is also a scalpel, to cut around the edges, that the state wields with equal effectiveness. Coerced-Internalized Confessions

#### Interrogations’ false knowledge production is so coercive that they cause innocents to falsely internalize belief in their own guilt by destroying their preexisting knowledge of the self

Dunning 10 [Eric Dunning, researcher at the University of Alabama, 7-1-2010, “Wrongful Incarceration: A Foucauldian Analysis,” Journal of Theoretical and Philosophical Criminology, https://scholars.indianastate.edu/cgi/viewcontent.cgi?article=1026&context=jtpcrim]/Kankee

Coerced-Internalized Confessions While coerced-compliant confessions run parallel with the “public spectacle” of torture, coerced-internalized confessions are more punishment-oriented, in which the confessor is removed from the exposed, physical/psychological deprivations of forced compliance and is tucked away - psychologically placed within the walls of a carceral system. In the same manner that 18 th century penal reforms focused more on controlling time and isolation as means to invest “the incarcerated soul” with an understanding of the proper means and modes of being a productive citizen for the state, coerced-internalized confessions also focuses on the soul of the confessor. A coerced-internalized confession is one in which the confessor, having been subjected to highly suggestive methods of interrogation, comes to believe that they committed the crime (Kassin & Sukel, 1997; Kassin & Kiechel, 1996). The starting point for coerced-internalized confessions is the internal conception of the confessor in regarding the very nature of the judicial system. A carceral society must exercise a very specific power- knowledge across the social body: there is an inherent “rightness” to the justice system, so the innocent need not fear it. The state has a vested interest in social inoculation against judicial cynicism. This reaches back to a Foucauldian framework, in which the diversification of the state power serves to make the social body pliable and productive. In coerced- internalized confessions, it is a micro-physical relationship, the power-knowledge of the state against the social body writ small. One of the results of the normalization of the carceral society is reflected in research by Kassin and Norwick (2004), using 72 participants in a study on theft and investigation; found that the innocent participants were significantly more likely to waive their Miranda rights than those who were guilty. Further research supported the idea that naïve belief in the “power of their innocence” to set them free was the major impetus for waiver. Whether guilty or innocent, any day an interrogator can get a suspect to waive their Miranda rights is a good one. Peter Reilly, an 18 year old who confessed to killing his mother after several hours of interrogation, provides tangible support for the “innocence mythos” that has been cultivated by the state as a disciplinary force. When asked why he waived his rights, Reilly said, “My state of mind was that I hadn’t done anything wrong and I felt that only a criminal really needed an attorney, and this was all going to come out in a wash” (Connery, 1996, p.63). The idea that innocence will clear matters up, is power-knowledge construction that specifically targets the innocent, as previous research (Softley, 1980; Leo, 1996) has found that those with no prior felony record are far more likely to waive their rights than those with criminal justice “experience.” The carceral justice system has individuated certain bodies (i.e. former felons), “trained” them (i.e. incarceration) and made them “capable” (i.e. power-knowledge) of exerting their Miranda rights, thereby reducing their visibility as they fall silent - withdraw from the carceral system - and await their attorney. However, for the innocent, they are in a micro-physical Panopticon, induced into a conscious visibility by consistent interactions with interrogators in the attempt to prove their innocence, complying with every request and answering every question, erroneously waiting for the “innocence mythos” to take effect. This is a power-knowledge dynamic with the scales tipped firmly in favor of state power, for the innocent have no knowledge/experience on how to exert their power (i.e. avoid false confession). Once again, as seen with the eyewitness, once the innocent have entered the carceral system of the interrogation room, they become docile and completely reactive to the state. The reactivity and the limitations of power-knowledge are the proverbial final nails in the coffin. A false confession is only hours, maybe minutes away. However, with coerced-internalized confessions, the state must make the suspect truly believe they committed the crime. The creation of belief comes from the state reframing the suspect’s body and mind. They must find a way to puncture the suspect’s belief in agency, free will and any lingering sense that they are in control of their body. The interrogation breaks down the suspect’s knowledge of their selves and institutes, through discipline, a new form of knowledge: a knowledge that gives the suspect a chance for absolution. While a coerced-compliant confession offers a plea bargain to help the suspect protect their body (i.e. no death penalty), a coerced-internalized one offers the suspect way to protect their mind (i.e. why did I do this?). It provides a means for the innocent to explain why they find themselves in the carceral mechanisms of the state, “as Williams continued to deny involvement, the interrogators began to suggest that he could have ‘repressed’ his memories of the crime – that he could have blacked out, or been sleepwalking, that he could have amnesia…at about 5:50 a.m., after almost 12 hours in the police station, Williams gave in, and began to concoct a story of his involvement.” (Leo & Davis, 1999) Creating an internalization that causes a suspect to believe they committed the crime is much more powerful than a coerced one, for the suspect is far less likely to retract the confession or fight its validity in the courtroom. So, while coercion is the quickest means, internalization is the more substantive of the two. Equilibrium and the Judicial State

#### Violations of contract law prove plea bargains are coercive

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Plea Bargaining and Improperly Obtained Assent The final step in our economic critique of plea bargaining leads us directly to its justification by the Supreme Court in Brady – the application of a juridically distorted law of contracts to plea bargaining. Since the Court has found justification for the plea in contract law, it seems only reasonable that the law of contracts should equally apply to plea bargains to deter- mine whether they are constitutionally permissible. This section will focus exclusively on the deficits arising from the application of contract law to pleas, with particular emphasis placed on improperly obtained assent.57 I will focus exclusively on misrepresentation, duress, undue influence, and unconscionability. The reason for this emphasis is consistent with the law of contracts and improperly obtained assent where, “each of the promisors [defendants] … manifested their assent to contract and were competent to do so. Nonetheless, their assent was alleged to have been induced by conduct on the part of the promisee [prosecutors] that undermines the normal signifi- cance of a manifestation of consent.”58 As I will demonstrate, the structure of plea bargaining as a contract is such that it is infected by four manifesta- tions of deficit that would, under private law, render the contracts to be in violation of constitutional law. Misrepresentation According to the Restatement (Second) of Contracts §159, misrepresentation “is an assertion that is not in accordance with the facts.”59 Furthermore, §162 stipulates the following: (1) A misrepresentation is fraudulent if the maker intends his assertion to induce a party to manifest his assent and the maker a. knows or believes that the assertion is not in accord with the facts, or b. does not have the confidence that he states or implies in the truth of the assertion, or c. knows that he does not have the basis that he states or implies for the assertion. (2) A misrepresentation is material if it would be likely to induce a reason- able person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so.60 Police only share case information directly with prosecutors. The typical plea case file will include a police crime scene report, a presentencing report, and possibly, though rarely, post hoc witness interviews. Three practices sig- nify case misrepresentation: 1) withheld material impeachment information, 2) charge stacking, and 3) an actual factual basis upon which to conclude the truth of events as asserted by the state. Each of these three practices is fraught with misrepresentation as defined by §162. In United States v. Ruiz61 a unanimous Supreme Court held that the United States Constitution does not require prosecutors to share material impeachment evidence with criminal defendants prior to entering plea nego- tiations. The justification for the opinion, written by Justice Breyer, pivots on the defendant’s waiver of non-jurisdictional defects that accompanies the guilty plea (as discussed in the first part of this chapter), as well as the bur- den that would be placed upon the state to conduct an investigation prior to entering into plea negotiations.62 What this means is that prosecutors who relied upon confidential informants and other witnesses providing informa- tion leading to the subsequent arrest and indictment of a defendant are not required to share the identities of those informants and witnesses with the defendant for possible impeachment.63 That means that there is no way for the defendant to know a) who bore witness against them, b) their ability to confront that witness (Sixth Amendment waiver), or c) even know the sub- stance of the information shared with prosecutors. What is as yet unknown is whether the Ruiz opinion equally applies to withheld exculpatory evidence that would at trial be guided by Brady v. Maryland64 and its progeny. In those states with open discovery laws, inculpatory and exculpatory evidence should be shared as a routine matter. But even in those states, how would we know? Prosecutorial control over all information relating to the case puts the defense at a serious disadvantage regarding discovery. Defendants will not be afforded the time or resources to conduct a pre-plea investigation, resulting in asymmetrical control over and dissemination of information. Charge stacking is the practice of intentionally overcharging criminal defendants with violations of criminal law to induce a downward charge and sentence bargain.65 Typically, these are charges that the state has no inten- tion of pursuing as part of its case in chief were the case to go to trial since the existing evidence would be too thin to gain a conviction. Threatened but superfluous charges are used as bargaining chips held by the state and presented to defendants by prosecutors as an indication of “good-faith” negotiations over optimal benefits. With little knowledge of the evidence that actually exists within the state’s file, the absence of resources (including time) to properly investigate the case, and the probability of a conviction at trial generating a far greater sentence than that offered by the plea (the trial tax), the state is guilty of misrepresentation. Finally, Federal Rule 11 provides no guidance for determining the quan- tum of evidence constituting the “factual basis” necessary to convict by way of a guilty plea. Syllogistically, it must be true that since guilty pleas are the immediate byproduct of indictments, and since the standard of proof necessary for a grand jury to indict is probable cause, we must assume that the quantum of evidence necessary to meet the “factual basis” criteria to convict by way of the plea is probable cause. Probable cause is the second lowest standard of proof. This is, of course, quite reasonable since no case investigation has taken place to generate a more robust accounting of alleged criminal activity. With no case investigation, neither the prosecutor nor the defense attorney has much information pertaining to factually accurate accounts of allegedly criminal events. The question, then, is whether the probable cause standard generates enough of a factual basis to meet consti- tutional muster. With one-sided adversarial control over negligible case evi- dence, and no mandate to share exculpatory material impeachment evidence with the defense (and likely any other exculpatory Brady material), by what standard should we be assured that prosecutors are engaging in truthful plea negotiations? In sum, how does the defendant prove a negative? When exposed to actual plea practice, Federal Rule 11’s “factual basis” standard is legal sophistry, and as a result, criminal defendants are subjected to systemic information asymmetry generative of misrepresentation. Duress Plea bargains are “negotiated” under conditions of duress. And while the noun “duress” is not one that most of us use in daily interaction, its meaning is well known to all lay people. Simply, duress means: “threats,” “violence,” “constraints,” or other action brought to bear on someone to do something against their will or better judgment. The lay definition of duress provides context for the Restatement (Second) of Contracts. While the Restatement (Second) of Contracts speaks specifically to physical duress, basing my argu- ment on my previously published work on neurophenomenology, I would add psycho-emotional duress as well. Specifically, “the paradigm defense to con- tract is that of physical duress. It seems obvious that one’s ‘consent’ to con- tract is not binding if it was obtained by the use or threatened use of force.”66 Barnett and Oman cite Lord Coke’s expression of the conditions manifesting physical duress, and they include: “1. for fear of losse of life, 2. of losse of member, 3. of mayhem, and 4. of imprisonment.”67 In §175 of the Restatement (Second) of Contracts, the definition of duress includes the following: (1) If a party’s manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.68 In §176, the Restatement (Second) of Contracts identifies “When a threat is improper.”69 Among the list of actions that render a contract void, and that would apply to plea bargaining, is: • What is threatened is a criminal prosecution. • What is threatened is the use of the civil process and the threat is made in bad faith. • The threat is a breach of duty of good faith and fair dealing under a contract with the recipient. • A threat is improper if the resulting exchange is not on fair terms, and • (a) The threatened act would harm the recipient and would not sig- nificantly benefit the party making the threat. • (c) What is threatened is otherwise a use of power for illegitimate ends. The ways in which defendants confronted with the plea are exposed to duress include: 1) the trial tax (excessive sentence if convicted at trial), 2) charge stacking, 3) minimal case investigation (if any), 4) no procedural access to impeachment evidence (Ruiz), and 5) threatening a defendant with increased punishment if the prosecutor’s plea offer is rejected and the defendant is con- victed at trial (see Brady and Bordenkircher). Undue Influence Undue influence puts prosecutorial pressure front and center during plea negotiations. An expression of undue influence as applied to the law of con- tracts appears in the 1868 case Hall v. Hall: To make a good contract a man must be a free agent. Pressure of whatever sort which overpowers the will without convincing the judgment is a spe- cies of restraint under which no valid contract can be made. Importunity or threats, if carried to the degree in which the free play of a man’s will is overborne, constitute undue influence, although no force is used or threatened. A party may be led but not driven, and his acts must be the offspring of his own volition and not in accord with someone else’s.70 Barnett and Oman clarify the meaning of the Hall opinion by stressing that undue influence involves the use of excessive pressure to persuade one vulnerable to such pressure, pressure applied by a dominant subject to a servient object. In combination, the elements of undue susceptibility in the servient person and excessive pressure by the dominating person make the latter’s influence undue, for it results in the apparent will of the servient person being in fact the will of the dominant person.71 Under the Federal Rules of Criminal Procedure Rule 11, plea bargains are entirely the province of prosecutors who determine a) whether to charge, b) whether to plea, c) the conditions of the plea, and d) the proposed sentence. This process unfolds premised upon indictment by grand jury where the standard for indictment is probable cause. And while it may be said that the Sixth Amendment right to counsel should abate concerns of undue influence, the scholarship surrounding assistance of counsel in plea cases suggests that for a host of economic and pragmatic professional culture reasons, defense attorneys in no way serve to ameliorate the power imbalance constituting plea negotiations. For reasons previously stated, defendant Homo sapiens is presented with a Faustian bargain: a) plead not guilty and exercise the right to trial where, if convicted, the sentencing ranges are draconian (trial tax), b) threaten to plead not guilty and be pressured by prosecutors and/or judges to recon- sider the guilty plea offer or risk the maximum sentence if convicted at trial (which may include execution – Brady and Bordenkircher), c) confront charge stacking (overcharging cases, which confuses the plea negotiation by introducing duress), d) withholding impeachment evidence (Ruiz), and e) withholding other non-jurisdictional defects known to the prosecutor but not to the defendant (e.g., Brady v. Maryland material). Finally, Rule 11’s prohibition on judicial oversight relating to the sub- stance of the plea deal means that the prosecutor, and only the prosecu- tor, has the power to administer the plea process. Because plea deals are arranged in private, based upon an admittedly thin police crime scene report and a presentencing report (Why conduct an investigation at this point in the process when an admission of guilt makes it unnecessary?), and without judicial review of the substance of the charges and the “factual basis” nec- essary to establish whether the appropriate charges have been brought and guilt has been properly established, working a plea conviction case on appeal is nearly impossible to do. That means that once codified, the plea deal will likely stand without any attack upon substantive or procedural defects. In this context, the plea should be voided as an improperly obtained assent since “negotiations” took place under circumstances of undue prosecutor influence. Unconscionability The last of the concerns to be raised relative to improperly obtained assent to contract is unconscionability. To be an unconscionable act means an act that is “wrong” or “excessive.” In the language of contract law, unconscion- ability means an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party … In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power. The manner in which the contract was entered is also a relevant consideration. Did each party to the contract, considering his obvious education or lack of it, have a reasonable oppor- tunity to understand the terms of the contract[?] … But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms.72 In order to prevail on a charge of unconscionability, a defendant has avail- able §2-302 of the Sales Contracts: The Uniform Commercial Code, and §208 of the Restatement (Second) of Contracts. §2-302 provides for court consideration of the substantive contractual agreement to determine whether unconscionability existed, and if so, whether it tainted the contract. The Restatement (Second) of Contracts, §208, applies nearly identical language, voiding any contract, or part of a contract, where unconscionability has been uncovered. Two problems are immediately noticeable when attempting to apply unconscionability in the context of plea bargaining as a contract. First, Rule 11 expressly forbids judicial participation in, or review of, substantive plea negotiations and agreements (judges affirm the knowing and volun- tary prongs during the plea colloquy, and they issue the sentence). Second, considering the absence of judicial oversight, coupled with Supreme Court precedent forbidding defense access to impeachment evidence (and possibly other exculpatory Brady v. Maryland material) known to the prosecutor during plea negotiations (Ruiz), charge stacking, and threats of harsher pun- ishment if convicted at trial, we are left with a negotiation procedure that bears the hallmark of unconscionability but without any apparent statutory or common law remedy. In sum, the private law of contracts provides far greater judicial oversight and legal remedies for unconscionably procured agreements, but it does so because judges have the authority to scrutinize the terms and conditions generating the agreement for fairness. Unlike the prosaic defense of the proof beyond a reasonable doubt stand- ard expressed in Winship, Brady, with its emphasis upon contract law, ushered in constitutional protection for a bastardization of both criminal procedure and contract law since plea bargaining as a contract gives rise to improperly obtained assent. Contracts of Adhesion In this final section of the chapter, I would like to explore what I think may be a hybrid application of contract law to plea bargaining. While it super- ficially appears to be a conventional contractual negotiation between two parties where concerns relating to misrepresentation, duress, undue influ- ence, and unconscionability as related to the plea context are paramount, the plea bargaining context also resembles contracts of adhesion. Contracts of adhesion are typically entered into by two or more private parties nego- tiating a deal. To the extent that contracts of adhesion are guided by pri- vate and not public law, they do not automatically appear to apply to plea bargain contracts negotiated between criminal defendants and the govern- ment. In 1983, Professor of Law at Harvard Law School Todd Rakoff pub- lished what is considered now to be the standard articulation of contracts of adhesion.73 For Rakoff, there are seven characteristics defining contracts of adhesion: 1. The document whose legal validity is at issue is a printed form that con- tains many terms and clearly purports to be a contract. 2. The form has been drafted by, or on behalf of, one party to the transaction. 3. The drafting party participates in numerous transactions of the type represented by the form and enters into these transactions as a matter of routine. 4. The form is presented to the adhering party with the representation that, except perhaps for a few identified items (such as the price term), the drafting party will enter into the transaction only in terms contained in the document. This representation may be explicit or may be implicit in the situation, but it is understood by the adherent. 5. After the parties have dickered over whatever terms are open to bargain- ing, the document is signed by the adherent. 6. The adhering party enters into few transactions of the type represented by the form – few, at least, in comparison to the drafting party. 7. The principal obligation of the adhering party in the transaction consid- ered as a whole is the payment of money.74 What should be most apparent from Rakoff’s list of adhesion contract char- acteristics is the fact that, in the plea bargaining context, it is the pros- ecutor who, constituted by points 1–4 listed above, holds absolute power over “adherents” or criminal defendants. It is point 7, “payment of money,” that only slightly deviates from the felony plea bargaining situation. That is, depending upon the seriousness of the charge, some felony criminal defend- ants may be able to bargain with prosecutors such that their punishment will be financial remuneration provided to victims and/or the state. In that way, criminal defendants confronting a plea offer are similarly situated to those private parties prosecuted for violating adhesion contracts. More often than not, however, in the criminal context, fines and fees are combined with some kind of probation tail requiring a commitment to avoid criminal activity or confront serious jail or prison time. Contracts of adhesion are offered in a “take it or leave it” format. That is, in the private law context, a contract’s forms and terms have already been determined by corporate attorneys and are used to establish boilerplate lan- guage that applies to all who wish to engage with the party offering the ser- vice. Adherents, those who pursue the good or service being offered by the private seller, are confronted with a contract that includes the “small print” necessary to establish the legal authority and responsibility accruing to each party to the agreement. It is my argument that, but for a few structural dif- ferences, plea bargaining represents a hybrid juridical procedure guided by both conventional contract law and contracts of adhesion.75 Let us return for a moment to the plea bargaining process. Let us also be reminded of the fact that it is the legislature that determines which behaviors will be considered “criminal” violations of law. Those behaviors are clearly articulated and appear as part of each state’s criminal code. In addition, states’ legislatures are equally responsible for establishing the sentencing ranges that apply to convictions of each type of criminal violation. For exam- ple, in my home state of Arizona, the legislature has created three classes relating to the crime of robbery: Robbery, Aggravated Robbery, and Armed Robbery.76 A subject convicted of Robbery (a Class 4 felony) and who has no priors will be sentenced to between 1 and 3.75 years in prison. A subject with one prior conviction will confront a sentencing range of between 2.25 and 7.5 years. For Aggravated Robbery (a Class 3 felony), a subject with no priors may be sentenced to between 2 and 8.75 years in prison, while a subject with one prior will be subjected to between 3.5 and 16.25 years in prison. Finally, for Armed Robbery (a Class 2 “dangerous” felony), a subject with no priors is confronted with a prospective sentence of between 7 and 21 years in prison, while a subject with one prior “dangerous” conviction will be sentenced to between 14 and 28 years in prison. The sentencing ranges provide prosecutors with the ability to focus their sentencing recommenda- tions upon the known facts of the case, with the more serious facts (and the presence of prior convictions) pushing prosecutors to the higher end of the sentencing range. Regardless, there is still a discreet range, a non-negotia- ble framework, that is presented to the adherent felony defendant in what is a “take it or leave it” context. At the local level, institutional practices may become ensconced over time and with regard to specific county attor- neys and their preferences for punishing certain types of crimes (say sexual assault or drug dealing) consistent with their community’s standards and expectations. Still operating within the charge and sentencing guidelines, those local practices may deviate relative to other counties in each state, but there will still emerge a specific set of patterns and practices premised upon the legislatively enacted law that produces a structured procedure for nego- tiating plea agreements. At issue when confronting plea bargains as negotiated contracts is an academic and judicial concern over the application of monopoly power.77 Readers will recall from Chapter 1 that plea bargaining is premised upon Federal Rule 11 and accompanying case law. Federal Rule 11 requires judges to establish in open court as part of a plea colloquy that the defendant has entered the plea agreement without coercion by establishing that the defendant understands the charges they are facing and the rights they are relinquishing (knowing and intelligent), and that they are voluntarily enter- ing into the agreement (voluntariness). As I have previously demonstrated in Chapter 1, both the knowing and voluntary prongs characterizing plea bargaining are empty signifiers requiring far greater scholarly and juridical understanding. Given the monopoly power constituting prosecutors in the plea context, and the fact that it is unlikely that the defendant will be fully aware of the nature of the terms of the contract, plea bargains as adhesion contracts raise the specter of executive force to the level of concern that I have reserved for it in this book. What is known to prosecutors is that most defendants will not understand the terms and conditions of their proposed charges and sentence. In fact, argues Rakoff, “the adhering party is in prac- tice unlikely to have read the standard terms before signing the document and is unlikely to have understood them if he has read them.”78 More impor- tant, prosecutors know this as well. As the drafter of the proposed plea deal, “In all probability the drafting party, too, knows this fact about adherents’ behavior.”79 For Rakoff, it is this aspect of contracts of adhesion – form clauses and the monopoly power of prosecutors – that raises questions about their enforceability. And while the law and terminology used in the private law context may not be properly or easily applied to the public law context, in the case of Williams v. Walker-Thomas Furniture Co.,80 Judge Wright’s explication of the unconscionability of adhesion contracts applies to the plea bargaining case. Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all terms.81 Of course, our concern in this book is for the felony plea bargain and not a “commercially unreasonable contract,” but with this one exception, Justice Wright’s remark in Williams directly applies to the plea. Questions relating to the probity of applying adhesion contracts to pleas include whether there is a public interest at stake, or whether “one party to the transaction had ‘superior bargaining power’.”82 In his work addressing adhesion contracts, Kessler contends that they most often appear when there are significant power imbalances between the offering party and the adherent. Specifically, Standard contracts are typically used by enterprises with strong bargain- ing power. The weaker party, in need of the goods or services, is fre- quently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses. His contractual inten- tion is but a subjection more or less voluntary to terms dictated by the stronger party, terms whose consequences are often understood only in a vague way, if at all. Thus, standardized contracts are frequently contracts of adhesion.83 Once again, it bears repeating that plea bargains take place as part of pub- lic law. Contracts of adhesion are typically considered ubiquitous in the private law context. But it is my argument that, with very few substan- tive exceptions, plea bargaining is a contract of adhesion. Unlike a person who engages in negotiation over the purchase of a new automobile where they will be confronted with the terms of an adhesion contract and may shop those terms to other competitors in the automobile market, crimi- nal defendants are not free to disengage from unfavorable plea negotia- tions by requesting to negotiate with a different and perhaps more amiable prosecutor. Rather, criminal defendants “get what they get.” All power to determine whether to charge, what to charge, what to sentence, and whether to negotiate lies solely within the purview of prosecutorial discre- tion. Kessler’s assessment of the lawfulness of adhesion contracts, then, “lies in their being employed to exert monopolistic, or at least oligopolistic, power.”84 Consistent with a Weberian analysis of contracts of adhesion is attention to the bureaucratic organization of firms and institutions toward the use of form documents. As a way to promote efficiency and consistency, form documents facilitate coordination among departments; eliminate linguistic confusion through the use of familiar terms; make efficient use of expensive managerial and legal talent; provide for supervisory evaluation of adminis- trative actions; and help to solidify the organization’s internal power struc- ture.85 Consistent with the argument that I made in Chapter 5 regarding Homo economicus and the liberty of contract doctrine, each of which was ideologically deployed to the capitalist cause of framing all people as “free to labor,” in a similar way Rakoff suggests that “The consumer’s experience of modern commercial life is one not of freedom in the full sense posited by tra- ditional contract law [i.e., liberty of contract], but rather one of submission to organizational domination, leavened by the ability to choose the organi- zation by which he will be dominated.”86 Here, Rakoff makes precisely the same connection to political economy and domination that I have argued for throughout. That is, the ideological construct of “free labor” really only means the “freedom” to choose one’s oppressor. In the private law context discussed by Rakoff, that would mean the “choice” between commercial vendors. In the public law context, framing criminal defendants as atomized individuals who are confronting the power of the state alone to “negotiate” the terms of their case falls squarely within the narrative construction of Homo economicus and the liberty of contract doctrine as applied to con- tract law. That being so, each of the concerns raised relating to power and information imbalances as attaching to adhesion contracts are equally pre- sent in the plea bargaining case. I conclude this section by arguing, consist- ent with Rakoff, that adhesion contracts, like those I have suggested are applied to the plea bargaining context, are unenforceable. Once placed in its proper context as a matter primarily implicating the ordering of power and freedom in our society, the general rule that con- tracts of adhesion are presumptively enforceable cannot be upheld. The inevitable infringement of adherents’ individual freedom that results from the rule leads one to suggest that form terms should never be enforced.87 There are two important principles raising serious concerns about contin- ued reliance upon adhesion contracts for plea bargains. The first concern is infringement upon the freedom of the adhering parties. The second concern emerges from the first. For Rakoff, The danger of upholding the authoritarian relationship between the drafting party and the adherent is a danger different in kind from the risk that the terms of the transaction, overall, represent an unfair exchange of values, and is less likely to be cured by competition. Indeed, there is a very real possibility that drafting parties will attempt to capitalize on any legal toleration of form contracting. (My emphasis.)88

#### Plea bargaining is coercive like torture

Langbein 78 [John H. Langbein, Professor of Law at The University of Chicago, 2017, "Torture and Plea Bargaining", Taylor & Francis, https://www.taylorfrancis.com/chapters/edit/10.4324/9781315189437-11/torture-plea-bargaining-john-langbein]/Kankee

\*NOTE: three stupidly long argumentative footnotes included

III. THE PARALLELS Let me now turn to my main theme-the parallels in function and doctrine between the medieval European system of judicial torture and our plea bargaining system. The starting point, which will be obvious from what I have thus far said, is that each of these substitute procedural systems arose in response to the breakdown of the formal system of trial that it subverted. Both the medieval European law of proof and the modern Anglo-American law of jury trial set out to safeguard the accused by circumscribing the discretion of the trier in criminal adjudication. The medieval Europeans were trying to eliminate the discretion of the professional judge by requiring him to adhere to objective criteria of proof. The Anglo-American trial system has been caught up over the last two centuries in an effort to protect the accused against the dangers of the jury system, in which laymen ignorant of the law return a one- or two-word verdict that they do not explain or justify. Each system found itself unable to recant directly on the unrealistic level of safeguard to which it had committed itself, and each then concentrated on inducing the accused to tender a confession that would waive his right to the safeguards. The European law of torture preserved the medieval law of proof undisturbed for those easy cases in which there were two eyewitnesses or voluntary confession. But in the more difficult cases (where, I might add, safeguard was more important), the law of torture worked an absolutely fundamental change within the system of proof: it largely eliminated the adjudicative function. Once probable cause had been determined, the accused was made to concede his guilt rather than his accusers to prove it. In twentieth-century America we have duplicated the central experience of medieval European criminal procedure: we have moved from an adjudicatory to a concessionary system. We coerce the accused against whom we find probable cause to confess his guilt. To be sure, our means are much politer; we use no rack, no thumbscrew, no Spanish boot to mash his legs. But like the Europeans of distant centuries who did employ those machines, we make it terribly costly for an accused to claim his right to the constitutional safeguard of trial. We threaten him with a materially increased sanction if he avails himself of his right and is thereafter convicted. This sentencing differential is what makes plea bargaining coercive. There is, of course, a difference23 between having your limbs crushed if you refuse to confess, or suffering some extra years of imprisonment if you refuse to confess, but the difference is of degree, not kind. Plea bargaining, like torture, is coercive.24 Like the medieval Europeans, the Americans are now operating a procedural system that engages in condemnation without adjudication.25 The maxim of the medieval Glossators, no longer applicable to European26 law, now aptly describes American law: confessio est regina probationum, confession is the queen of proof. 23 This difference is related to differences in the sanctions that characterize the medieval and the modem worlds. The law of torture served legal systems whose only sanctions for serious crime were severe physical maiming and death. The torture victim was coerced into a confession that condemned him to the most severe of punishments, whereas the plea bargain rewards the accused with a lesser sanction, typically some form of imprisonment, in exchange for his confession. Obviously, the greater the severity of the sanction that the accused’s confession will bring down upon himself, the greater the coercion that must be brought to bear upon him to wring out the confession. Plea bargaining is as coercive as it has to be for the modem system of sanctions. 24 Defenders of plea bargaining sometimes try to minimize the force of this point with a reductio-ad- absurdum argument: granted that plea bargaining is coercive, so is virtually every exercise of criminal jurisdiction, since few criminal defendants are genuine volunteers. I think that the answer to this argument is straightforward. The accused is made a criminal defendant against his wishes, but not contrary to his rights. The Constitution does not grant citizens any immunity from criminal prosecution, but it does grant them the safeguard of trial. Coercion authorized by law is different from coercion meant to overcome the guarantees of law. Coercing people to stand trial is different from coercing them to waive trial and to bring upon themselves sanctions that should only be imposed after impartial adjudication. Sometimes, as I have mentioned in the text, a rather opposite argument is made in behalf of plea bargaining—-not that everything is coercive, but that a mere sentencing differential is not serious enough to be reckoned as coercion. One can test this point simply by imagining a differential so great {e.g., death versus a fifty-cent fine) that any reasonable defendant would waive even the strongest defenses. Like torture, the sentencing differential in plea bargaining elicits confessions of guilt that would not be freely tendered. It is, therefore, coercive in the same sense as torture, although not in the same degree. The question whether significant numbers of innocent people do plead guilty is not, of course, susceptible to empirical testing. It is known that many of those who plead guilty claim that they are innocent. See A. BLUMBERG, CRIMINAL JUSTICE 89–92 (1970). See also text at note 29 infra (discussing North Carolina v. Alford). Alschuler thinks that “the greatest pressures to plead are brought to bear on defendants who may be innocent.’’ Alschuler, The Prosecutor’s Role in Plea Bargaining, 36 U. CHI. L. REV. 50, 60 (1968). See id. at 59–62 for evidence that the threatened “sentence differential between guilty-plea and trial defendants increases in direct proportion to the likelihood of acquittal.” Id. at 60. Alschuler reports one case that resembles the hypothetical choice between death penalty and fifty- cent fine: San Francisco defense attorney Benjamin M. Davis recently represented a man charged with kidnapping and forcible rape. The defendant was innocent, Davis says, and after investigating the case Davis was confident of an acquittal. The prosecutor, who seems to have shared the defense attorney’s opinion on this point, offered to permit a guilty plea to simple battery. Conviction on this charge would not have led to a greater sentence than thirty days’ imprisonment, and there was every likelihood that the defendant would be granted probation. When Davis informed his client of this offer, he emphasized that conviction at trial seemed highly improbable. The defendant’s reply was simple: “I can’t take the chance.” Id. at 61. I do not think that great numbers of American defendants plead guilty to offenses committed by strangers. (The law of torture was also not supposed to apply in circumstances where the accused could explain away the evidence that might otherwise have given cause to examine him under torture. See J. LANGBEIN, supra note 8, at 183.) I do believe that plea bargaining is used to coerce the waiver of tenable defenses, as in Attorney Davis’s example, supra, or when the offense has a complicated conceptual basis, as in tax and other white collar crimes. The objection is sometimes voiced that if an accused is innocent, it stands to reason that he will press his defense at trial; if an innocent accused does plead guilty, he must necessarily be calculating that there is a significant probability that the trier will fail to recognize his innocence despite the great safeguards of trial designed to prevent such error. If trials were perfectly accurate, plea bargaining would be perfectly accurate, since no innocent person would have an incentive to accuse himself. Ironically, therefore, anyone who would denigrate plea bargaining because it infringes the right to trial must also assume that the trial itself is to some extent recognized to be mistake-prone. The response, of course, is that paradox is not contradiction. So long as human judgment is fallible, no workable trial procedure can do more than minimize error. The social cost of a rule of absolute certainty—massive release of the culpable—would be intolerable. This was the lesson of the medieval European law, and it explains why the standard of our law is not “beyond doubt” but “beyond reasonable doubt.” I have said that European law attempted to devise safeguards for the use of torture that proved illusory; these measures bear an eerie resemblance to the supposed safeguards of the American law of plea bargaining. Foremost among the illusory safeguards of both systems is the doctrinal preoccupation with characterizing the induced waivers as voluntary. The Europeans made the torture victim repeat his confession “voluntarily,” but under the threat of being tortured anew if he recanted. The American counterpart is Rule 11(d) of the Federal Rules of Criminal Procedure, which forbids the court from accepting a guilty plea without first “addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement.”27 Of course, the plea agreement is the source of the coercion and already embodies the involuntariness. The architects of the European law of torture sought to enhance the reliability of a torture-induced confession with other safeguards designed to substantiate its factual basis. We have said that they required a probable cause determination for investigation under torture and that they directed the court to take steps to verify the accuracy of the confession by investigating some of its detail. We have explained why these measures were inadequate to protect many innocent suspects from torture, confession, and condemnation. Probable cause is not the same as guilt, and verification, even if undertaken in good faith, could easily fail as a safeguard, either because the matters confessed were not susceptible of physical or testimonial corroboration, or because the accused might know enough about the crime to lend verisimilitude to his confession even though he was not in fact the culprit. The American law of plea bargaining has pursued a similar chimera: the requirement of “adequate factual basis for the plea.” Federal Rule 11(f) provides that “the court should not enter judgment upon [a guilty] plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.”28 As with the tortured confession, so with the negotiated plea: any case that has resisted dismissal for want of probable cause at the preliminary hearing will rest upon enough inculpating evidence to cast suspicion upon the accused. The function of trial, which plea bargaining eliminates, is to require the court to adjudicate whether the facts proven support an inference of guilt beyond a reasonable doubt. Consider, however, the case of North Carolina v. Alford,29 decided in this decade, in which the U.S. Supreme Court found it permissible to condemn without trial a defendant who had told the sentencing court: “I pleaded guilty on second degree murder because they said there is too much evidence, but I ain’t shot no man .... I just pleaded guilty because they said if I didn’t they would gas me for it .... I’m not guilty but I plead guilty.”30 I invite you to compare Alford’s statement with the explanation of one Johannes Julius, seventeenth-century burgomaster of Bamberg, who wrote from his dungeon cell where he was awaiting execution, in order to tell his daughter why he had confessed to witchcraft “for which I must die. It is all falsehood and invention, so help me God . . . . They never cease to torture until one says something.”31 The tortured confession is, of course, markedly less reliable than the negotiated plea, because the degree of coercion is greater. An accused is more likely to bear false witness against himself in order to escape further hours on the rack than to avoid risking a longer prison term. But the resulting moral quandary is the same.32 Judge Levin of Michigan was speaking of the negotiated guilty plea, but he could as well have been describing the tortured confession when he said, “there is no way of knowing whether a particular guilty plea was given because the accused believed he was guilty, or because of the promised concession.”33 Beccaria might as well have been speaking of the coercion of plea bargaining when he said of the violence of torture that it “confounds and obliterates those minute differences between things which enable us at times to know truth from falsehood.”34 The doctrine of adequate factual basis for the plea is no better substitute for proof beyond reasonable doubt than was the analogous doctrine in the law of torture. 32 Some of those who have favored me with prepublication critiques of this paper have resisted this point—largely, I think, because they do not give adequate weight to the seriousness with which the law of torture undertook to separate the guilty from the innocent. My critics suggest that plea bargaining is in theory meant to have a differential impact upon the guilty and the innocent, whereas torture was not. They contend that the plea bargaining system means to tell the accused, “Don’t put us to the trouble of a trial unless you are really innocent,” whereas the law of torture gave the same message to both the innocent and the guilty, “Confess or the pain will continue.”

#### Plea bargaining undermines public trust and increases authoritarianism with less judicial checks and balances

Langbein 78 [John H. Langbein, Professor of Law at The University of Chicago, 2017, "Torture and Plea Bargaining", Taylor & Francis, https://www.taylorfrancis.com/chapters/edit/10.4324/9781315189437-11/torture-plea-bargaining-john-langbein]/Kankee

\*NOTE: three stupidly long argumentative footnotes included

I think that both branches of the argument are mistaken. I have already pointed out, supra note 24, that plea bargaining can and does induce innocent defendants to convict themselves. As for the law of torture, I should reiterate that the safeguards discussed above, see text at notes 6–9 supra, were designed for the sole purpose of separating the innocent from the guilty, and the law of torture made express provision for releasing those who did not confess under torture. See J. LANGBEIN, supra note 1, at 16, 151 n.55. I am very willing to concede that the safeguards of the law of torture were even less effective than those of plea bargaining, but as I have said in the text, the difference is one of degree and not kind. The factual unreliability of the negotiated plea has further consequences, quite apart from the increased danger of condemning an innocent man. In the plea bargaining that takes the form of charge bargaining (as opposed to sentence bargaining), the culprit is convicted not for what he did, but for something less opprobrious. When people who have murdered are said to be convicted of wounding, or when those caught stealing are nominally convicted of attempt or possession, cynicism about the processes of criminal justice is inevitably reinforced.35 This wilful mislabelling plays havoc with our crime statistics, which explains in part why Americans— uniquely among Western peoples—attach so much importance to arrest records rather than to records of conviction. I think that the unreliability of the plea, the mislabelling of the offense, and the underlying want of adjudication all combine to weaken the moral force of the criminal law, and to increase the public’s unease about the administration of criminal justice. The case of James Earl Ray is perhaps the best example of public dissatisfaction over the intrinsic failure of the plea bargaining system to establish the facts about crime and guilt in the forum of a public trial.36 It is interesting to remember that in Europe in the age of Beccaria and Voltaire, the want of adjudication and the unreliability of the law of torture had bred a strangely similar cynicism towards that criminal justice system. Our law of plea bargaining has not only recapitulated much of the doctrinal folly of the law of torture, complete with the pathetic safeguards of voluntariness and factual basis that I have just discussed, but it has also repeated the main institutional blunder of the law of torture; Plea bargaining concentrates effective control of criminal procedure in the hands of a single officer. Our formal law of trial envisages a division of responsibility. We expect the prosecutor to make the charging decision, the judge and especially the jury to adjudicate, and the judge to set the sentence. Plea bargaining merges these accusatory, determinative, and sanctional phases of the procedure in the hands of the prosecutor. Students of the history of the law of torture are reminded that the great psychological fallacy of the European inquisitorial procedure of that time was that it concentrated in the investigating magistrate the powers of accusation, investigation, torture, and condemnation. The single inquisitor who wielded those powers needed to have what one recent historian has called “superhuman capabilities [in order to] . . . keep himself in his decisional function free from the predisposing influences of his own instigating and investigating activity.”37 The dominant version of American plea bargaining makes similar demands: it requires the prosecutor to usurp the determinative and sentencing functions, hence to make himself judge in his own cause. I cannot emphasize too strongly how dangerous this concentration of prosecutorial power can be. The modern public prosecutor commands the vast resources of the state for gathering and generating accusing evidence. We allowed him this power in large part because the criminal trial interposed the safeguard of adjudication against the danger that he might bring those resources to bear against an innocent citizen—whether on account of honest error, arbitrariness, or worse.38 But the plea bargaining system has largely dissolved that safeguard. While on the subject of institutional factors, I have one last comparison to advance. The point has been made, most recently by the Attorney-General of Alaska,39 that preparing and taking cases to trial is much harder work than plea bargaining—for police, prosecutors, judges, and defense counsel. In short, convenience—or worse, sloth—is a factor that sustains plea bargaining. We suppose that this factor had a little to do with torture as well. As someone in India remarked to Sir James Fitzjames Stephen in 1872 about the proclivity of the native policemen for torturing suspects, “It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil’s eyes than to go about in the sun hunting up evidence.”40 If we were to generalize about this point, we might say that concessionary criminal procedural systems like the plea bargaining system and the system of judicial torture may develop their own bureaucracies and constituencies. Here as elsewhere the old adage may apply that if necessity is the mother of invention, laziness is the father IV. THE JURISPRUDENCE OF CONCESSIONARY CRIMINAL PROCEDURE

#### Justice system legitimacy is key to prevent crime

Gilchrist 11 [Gregory M. Gilchrist, Assistant Professor of Law at the University of Toledo College of Law with an A.B. from Stanford and a J.D. from Columbia, 2011, “Plea Bargains, Convictions And Legitimacy,” American Criminal Law Review, https://heinonline.org/HOL/P?h=hein.journals/amcrimlr48&i=145]/Kankee

B. The Importance of the PerceivedLegitimacy of the Legal System Courts frequently recognize the importance of the perceived legitimacy of the legal system. 103 There is also empirical support for the proposition that the perceived legitimacy of the legal system is important to its function.104 A criminal justice system is effective to the extent it induces compliance with its rules. A system that is perceived as legitimate by those subject to its authority will more effectively induce compliance with its rules. People care about procedural fairness. "[P]eople are more interested in how fairly their case is handled than they are in whether they win .... [N]umerous studies conducted over the last several decades have consistently found this to be true."10 5 Moreover, the perception of procedural fairness is critical to fostering public confidence in the legal system.1 06 Psychologist Tom Tyler has argued that "[f]our critical factors dominate evalua- tions of procedural justice": First, people want to have an opportunity to state their case to legal authorities. They want to have a forum in which they can tell their story; they want to have a "voice" in the decisionmaking process. Second, people react to signs that the authorities with whom they are dealing are neutral. Neutrality involves making decisions based upon consistently applied legal principles and the facts of the case rather than personal opinions and biases. Transparency and openness foster the belief that decisionmaking procedures are neutral. Third, people are sensitive to whether they are treated with dignity and politeness and to whether their rights as citizens and as people are respected. Finally, people focus on cues that communicate information about the intentions and character of the legal authorities with whom they are dealing.107 The public perception of the legal system is critical to its function. Consider the different reasons one might obey a law. One might obey for fear of direct sanctions if she does not obey. One could follow the law out of a belief that what the law requires is just. To do so, however, is not so much to obey the law as to act in the manner that one believes to be morally correct, while at the same time enjoying the benefit that one's moral belief fortuitously coincides with the mandate of legal authority on the topic. One might, though, obey the law because she believes "that authorities have the right to dictate proper behavior."108 Among these possibilities, moral reasons tend to be strongest; people act in accord with laws they believe are just because they believe the laws to be just.1 09 However, the perceived legitimacy of the source of authority is also a significant factor in compliance."1O As Tracey Meares wrote, "[w]hile legitimacy is not as important to compliance as is morality, there is empirical work demonstrating that legitimacy matters more to compliance than instrumental factors, such as sanctions imposed by authorities on individuals who fail to follow the law or private rules."" That is, the perceived legitimacy of the source of authority may be more significant to compliance-and, thus, to the legal system's ability to control crime-than to the penalties imposed for non- compliance. Criminal justice may more effectively control crime by example than by deterrence. This does not suggest that perceived legitimacy predicated on procedural fairness is the only factor relevant to compliance. As Lawrence Solum has noted, "satisfaction with the process is not the whole story about procedural fairness."12 Nonetheless, "[a]s a pragmatic matter, it is important that citizens be able to regard procedures as legitimate so that we may secure their voluntary cooperation with the system of civil justice."11 3 C. How Plea Bargaining Undermines the Perceived Legitimacy of the Legal System

#### Treating low-evidence pleas and high-evidence trials as equivalent kills legitimacy

Gilchrist 11 [Gregory M. Gilchrist, Assistant Professor of Law at the University of Toledo College of Law with an A.B. from Stanford and a J.D. from Columbia, 2011, “Plea Bargains, Convictions And Legitimacy,” American Criminal Law Review, https://heinonline.org/HOL/P?h=hein.journals/amcrimlr48&i=145]/Kankee

C. How Plea Bargaining Undermines the Perceived Legitimacy of the Legal System There are three primary ways that the practice of plea bargaining in its current form tends to undermine the perceived legitimacy of the criminal justice system. First, as previously addressed, 1 4 plea bargaining is less reliable than trial. Second, bargained-for convictions are treated the same as trial convictions despite the diminished reliability of the former. And third, plea bargaining creates an incentive for dishonesty. 1. Bargained-forConvictions, Despite Their DiminishedReliability, Are Improperly Treated as Equivalent to Trial Convictions All who are convicted-be it by bargained-for plea or hard-fought trial-are formally in the same boat. The only distinctions arise in the context of sentencing and post-conviction relief. For example, the U.S. Sentencing Guidelines recognize that a sentence reduction can be appropriate solely "by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently . ... "15 Convictions by guilty plea are also distin- guished from convictions by trial in post-conviction proceedings. A plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence. Accordingly, when the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary. 1 6 But beyond sentencing and post-conviction relief, a conviction is a conviction, without regard for how it was obtained. Given the disparate factors that lead to each type of conviction, treating them as formally identical causes a legitimacy problem for the criminal justice system. Convictions carry numerous consequences, including "permanent or temporary ineligibility for federal welfare benefits, educational grants, public housing, voting, handgun licenses, and military service; prohibitions from various forms of employment as well as employment-related licensing; and, for non-citizens, deportation."'17 Should the defendant find herself again subject to the criminal justice system, the prior conviction may in some circumstances be presented as substantive evidence,1 8 and it will be considered as a factor in enhancing her sentence should she be convicted.1 9 These consequences are imposed equally whether the defendant was found guilty by proof beyond a reasonable doubt before a jury of her peers, or whether she agreed to plead guilty based on her calculation of the relative value of trial compared to a plea offer. However, the latter has an attenuated relation to actual guilt.' 2 0 Treating importantly dissimilar cases alike is an affront to the second factor identified by Tyler as critical to engendering faith in the procedural justice of a system: neutrality, which "involves making decisions based upon consistently applied legal principles." 2 1 Treating the less reliable conviction-by-plea identi- cally to the more reliable conviction-by-trial undermines the perceived neutrality of the system. Or, it does so to the extent people perceive these categories to be importantly different. H.L.A. Hart wrote that a "leading precept [of justice] is often formulated as 'Treat like cases alike'; ... [but this] must remain an empty form. To fill it we must know when, and for the purposes in hand, cases are to be regarded as alike and what differences are relevant."12 2 But, as addressed above, convictions by trial and convictions by plea (in a system that permits plea bargaining) are different in their relation to evidence and actual guilt,123 and they thus merit distinctive treatment. We care about wrongful convictions. Our system of criminal justice is predi- cated on valuing the avoidance of wrongful convictions more highly than the maximization of rightful convictions.' 24 Where one method of securing convic- tions is less able to avoid wrongful convictions and is less directly predicated on evidence, it is a difference that matters. The failure to recognize that difference is an affront to the principle of neutrality-to treat like cases alike and different cases differently. 2. Plea Bargaining Creates an Incentive for Dishonesty

#### Incarceration destroys personhood and is on par with torture – threatening such inhumane conditions to secure a deal is inherently coercive and indicates duress

**McLeod 15** [Allegra McLeod, Associate Professor of Law at Georgetown, 2015, “Prison Abolition and Grounded Justice”, Georgetown University Law Center, https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2502&context=facpub]/Kankee

A. Violence and Dehumanization Prisons are places of intense brutality, violence, and dehumanization.70 In his seminal study of the New Jersey State Prison, The Society of Captives, sociologist Gresham M. Sykes carefully exposed how the fundamental structure of the modern U.S. prison degrades the inmate’s basic humanity and sense of selfworth.71 Caged or confined and stripped of his freedom, the prisoner is forced to submit to an existence without the ability to exercise the basic capacities that define personhood in a liberal society.72 The inmate’s movement is tightly controlled, sometimes by chains and shackles, and always by orders backed with the threat of force;73 his body is subject to invasive cavity searches on command;74 he is denied nearly all personal possessions; his routines of eating, sleeping, and bodily maintenance are minutely managed; he may communicate and interact with others only on limited terms strictly dictated by his jailers; and he is reduced to an identifying number, deprived of all that constitutes his individuality.75 Sykes’s account of “the pains of imprisonment”76 attends not only to the dehumanizing effects of this basic structure of imprisonment—which remains relatively unchanged from the New Jersey penitentiary of 1958 to the U.S. jails and prisons that abound today77—but also to its violent effects on the personhood of the prisoner:[H]owever painful these frustrations or deprivations may be in the immediate terms of thwarted goals, discomfort, boredom, and loneliness, they carry a more profound hurt as a set of threats or attacks which are directed against the very foundations of the prisoner’s being. The individual’s picture of himself as a person of value . . . begins to waver and grow dim.78 In addition to routines of minute bodily control, thousands of persons are increasingly subject to long-term and near-complete isolation in prison. The Bureau of Justice Statistics has estimated that 80,000 persons are caged in solitary confinement in the United States, many enduring isolation for years.79 Solitary confinement routinely entails being locked for twenty-three to twenty-four hours per day in a small cell, between forty-eight and eighty square feet, without natural light or control of the electric light, and no view outside the cell.80 Persons so confined may be able to spend one hour per day in a “concrete exercise pen,” which, although partially open to the outdoors, is typically still con- figured as a cage.81 Raymond Luc Levasseur, who was held in solitary confinement at the Fed- eral Correctional Complex at Florence, Colorado, a prison devoted to solitary confinement (also called administrative segregation (ADX)), wrote of the first year of his isolation: Picture a cage where top, bottom, sides and back are concrete walls. The front is sliced by steel bars. . . . The term “boxcar” is derived from this configuration: a small, enclosed box that [does not] move. . . . The purpose of a boxcar cell is to gouge the prisoner’s senses by sup- pressing human sound, putting blinders about our eyes and forbidding touch. . . . It seems endless. Each morning I look at the same gray door and hear the same rumbles followed by long silences. It is end- less. . . . I see forced feedings, cell extractions . . . . Airborne bags of shit and gobs of spit become the response of the caged. The minds of some prisoners are collapsing in on them. . . . One prisoner subjected to four-point restraints (chains, actually) as shock therapy had been chewing on his own flesh. Every seam and crack is sealed so that not a solitary weed will penetrate this desolation . . . . When they’re done with us, we become someone else’s problem.82 Following thirteen years of solitary confinement, Levasseur was released from prison in 2004.83 The images that follow are not primarily intended to render more vivid this exploration of incarceration and punitive policing, but instead are incorporated to illustrate an important part of this Article’s argument: We must look at what these practices actually entail, especially because so often the ideology of criminal regula- tion renders much of the criminal process and its violent consequences opaque or even invisible to us. By removing the violent results of these regulatory approach- es from the center of our attention, and often removing them entirely from our view, this same ideology persuades us of the necessity and relative harmlessness of incarceration and punitive policing. An abolitionist ethic, however, requires us to confront what penal regulation actually involves rather than assuming that creating a certain spatial distance—by putting particular persons in cages, or controlling individuals and communities through prison-backed police surveillance—satisfactorily addresses the social and political prob- lems of violence, mental illness, poverty or joblessness, among others, that those persons and communities have come to represent. This photograph portrays prisoners who are suffering from mental illness and subject to solitary confinement in an Ohio State Prison, held in cages for a “group therapy” session: These persons’ bodies are revealed in this image as objects locked in isolated small spaces, shackled, rendered plainly less than human. Cages are also used for booking mentally ill inmates in California prisons, as reflected in the record addressed in the U.S. Supreme Court’s opinion in Brown v. Plata: 85 This is a suicide watch cell, also used for isolation, in a state prison in Cali- fornia, drawn from a related court record: 86 In these cells, feces may be smeared on the walls as those detained mentally de- compensate, the odor of rot and acute despair palpable.87 As incarcerated populations have increased, solitary confinement has emerged as a primary mechanism for internal jail and prison discipline, such that the actual number of individuals confined to a small cell for twenty-three hours per day remains unknown and may be significantly in excess of 80,000.88 Some people are sentenced to “Super-Max” facilities that only contain solitary cells; other people are placed in solitary confinement as punishment for violating pris- on rules or for their own protection. Stays in solitary confinement are often lengthy, even for relatively minor disciplinary rule violations, and may be indefinite. For example, one young pris- oner caught with seventeen packs of Newport cigarettes was sentenced to fifteen days solitary confinement for each pack of cigarettes, totaling more than eight months of solitary confinement.89 Another prisoner in New Jersey spent eighteen years in solitary confinement. Although his solitary confinement sta- tus was subject to review every ninety days, this prisoner explained that he eventu- ally stopped participating in the reviews as he felt they were “a sham, with no real investigation,” and lost hope that he would ever be able to leave.90 Solitary confinement has become a widely tolerated and “regular part of the rhythm of prison life,”91 yet this basic structure of prison discipline in the United States entails profound violence and dehumanization; indeed, solitary confine- ment produces effects similar to physical torture. Psychiatrist Stuart Grassian first introduced to the psychiatric and medical community in the early 1980s that prisoners living in isolation suffered a constellation of symptoms including overwhelming anxiety, confusion, hallucinations, and sudden violent and self- destructive outbursts.92 This pattern of debilitating symptoms, sufficiently consistent among persons subject to solitary confinement (otherwise known as the Special Housing Unit (SHU)), gave rise to the designation of SHU Syn- drome.93 Partly on this basis, the United Nations Special Rapporteur on Torture has found that certain U.S. practices of solitary confinement violate the U.N. Con- vention Against Torture and Other Cruel, Inhuman and Degrading Punish- ment.94 Numerous psychiatric studies likewise corroborate that solitary confinement produces effects tantamount to torture.95 Bonnie Kerness, Associ- ate Director of the American Friends Service Committee’s Prison Watch, testi- fied before the Commission on Safety and Abuse in America’s Prisons that while visiting prisoners in solitary confinement, she spoke repeatedly “with people who begin to cut themselves, just so they can feel something.”96 Soldiers who are cap- tured in war and subjected to solitary confinement and severe physical abuse also report the suffering of isolation to be as awful as, and even worse than, physical torture.97 But despite its more apparent horrors, solitary confinement is simply an ex- tension of the logic and basic structure of prison-backed punishment—punitive isolation and surveillance—to the disciplinary regime of the prison itself. Solitary confinement’s justification and presumed efficacy flows from the assumed legiti- macy of prison confinement in the first instance. Prison or jail confinement isolates the detained individual from the social world he inhabited previous- ly, stripping that person of his capacity to move of his own volition, to inter- act with others, and to exercise control over the details of his own life. Once that initial form of confinement and deprivation of basic control over one’s own life is understood to be legitimate, solitary confinement merely applies the same approach to discipline within prison walls. But the basic physical isolation and confinement is already countenanced by the initial incarceration. In addition to the dehumanization entailed by the regular and pervasive role of solitary confinement in U.S. jails, prisons, and other detention centers, the en- vironment of prison itself is productive of further violence as prisoners seek to dominate and control each other to improve their relative social position through assault, sexual abuse, and rape. This feature of rampant violence, presaged by Sykes’s account, arises from the basic structure of prison society, from the fact that the threat of physical force imposed by prison guards cannot adequately en- sure order in an environment in which persons are confined against their will, held captive, and feared by their custodians.98 Consequently, order is produced through an implicitly sanctioned regime of struggle and control between prisoners. 99 Rape, in particular, is rampant in U.S. jails and prisons.100 According to a conservative estimate by the U.S. Department of Justice, 13 percent of prison in- mates have been sexually assaulted in prison, with many suffering repeated sexual assaults.101 While noting that “the prevalence of sexual abuse in America’s in- mate confinement facilities is a problem of substantial magnitude,” the Depart- ment of Justice acknowledged that “in all likelihood the institution-reported data significantly undercounts the number of actual sexual abuse victims in prison, due to the phenomenon of underreporting.”102 Although the Department had previ- ously recorded 935 instances of confirmed sexual abuse for 2008, further analysis produced a figure of 216,000 victims that year (victims, not incidents).103 These figures suggest an endemic problem of sexual violence in U.S. prisons and jails produced by the structure of carceral confinement and the dynamics that inhere in prison settings. In one notable case that makes vivid these underlying dynamics, Roderick Johnson sued seven Texas prison officials for failing to protect him from victimi- zation by prison gang members who raped him hundreds of times and sold him between rival gangs for sex over the course of eighteen months.104 Johnson, a gay man who had struggled with drug addiction, was incarcerated for probation vio- lations following a burglary conviction.105 Rape was so prevalent in the facility where Johnson was incarcerated that it had a relatively fixed price: A former pris- oner witness explained to the judge and jury at the trial that a purchased rape in that prison cost between $3 and $7.106 When Johnson sought protection from prison officials, he was told he would have to “fight or fuck.”107 Seeking to avoid liability at trial, one of the prison official defendants, Jim- my Bowman, explained that prison officials were not responsible for failing to protect Johnson because “an inmate has to defend himself.”108 Richard E. Wathen, the assistant warden, conceded that “[p]rison . . . is a violent place,” but he testified that prison officials ought not to be held accountable under the Eighth Amendment for repeated gang rapes of prisoners if there was little offi- cials could have done to prevent the abuse: “I believe that we did the right thing then, and I would make the same decision today. . . . There has to be some ex- treme threat before we put an offender in safekeeping.”109 In any event, safekeeping in many detention settings only amounts to soli- tary confinement. And though prisoners are less likely to be subject to rape if they are held in relative isolation for their own protection, they are likely to suffer other substantial psychological harm, as previously noted.110 Ultimately, Johnson lost his civil case as the jury found for the prison officials.111 After his trial, John- son relapsed in his addiction recovery, reoffended by attempting to steal money presumably to buy drugs), and returned to serve out a further nineteen-year pris- on sentence.112 These horrific experiences of incarceration are not simply outlier forms of dehumanization and violence, but are produced by the structure of U.S. imprisonment—by the basic manner in which caging or confining human be- ings strips individuals of their personhood and humanity, and sets in motion dynamics of domination and subordination. In research widely known as the Stanford Prison Experiment, psychologists Philip Zimbardo and Craig Haney further elucidated these structural dynamics.113 Notwithstanding subsequent criticism, their experiment revealed how the basic structure of the prison in the United States tends toward dehumanization and violence.114 At the outset of their now famous (or infamous) experiment, Zimbardo and Haney placed a group of typical college students into a simulated prison environment on Stanford University’s campus.115 Zimbardo and Haney randomly designated certain of the students as mock-prisoners and others as mock-guards.116 What happened in the course of the six days that followed shocked the researchers, professional col- leagues, and the general public.117 Zimbardo and Haney found that their “‘institu- tion’ rapidly developed sufficient power to bind and twist human behavior . . . .”118 Mock-guards engaged with prisoners in a manner that was “negative, hostile, af- frontive, and dehumanizing,” despite the fact that the “guards and prisoners were essentially free to engage in any form of interaction.”119 “[V]erbal interactions were pervaded by threats, insults and deindividuating references . . . . The nega- tive, anti-social reactions observed were not the product of an environment creat- ed by combining a collection of deviant personalities, but rather the result of an intrinsically pathological situation which could distort and rechannel the behavior of essentially normal individuals.”120 The Stanford Prison Study has been criticized for methodological, ethical, and other shortcomings, but, despite its limitations, it attests to the dehumaniz- ing dynamics that routinely surface in carceral settings.121 According to some critics, for instance, the Stanford Prison Study reflects the participants’ obedience and conformity to stereotypic behavior associated with prisoners and guards, ra- ther than an effect produced exclusively and directly by the institutional environ- ment of prisons.122 But even if the study’s critics are correct, it remains true that these same features of conformity and behavioral expectations obtain in actual prison environments. Therefore, whether the Stanford Prison Study measures institutional effects or the tendency of people in such institutional settings to con- form to widely understood behavioral expectations associated with such settings, it is still the case that these settings will tend to reproduce powerful dynamics of dominance, subordination, dehumanization, and violence. Of separate though equal concern, the violence and dehumanization of in- carceration not only shapes those who are incarcerated, but produces destructive consequences for entire communities.123 People leaving prison are marked by the experience of incarceration in ways that makes the world outside prison more violent and insecure; it becomes harder to find employment and to engage in collective social life because of the stigma of criminal conviction.124 Further, incarcerating individuals has harmful effects on their families. The children, par- ents, and neighbors of prisoners suffer while their mothers, fathers, children, and community members are confined.125 Coming of age with a parent incarcerated generally has a substantial and negative impact on the life chances of young people.126 It is insufficient to simply seek to reform the most egregious instances of violence and abuse that occur in prison while retaining a commitment to prison- backed criminal law enforcement as a primary social regulatory framework. Of course, less violence in these places would undoubtedly render prisons more hab- itable, but the degradation associated with incarceration in the United States is at the heart of the structure of imprisonment elucidated decades ago by Sykes: Im- prisonment in its basic structure entails caging or imposed physical constriction, minute control of prisoners’ bodies and most intimate experiences, profound de- personalization, and institutional dynamics that tend strongly toward violence. These dehumanizing aspects of incarceration are unlikely to be meaningfully eliminated in the U.S., following decades of failed efforts to that end, while re- taining a commitment to the practice of imprisonment. This is especially so in the United States for reasons related to the specific historical and racially subor- dinating legacies of American incarceration and punitive policing. Two hundred and forty years of slavery and ninety years of legalized segregation, enforced in large measure through criminal law administration, render U.S. carceral and punitive policing practices less amenable to the reforms undertaken, for exam- ple, in Scandinavian countries, which have more substantially humanized their prisons.127 The following Subpart addresses the racial dynamics associated with incar- ceration and punitive policing in the United States and the practices of racial de- humanization through which U.S. carceral and policing institutions developed. B. Racial Subordination and the Penal State

#### Guilty pleas are unfair negotiation – first mover, asymmetric power, collateral consequences

Lord 22 [David A. Lord, lecturer in prosecutorial ethics, 2022, “Breaking the Faustian Bargain: Using Ethical Norms to Level the Playing Field in Criminal Plea Bargain,” Georgetown Journal of Legal Ethics, https://heinonline.org/HOL/P?h=hein.journals/geojlege35&i=78]/Kankee

INTRODUCTION In its ideal state, the **American legal system** is built on high-quality **adversarial** confrontation. Two opposing sides work **diligently** to promote their clients' inter- ests, and that competition is mediated through the prism of the law and the rules of evidence to produce a just result. But when one of the litigants has dispropor- tionate power in establishing the rules of the game, it creates a **serious challenge** to achieving justice. As a prosecutor, I acknowledge that when I step into the courtroom, it often is not a fair fight. In what game does one team get to decide the playing field and structure in which the competition takes place? In my line of work that happens every day. I decide who gets charged and with which crimes. Those decisions, along with "first mover **advantage**," often result in my deter- mining the analytical framework within which the trial itself takes place. Plea negotiations, much like trials, suffer from a similar asymmetrical power structure. What can a defendant offer a prosecutor in negotiations? The defendant can save me time and effort, which allows me to move on to the next case and focus my resources on other cases. The defendant can save me the embarrassment 75 and frustration of potential defeat at trial. The defendant can help me reach a reso- lution that will leave a victim feeling like I did my job because the victim received some measure of justice. But it is really the first of those three items where there is meaningful leverage, because the balance can, more often than not, be accomplished through hard work in the courtroom itself. Consider, how- ever, a defendant's ability to save the prosecution time weighed against what I have to offer that individual. I may be deciding whether the defendant will be labelled a convicted felon or have a conviction of any kind forever on a criminal record. In turn, that decision might impact whether the defendant gets **deported**, keeps his **security clearance**, or loses public housing benefits.2 I may be deciding whether a defendant faces incarceration and is exposed to the **trauma** of jail or the penitentiary. I may be deciding the daily schedule of that defendant for months and years to come and whether that individual will be obligated to comply with probation and community service. That kind of incentive structure, stacked up against a defendant's mere capacity to save me some time, is like a David versus Goliath battle, where Goliath wins virtually every time. And if that is not enough, other components of the existing legal structure strengthen my hand as a prosecutor even more. The possibility of charging a crime carrying a lengthy **mandatory minimum** might easily compel a defendant who is otherwise reluctant to accept any plea offer into a choice as severe as assuming the label of "convicted felon" in order to avoid the immediate pain of incarceration.3 The inordinate power that society has handed prosecutors gives them the ability to strike Faustian bargains4 with defendants, who may accept substantial long-term harm to themselves in order to achieve a short-term benefit. It is easy for a defendant to not consider the collateral consequences a conviction may have for their future when they are told that by pleading guilty, they can avoid going to jail today.5 And it becomes **an ethical morass** when the prosecutor is the architect of this style of negotiations. Prosecutors are charged by the Model Rules of ProfessionalConduct with being "minister[s] of justice,"6 yet they have little official guidance as to what actually defines justice within the context of exercising this incredible power. The criminal justice reform movement has stepped into the middle of this ethi- cal quagmire by advancing numerous measures to try to address this disparate power structure. For example, reducing or eliminating mandatory minimum sen- tences is one way that reformers have sought to transfer power from the prosecu- tor to the neutral judge.' But these types of reforms offer only limited relief to the basic problem-a system premised on adversarial conflict where one of the adversaries has disproportionate power. There are two primary reasons why these legislative reforms are insufficient for resolving the broader problem. First, elimi- nating mandatory minimums is reform that occurs at the margins. Yes, the elimi- nation of these provisions takes away one tool by which a prosecutor can extract a plea from an otherwise reluctant defendant. But the simple ability to charge a crime in the first place, not to mention determining which crimes and how many counts to indict, and the authority to effectively set an upward cap on the defend- ant's sentence through the government's sentencing recommendation, effectively means the prosecutor may still be able to bring so much pressure to bear that a de- fendant believes he or she has no choice but to plead guilty. Second, we have to acknowledge the very real possibility that these marginal reforms may not reach deeper into the criminal system for a long time. The brutal murder of George Floyd quickly captured the public's attention and brought forth urgent calls for a fairer justice system.8 But rising crime rates may call into question how committed voters remain to change.9 The Washington Post recently reported how an increase in crime rates are now compelling progressive politicians to distance themselves from once seemingly popular efforts to defund the police and for voters to step back from further systemic reform.1 0 The article also noted a difference in the electorate by pointing out that in 2016, Kim Foxx won the Cook County State's Attorney's race on a reform-minded platform, achieving 72 percent of the vote." ~~F~~

#### Imprisonment while awaiting trial is coercive

Subramanian et al. 20 [Ram Subramanian, director of the Brennan Center’s Justice Program and former editorial director of the Vera Institute of Justice with an undergraduate degree from Wesleyan University, a master's degree in international affairs from Columbia University, and a law degree from the University of Melbourne Law School, Léon Digard, psychotherapist and criminology research with a PhD from the University of Cambridge in Criminology, Melvin Washington II, public policy professional and researcher at the Vera Institute of Justice with a MPP from UMich, and Stephanie Sorage, Analyst at Corporate Insight with a master’s degree in psychology from CUNY, 09-2020, “In the Shadows: A Review of the Research on Plea Bargaining,” Vera Institute of Justice, https://vera-institute.files.svdcdn.com/production/downloads/publications/in-the-shadows-plea-bargaining.pdf]/Kankee

**Coercive factors** Of great concern to advocates, researchers, and defense counsel is the inherently **uneven playing field** between accused and prosecutor in **plea bargaining situations**—especially given the wide arsenal of tools, particularly around charging, that prosecutors can use to increase their leverage in negotiations. Researchers have looked at how two coercive factors in particular influence plea bargaining outcomes: pretrial detention and the potential for a death sentence. These studies have concluded that these **factors** likely **play a significant role** in inducing guilty pleas so that people can obtain their liberty—or even sustain their life. Pretrial detention The vast majority of people in local jails are detained pretrial, meaning that they have not been convicted of any crime, are legally presumed **innocent**, and are awaiting **resolution** of their **criminal cases** behind bars—most often because they cannot pay the bail set in their cases.18 Pretrial detention status has far-reaching consequences for justice-involved people. Concern about this population—and the potential negative impacts of detention on their criminal justice outcomes—has spawned a growing body of **research** that has established a strong correlation between **pretrial detention** and an increased likelihood of **conviction**, longer custodial sentences, and future system involvement.19 While it has long been assumed that the pressure and isolating circumstances of incarceration induce people to plead guilty more readily during the pretrial phase—potentially explaining why people in pretrial detention are more likely to be convicted than those who are released—researchers have attempted only recently to specifically examine the influence of pretrial detention on a person’s plea bargaining behavior.20 Using a variety of different methods, this small body of scholarship has **established** a strong **association** between pretrial detention and pleading guilty. For example, in a 2012 study examining 634 criminal cases in New Jersey courts, researchers found that people who were detained pretrial reached faster case dispositions, usually during the pre-indictment phase, than people who were released, primarily because, as an interviewee described it, “defendants **plead guilty** to get out of jail . . . get time served or to get it over with.”21 In a 2018 study looking at nearly 76,000 arrests in Delaware, researchers similarly uncovered that pretrial detention increased a person’s likelihood of pleading guilty by 46 percent—although there were differences depending on the person’s race.22 Similar to previous research, the study found that Black people were 10 percent less likely than white people to enter into guilty pleas.23 To explain this finding, researchers have postulated that plea bargaining may be less common among Black people because they may receive less favorable guilty plea agreements from prosecutors than do white people. Another reason may be that Black people may be more distrustful of a legal system that disproportionately and unfairly impacts them and, thus, less likely to strike a bargain.24 Both the New Jersey and Delaware studies employed regression analyses—a statistical method of measuring the relationship between multiple variables—with only a limited set of controls based on data that was available (for example, current charge aggregated into broader offense categories, criminal history, and demographic information). This means that they did not account for a number of unobservable confounding factors that may have also influenced people’s decisions to plead guilty (such as strength of evidence, quality of defense, individual cognitive biases, or wealth). To correct for this potential bias and better estimate the causal effect of pretrial detention on a person’s propensity to plead guilty, four recent studies conducted natural experiments—non-controlled observational studies that exploit random assignment that occurs in “nature” and which provide social scientists with a stronger inferential tool to potentially improve the quality of their empirical inferences, particularly when trying to infer causation.

#### Plea bargaining is coercive, distorts incentives, and is inconsistent.

Ortman 23 [William Ortman, Associate Professor of Law at Wayne State University, 2023, “Plea Bargaining Abolitionism: A History,” Ohio State Journal Of Criminal Law, https://moritzlaw.osu.edu/sites/default/files/2024-08/20.2\_Ortman\_Final\_3.pdf]/Kankee

A. Abolitionist Scholars So what were the bases for the academic abolitionists’ view that plea bargaining produces irrationality and injustice? They were motivated by some of the same con- cerns we have already seen, but the scholarly attack on plea bargaining went deeper and broader. I will divide it into three categories, though they overlap and have blurry boundaries. Academic opponents of plea bargaining in the 1970s argued that plea bargaining (i) is impermissibly coercive, (ii) distorts the roles and functions of each set of actors in the justice system, and (iii) is inconsistent with constitutional law and core notions of justice. There was a fourth part to their argument—that plea bargaining is not inevitable—but we will save that until after exploring academic defenses of plea bargaining. 1. Coercion First, academic abolitionists focused, naturally, on plea bargaining’s coercive- ness. Writing in Ethics in 1976, for instance, philosopher Kenneth Kipnis compared two scenarios.206 In the first, a person is confronted by a gunman demanding his money. In the second, a prosecutor offers an innocent defendant charged with rape a plea to simple battery and a sentence of probation. “[I]f one had to choose,” Kipnis argued, it “would be reasonable” to prefer being the robbery victim, since at least he can sue the gunman later.207 “[W]e must seek a better way,” Kipnis implored.208 Peter Zimroth, then on the New York University law faculty, made a similar argu- ment in a 1972 New York Times Magazine essay. Even if plea bargaining was re- formed, he told readers, “defendants who plead guilty will get a break in sentencing simply because they plead guilty.”209 “As long as that is so,” he explained, “there will be a strong element of coercion in the system.”210 We have seen the coercion objection to plea bargaining raised before.211 While the academic version added so- phistication,212 we will do better to dwell on more novel aspects of the scholars’ case against plea bargaining. 2. Role Distortion Second, academic abolitionists—Alschuler, in particular—focused on how plea bargaining distorts the incentives of judges, prosecutors, and defense lawyers. Alschuler wrote three articles on this theme, one for each subprofessional group.213 The work was based on interviews he had conducted in ten major cities in 1967 and 1968, which he described as a “kind of legal journalism.”214 All told, the articles run nearly three-hundred law review pages, so we can do little more here than gesture to their flavor. The first, in 1968, tackled the prosecutor’s role. Everyone agrees, Alschuler posited, that criminal punishment “should be based on penologically relevant con- siderations.”215 Yet under plea bargaining it often is not, because prosecutors face pressures to make deals based on considerations lacking legitimate penological sig- nificance. For example, imagine that a prosecutor realizes, after charging a case, that there is an evidentiary problem such that the defendant would probably be acquitted at trial. Because the prosecutor’s incentive, Alschuler explained, is to “get something from every defendant,”216 his response will be to make a “generous” offer. But that means that no matter the defendant’s guilt or innocence, the punishment is guaran- teed to be wrong! Either it will be too generous, if the defendant is guilty, or unjust, if he is innocent. Alschuler’s point was not that plea bargaining yields overly puni- tive outcomes,217 but that it produces irrational results. Seven years later, Alschuler published the next piece of the trilogy, on defense lawyers.218 He was, by then, more strident. The article is a forceful challenge to the assumption of plea bargaining’s supporters—including in the judiciary—that “crim- inal defense attorneys will, almost invariably, urge their clients to choose the course that is in the client’s best interests.”219 Alschuler argued that this is simply untrue, because plea bargaining is “necessarily destructive of sound attorney-client relation- ships.”220 For retained counsel, the “path to personal wealth” for most defense law- yers is a high-volume practice, and the “way to handle a large volume of cases is, of course, not to try them but to plead them.”

### Contention 8: Carceral Capitalism

#### Plea bargaining fairness is premised on homo economicus, a contrived narrative of our perfect utility maximization capacity that justifies capricious contracts under the guise of voluntariness

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PLEA BARGAINING AS CONTRACT Autonomy and Efficiency In the preceding chapter, I introduced the liberty of contract doctrine and the ideological construction of Homo economicus. By way of reminder, it is my argument that the constitutionality of plea bargaining is articulated as a product of framing human subjects as “free agents” confronting accusations made by the state of criminal wrongdoing armed with the power to negotiate the terms of a contract that will benefit both the state and the accused. The power of the state to enter into contractual negotiations regarding specific charges and a proposed sentence has, since the 1970 Brady v. United States opinion, been legitimated through the juridical coding of capitalism. The specific juridic code applied to plea bargaining first required the centuries- long proliferation of an ideological commitment to essentializing individ- ual autonomy. As I demonstrated in Chapter 5, this occurred as part of a larger historical transformation in the mode of production in the United States, one that positioned each individual as the master of their own des- tiny – Homo economicus. The “free labor” ideology that emerged during the mid-19th century demonstrated both a philosophical commitment to privileging human agency and an ideological justification for the pursuit of political, economic, and cultural self-interest. Serving as the Archimedean core, Article I §10, cl. 1, also known as the “Contract Clause” of the United States Constitution, stipulates the following: No state shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligations of Contracts, or grant any Title of Nobility. (My emphasis.)1 As I sought to demonstrate in Chapter 5, the United States Supreme Court further developed the essentializing power constituting the individual right to contract through its 19th and early 20th-century common law opinions. It was this important juridical and cultural emphasis upon Homo sapiens as Homo economicus that provided the hegemonic context necessary to argue, as it did in Brady v. United States and the other relevant 1970s plea cases discussed in Chapter 1, that an indicted felony criminal defendant may, if they choose (autonomy), abdicate their constitutionally protected Fifth and Sixth Amendment trial rights in exchange for a sentencing reduction. As Chapter 4 made clear, the right to trial by jury was, until the mid-19th century, viewed as a vital instrument of the judiciary, one that would serve as a public check upon executive and legislative power. But for ease of prosecution, certainty of outcome, and efficient use of scarce resources, plea bargains emerged as an artifact of powerful state actors – including lawyers working in concert with captains of industry – to isolate and segment the mass of Americans who, like today, largely operate outside the corridors of power. Once successfully framed within the discourse of Homo economicus, Americans were suscepti- ble to being selectively preyed upon by political, economic, and cultural forces that isolated and separated them from each other, thereby discursively negat- ing what had historically been life lived in common. In sum, each American is perceived as an agent of their own making, separated from their community. Through the process of valorizing the making and protection of contracts in Article I §10 of the Constitution and through Supreme Court case law, com- bined with the successful ideological construction of Homo sapiens as Homo economicus, the legislative, executive, and judicial branches have at their dis- posal the structural legitimacy necessary to construct a legal code (i.e., Federal Rule 11) in such a way that the right to trial by jury has all but disappeared. In this chapter, I will briefly return to the liberty of contract doctrine to explore the two principal ideological and political assumptions guiding it: individual autonomy and efficiency. Next, I will discuss the application of conventional contract law to plea bargaining by exploring concerns relating to improperly obtained assent. Finally, I will introduce my argument that plea bargaining signifies the confluence of conventional contract law with contracts of adhesion. Liberty of Contract: Autonomy and Efficiency The liberty of contract doctrine was and remains constituted by two pre- vailing principles: 1) individual autonomy (liberty), and 2) efficiency. As I will demonstrate, justifications for plea bargaining that rest upon individual autonomy fail in two important ways. First, the notion of the free-thinking, free-acting, reasonable rational actor possessing free will is a myth. Second, granting the existence of an autonomous individual as was and continues to be the hegemonically rhetorical standard, plea bargaining still fails by constitutional standards. I give primacy to the former argument, and I jux- tapose the latter one to demonstrate what I perceive to be a misapplication of constitutional law. Autonomy Generally, from a moral and political philosophy perspective, we can view autonomy as being comprised of two conditions – competency and authentic- ity.2 Competency refers to “various capacities for rational thought, self-con- trol, freedom from debilitating pathologies, [and] systematic self-deception … Authenticity conditions often include the capacity to reflect upon and endorse (or identify with) one’s desires, [and] values.”3 Consistent with Homo economicus, “Autonomy is the source of all obligations, whether moral or non-moral, since it is the capacity to impose upon ourselves, by virtue of our practical identities, obligations to act.”4 Viewing individuals as rational economic maximizers is the premise of the Coase theorem, the nucleus of the law and economics school of thought.5 Generally, the Coase theorem posits individuals as rational cost calculators driven by utility maximiza- tion. Moreover, “in virtually all economic accounts … the individual is the fundamental unit of economic behavior … The interaction of rational indi- viduals, each maximizing his or her own self-interest, tends toward market ‘equilibrium’ or steady state that will not change in the absence of outside forces.”6 Since markets are solely produced through the interaction of self- interested individuals, there is no need to consider politics, law, or culture as exogenous to them and influential over them. As it pertains to plea bargaining, Coase’s theorem suggests that “when parties are free to bargain costlessly they will succeed in reaching efficient outcomes regardless of the initial allocations of legal rights” (my empha- sis).7 Law may be implicated in restoring system equilibrium under circum- stances producing “transaction costs.”8 Coase was primarily concerned with acknowledging that every decision produces unanticipated collateral effects. This is especially important as it pertains to my argument in this book since, as Coase makes clear in his conclusion, It would clearly be desirable if the only actions performed were those in which what was gained was worth more than what was lost. But in choos- ing between social arrangements within the context of which individual decisions are made, we have to bear in mind that a change in the existing system which will lead to an improvement in some decisions may well lead to worsening of others.9 Of course, in the plea bargaining context, transaction costs are transpar- ent and costly. They may be experienced through the assertion of the right to trial where, upon conviction, a defendant may be sentenced to a lengthy prison term. Or perhaps transaction costs associated with the plea might entail relinquishing access to government-funded housing, child care, or the opportunity for employment. Most egregiously, the adoption of felony crim- inal plea procedures with its emphasis on negotiated contracts between a powerful representative of the government and a powerless defendant, along with procedural rules barring access to impeachment evidence known to the prosecutor (Ruiz) while requiring abdication of Fifth and Sixth Amendment rights, signifies the ultimate in transaction costs – the creation of a criminal procedure technology that presents as a threat to democracy. Why? Through the legal coding of capitalism, and consistent with Justice Harlan’s contentions in Hopt and Thompson that rights may not be taken away, nor given away (i.e., through waiver of the Fifth and Sixth Amendment to plead), Coase’s theorem and its emphasis upon an autopoietic economic system of self-interested individual utility maximizers leads to a broader sys- tem-wide diminution of juridical rights protections. If the state may engage in “trading” rights for a benefit (the commodification of rights), cherry- picking rights protections from theoretically atomized individuals, then the right no longer possesses the cultural, institutional, or constitutional authority to protect people from the coercive power of the state. Following Coase’s theorem, so long as transaction costs are kept to a minimum, and so long as there is “mutuality of benefit” (e.g., the state gains a conviction, the defendant receives downward departure on sentencing), the accused who confronts the state is a “free agent” possessing the “right” and “ability” to “knowingly” and “voluntarily” negotiate the charges against them, and the subsequent punishment, but only after abdicating their rights protections. While I contend that this construction is mythological as applied to econom- ics, it is perhaps not quite as dangerous to liberty as when it is applied to plea bargaining. Liberalism’s contribution to political philosophy and autonomy was fundamental to the adoption of the liberty of contract doctrine and the “freedom” to negotiate the terms of one’s work. Inherent in the liberty of contract doctrine is individual autonomy as a prerequisite to forging the contracts integral to private law where “mutual recognition or the equal- ity of persons is the necessary condition for the correlation of rights and obligations in the private legal relationship.”10 But autonomy is also inte- gral to a commitment to the social contract upon which liberal democracy would be formed. Important for my purposes, “liberalism refers generally to that approach to political power and social justice that determines prin- ciples of right (justice) prior to, and largely independent of, determination of conceptions of the good.”11 Liberal conceptualization of autonomy is integral to Homo economicus since it “implies the ability to reflect wholly on oneself to accept or reject one’s values, connections, and self-defining features, and change such elements of one’s life at will.”12 At bottom is the belief that individuals possess rights “by virtue of their having some “prop- erty” (moral autonomy, human dignity) that constitutes them as bearers of rights.”13 As such, “Law and political decisions are binding to the degree to which they respect individual rights”14 since they signify expression of individual autonomy. In sum, to be autonomous as envisioned by liberal theorists of the Enlightenment period, or as we continue to hear from juridical actors today, is to assume that Homo sapiens possesses an objective awareness of self and others to such an extent that a “reasonable man” will be able to properly comprehend and act in accordance with published law.15 Consistent with this narrative, and with the exception of those who are mentally compro- mised, violation of the law is a choice made by a reasonable rational actor who calculated the costs and benefits of their actions and chose the illegal path. Arguing from within the narrative of liberalism and moral philosophy, ascribing autonomy to a defendant confronted with plea bargaining demon- strates species respect for the individuality constituting Homo sapiens. That is, providing a defendant with an option regarding their punishment for charged crimes signifies acknowledgment that each of us has the capacity to make “reasonable” decisions premised upon our objective assessment of the circumstances we are confronting. It is precisely this kind of justification for the plea that was provided by the Court in Brady and its progeny. So long as there is a “mutuality of benefit” accruing to the state and to the defendant, and so long as the defendant has the voluntary choice to plead guilty or not guilty, then the system preserves both the integrity of individual autonomy and system efficiency. Such is the accepted wisdom of legal scholars and practitioners, but for the reasons I present below, it is wrong. Many years ago, while developing my ideas regarding the constitutionality of the plea, I had an email exchange with Harvard Law Professor Lawrence Tribe. Professor Tribe had read a short early draft of my work, and while he agreed with me that there were problems regarding plea procedure, he was not willing to concede my argument that plea bargaining is per se unconsti- tutional. Specifically, Professor Tribe said, I should say, however, that I don’t agree with you that the very notion of waiver of fundamental rights is somehow oxymoronic or otherwise unacceptable … I believe that the autonomy and independent agency of supposedly free individuals ordinarily presupposes that they should be able to “trade” otherwise fundamental rights in exchange for benefits they desire more.16 Professor Tribe’s emphasis upon individual autonomy is the normative legal position, especially as it pertains to plea bargaining. However, his position, like that of the legal profession more generally, and the Supreme Court most specifically, is simply at odds with what we know about how Homo sapiens comes to an awareness of subjective identity. As I estab- lished in Chapter 5, notions of “freedom,” “liberty,” and “autonomy” con- stitute the foundation of the liberty of contract doctrine, a doctrine that posits each person as a reasonable and rational individual fully capable of engaging in all social relationships as a “free agent.” At bottom, there is a Kantian presumption of free will.17 But as more than a century’s worth of Sociology,18 Psychology,19 Anthropology,20 Neuropsychology,21 and more recently Neurophenomenology22 establishes, Homo sapiens are politically, economically, and culturally embedded subjects constituted by their respec- tive brains and experiences. That means that no person has the capacity to “step outside” of themselves in order to perceive the “world as it is.” This is because: a) there is no “world as it is,” an objective reality signifying an overdetermined essentialism available to all who are able to reason, and b) subjects limited as they are by their own physiology and cultural expe- riences (especially language)23 will always filter new information through their political, economic, and cultural lenses. Moreover, each brain is a snowflake,24 unique in its composition and its capacity for processing infor- mation. Each brain symbiotically processes information consistent with its cultural embeddedness, making the question of “choice” and autonomy sus- pect. After all, “[t]he complex interactions of genes and environment mean that all citizens—equal before the law—possess different perspectives, dis- similar personalities, and varied capacities for decision-making. The unique patterns of neurobiology inside each of our heads cannot qualify as choices; these are the cards we’re dealt.”25 Events and experiences occurring out- side a subject’s field of influence will not stimulate consciousness leading to action or inaction in the same way that they would for those who are more familiar with them. Three brief examples will suffice to establish the point: 1) those who followed and continue to follow the autocratic white supremacy of former president, Donald Trump; 2) those who follow and believe in QAnon conspiracies; and 3) those Russians who believe Vladimir Putin’s “deNazification” rhetoric is a legitimate justification for war with Ukraine. Limited as we are by our political, economic, and cultural experi- ences, including the quality of information we receive, our relative fear over the state of the country and our families, and the precariousness of our lives, what is real and true will always be a contested terrain of competing values and ideas, not something that lives objectively “outside” of us. As it pertains to neuropsychology, a subject far too complex to develop here, we know that for reasons associated with species preservation, the Homo sapiens brain defaults to the “fixation of belief” in original positions adopted by it.26 Homo sapiens, then, is constituted by a complex and ongoing intersection of political, economic, cultural, and neuropsychological factors that make any argument for “free will” theoretically and empirically anachronistic.27 In previous work deconstructing the knowing and voluntary prongs of Federal Rule 11, I have emphasized the power of neurophenomenology to provide a far more thorough assessment of constituted subjects.28 Specifically, “It [neurophenomenology] seeks a comprehensive understanding of human identity construction and consciousness through integration of the natural and social sciences, and phenomenology.”29 Consider the following assess- ment of neurophenomenology to embedded notions of autonomy, especially as manifested in plea bargaining. What appears to be common among neurophenomenologists, and that is especially significant as it pertains to our concerns with mental compe- tency and plea bargaining, is recognition that cognition and conscious- ness is a far more dynamic and nuanced process than what the courts have generally understood. Common among neurophenomenologists is the assumption that, “[c]onscious experience is not located in a specific part of the brain, nor can it be identified in terms of special neural struc- tures. It is an emergent property of a particular cognitive process—the formation of transient functional clusters of neurons.” For Varela, “each conscious experience is based on a specific cell assembly, in which many different neural activities—associated with sensory perception, emotions, memory, bodily movements, etc.—are unified into a transient but coher- ent ensemble of oscillating neurons.” Consciousness thereby manifests as the confluence of a dynamic and emergent process combining neurologi- cal networks with subjective environmental experiences.30 Much more could be said with regard to the neurophenomenological cri- tique of free will and the rational actor model that has constituted the crimi- nal legal system since the Enlightenment. However, suffice it to say that the evidence exists from within the social sciences, neuroscience, and phenom- enology that human subjects are anything but “autonomous,” “reasonable,” and “rational actors” confronting the state.31 So why is it that the criminal legal system continues to cling to an out- moded and simplistic framing of human consciousness? Because presump- tions of “individual autonomy” serve as a hegemonic rhetorical device necessary for both the coding of capital (e.g., freedom to work and to con- tract) and for state-sanctioned governmentality through the application of law (control over subject behavior, especially punishment). To contend, as Professor Tribe, the legal community, and certain state actors do, that Americans are autonomous actors each capable of confront- ing the state on equitable grounds in order to bargain for advantage is, when confronted with neurophenomenology, a cynical straw man argument useful for justifying the exercise of power over criminal defendants confronting the police power of the state. I indicated in the opening paragraph of this chapter that there were two reasons for rejecting the Court’s justification for the plea – individ- ual autonomy was the first. The second pertains to the positive right to a criminal trial by jury expressed in Article III §2 and the Sixth Amendment. Assuming for the moment that Homo sapiens is a species capable of “indi- vidual autonomy,” I find the argument for the constitutionality of plea bar- gaining still fails to convince. As discussed in Chapter 4, Article III §2 and the Sixth Amendment were crafted precisely to protect liberal notions of individual autonomy against an overpowering judging and punishing state. That is, just as Justice Harlan explained in Hopt and Thompson, as well as the constitutional protections afforded by the Fourth, Fifth, Sixth, Eighth, Thirteenth, Fourteenth, and Fifteenth Amendments, presuppose an autono- mous actor confronted by the police and prosecutorial power of the state. With the exception of the Sixth Amendment, those protections were largely assumed to be negative rights that limited how far the state could go to intrude upon individual (autonomous) liberty. To summarize, while I con- tend consistent with the published neurophenomenological scholarship that no Homo sapiens is an island unto itself, rather that each is constituted by its neurological soundness and cultural embeddedness, even if I were to con- cede the autonomous actor argument consistent with the Constitution, Bill of Rights, and Reconstruction Amendments, it is clear that the dignity of the subject confronted with state authority is embedded in each. Law and Efficiency

#### Neoliberal free contract logics in private law is applied to the unanalogous public realm, ensuring plea bargains guarantee inequitable deals

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Legal scholars of the Progressive era applied the theory of marginal util- ity to the accumulation of wealth. The argument was simple enough. For the wealthy, the accumulation of an additional dollar will generate only “marginal utility” since a dollar added to hundreds of thousands or mil- lions of dollars already procured will not significantly enhance their qual- ity of life. However, for the poor, every additional dollar accumulated does significantly enhance their quality of life, and in so doing, the overall health of the national economy. According to marginal utility theory, “the transfer of dollars from the millionaire to the pauper would continue to improve total welfare until the millionaire and the pauper had the same amount of marginal utility for the next dollar.”46 The redistributive nature of Progressive marginal utility theory led to its practitioners being referred to as the material welfare school of economics. The material welfare school was influential from the turn of the 20th century until 1930.47 Hovenkamp states that the material welfare school influenced the jurisprudence of tort law, family law, environmental law, criminal law, and civil rights law.48 They supported the application of marginal utility economics to a vast array of policies and practices meant to counteract the well-known detritus gener- ated by the capitalist mode of production, including “minimum wage laws, graduated income taxes, subsidized public education, welfare payments to the poor, taxes on monopoly profits, and other devices by which the rela- tively wealthy were required to finance the provision of goods and services to the relatively impoverished. Health and safety regulation could also be justified as taxes on wealthy producers for the benefit of poorer consum- ers.”49 With its attention to the degradation of human life generated through oppressive living and working conditions, the material welfare school of economics responded with policies that, in my opinion, seem consistent with those recommended by the physiocrats discussed previously. The phys- iocrats, you may recall, were foremost in promoting the natural law ideol- ogy of individual autonomy consistent with the application of property and the right to freely labor. They were also well aware of the abject suffering of the laboring poor and argued for policies that would ameliorate it. The Progressive era material welfare school applied marginal utility to a set of policies designed to protect the poor and vulnerable through the redistribu- tion of wealth. Richard T. Ely was a progressive law and economics scholar writing in the early to mid-20th century. He was, like many of his predecessors, heav- ily influenced by the German Historical School of economics. I mention Ely because his analysis is both historical and structural in nature, and because of his analysis of contracts. In 1914, Ely published his two-volume Property and Contract in Their Relations to the Distribution of Wealth. An institu- tionalist economist by training, Ely “argued that the distribution of wealth in society was a product of previously created legal rules, not merely that of the natural laws of economics” (my emphasis).50 That is, no “invisible hand” drove economic prosperity. Rather, individual wealth was established and maintained through a series of legal codes (recall Katharina Pistor and the coding of capital) produced by those with access to power. Important for my purposes is Ely’s concern with contract law. Ely insists that unregulated bargaining enhances power that already exists and creates increasingly greater economic inequality. The law of contract tends to pre- serve advantages once secured, because the inequalities of disadvantages under which one party may labor will express themselves in contract. And as contract tends to preserve advantages secured, so it continues dis- advantages – contract tends to keep the existing conditions of things, or to allow existing currents to flow on.51 As applied to plea bargaining, Ely’s expression of the power vested in the progenitor of contracts (i.e., a prosecutor), and the sempiternal application of plea procedure as a contractual bargain, signify a self-contained autopoi- etic process that over time constructs its own internal logic. Importantly, to the extent that there is no substantive systemic oversight of prosecuto- rial authority in the context of the plea (recall Federal Rule 11), the process shares similarities with Ely’s larger concern over “unregulated bargaining.” In addition, Ely’s contention that it is the contract as legal technology that facilitates the perpetuation of the inequalities and disadvantages that exist between the author of a contract (a prosecutor) and its recipient (a defend- ant) is precisely the point that I am making in this chapter. What prosecutors achieve through the application of contract law to plea negotiations is: a) normalizing the hierarchical authority of the state in the person of the pros- ecutor, b) legitimating the application of contract law to criminal procedure, c) promoting Homo economicus, the atomized rational individual confront- ing the state, d) efficiency and ease of conviction, and e) autopoietic normali- zation of the plea process. The practical result of the normalization of the application of contract law to plea bargains is, as Ely suggests the “preserva- tion of advantages secured” for the powerful, while contracts continue to promote disadvantages for the powerless since they tend to perpetuate the “condition of things.” In sum, for Ely it is contract as legal technology that serves to perpetuate unequal bargaining. This point will become clearer as I discuss contracts of adhesion below. Beginning in 1970 and continuing throughout the decade, neoclassical (or neoliberal) economics began to take hold with its primary emphasis on a reinterpretation of common law (judge-made law) to emphasize efficiency, where the common law was considered more desirable than legislation for promoting individual wealth and societal well-being. Neoliberal economists considered common law superior to legislation for two reasons. First, “com- mon law is designed to give effect to private bargains with minimum active interference from the state” because the “invisible hand” of the market was a more efficient mechanism for determining resource allocations. Second, “common law rules tend to become precedential only to the extent that they are efficient – i.e., through an evolutionary process, more efficient rules are upheld while less efficient ones are overruled.”52 What I find compelling is the emerging confluence of neoliberal economics during the 1970s with the United States Supreme Court opinions relating to plea bargaining. As I emphasized in Chapter 1, a brief review of the Court’s 1970s plea jurisprudence makes it clear that the Court’s majority had been influenced by an enervated liberty of contract doctrine that emerged largely in response to the publication of Coase’s 1960 article. As applied to the plea, the Court’s language speaks specifically to procedural efficiency by framing criminal defendants as atomized individuals subject to the power of government through the office of the prosecutor. The historical timing of the Court’s plea jurisprudence with an emergent neoliberal law and economy movement cannot be overlooked. There are two prevailing theories applied to questions of efficiency and that are normative within law and economics – the Pareto efficiency princi- ple and the Kaldor–Hicks efficiency principle. The Pareto efficiency principle (which ultimately leads to the development of the Coase theorem) stipulates that “a policy is efficient if there is no alter- native policy that makes someone better off without making anyone worse off (what Coase referred to as ‘transaction costs’).”53 The ultimate Pareto achievement is equilibrium, the balancing of interests. In order for a policy to be Pareto efficient, “a state policy may be said to increase welfare only if at least one person subjectively perceived that he benefitted and no one sub- jectively perceived that she was injured.”54 In the 1930s, marginal utility theory met with severe opposition from ordinal economics. Rather than emphasizing class as an independent vari- able affecting all manner of human behavior, ordinal economics assessed individual preferences for, say, commodity purchases, by ranking them on an ordinal scale. Ordinal efficiency analysis most commonly appears in the form of the Kaldor-Hicks efficiency principle. Nicholas Kaldor and John R. Hicks conceived an efficiency principle that would embellish upon Pareto efficiency. The Kaldor–Hicks efficiency principle posits that the most effi- cient policy is the one that people are most willing to pay for.55 That is, a law or procedure is Kaldor–Hicks efficient, not when relationships are in equipoise as with Pareto efficiency, but rather when the beneficiaries of an agreement “are able to compensate the losers fully for their losses and still have something left over” (my emphasis).56 Axiomatic of contractual nego- tiations, Kaldor–Hicks efficiency acknowledges that there will be “winners” and “losers.” This is most likely to be true under circumstances where con- tracts of adhesion (discussed below) are in play since a clear power imbal- ance exists between the author of the negotiation and those to whom the terms of the contract will be applied. Plea bargaining is Kaldor–Hicks efficient. It is my argument that to the extent the question of efficiency is paramount for legal scholars and mem- bers of the judiciary who defend the contractual nature of plea bargain- ing, it is the Kaldor–Hicks efficiency principle that most clearly encapsulates the post-indictment plea agreement between a prosecutor and a defendant. Unlike Pareto efficiency, which tolerates a unit of improvement for one sub- ject so long as, in accruing that unit of improvement, no other subject is harmed, the criminal legal process may be considered Kaldor–Hicks effi- cient when one subject receives a unit of improvement at the expense of the other subject, but the other subject is compensated for their loss. As applied to the administration of justice through plea bargaining, prosecutors “win” by gaining an admission of guilt from a defendant who must also abdi- cate their Fifth and Sixth Amendment rights (i.e., their losses), while those defendants are “compensated” for their loss (abdication of Fifth and Sixth Amendment rights) through receipt of charge and sentencing reductions. So while the plea process fails to produce equitable contractual outcomes, it is Kaldor–Hicks efficient since it satisfies the needs of the state (a unit of improvement) while simultaneously compensating defendants for their deci- sion to forego trial. In summary, the law and economics movement in the United States has a fascinating and bipolar history. Initially forming in response to the deleteri- ous effects of capitalism, early material welfare school economists apply- ing marginal utility theory turned to the state for regulation of industrial practices. The influence of the material welfare school began to wane in the 1930s, and by the 1970s the United States was firmly in the grip of neolib- eral economic theory – a return to classical economics with its emphasis on deregulation of industry and the free labor liberty of contract language that generated Homo economicus. The 1970s economic turn emerged at pre- cisely the same moment as the plea bargaining cases presented in Chapter 1 were decided by the United States Supreme Court. The Kaldor–Hicks effi- ciency principle provided the theoretical and juridical justification for a con- stitutionally protected form of due process – plea bargaining – substantively codified through a legal code of capitalism – Rule 11. Plea Bargaining and Improperly Obtained Assent

#### Plea bargains represent the neoliberal desire to maximize efficiency via escaping regulations and safeguards due to the mythos of American free market capitalism

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Piketty is acknowledging the historical contingency constituting the legal coding of capital, especially Foucault’s emphasis upon law as an instrument of power (“that is neither the truth of power, nor its alibi”). His argument, like Pistor’s (and Foucault developed in Chapter 7), insists upon the his- torical autonomy of actors and institutions. The importance of this framing of political, economic, and cultural arrangements is historically analogous to a semi-permeable membrane that both restricts and provides cleavages that enable the manifestation of new ideas about ways of organizing our- selves. For, as Piketty rightly observes, “At every level of development, eco- nomic, social, and political systems can be structured in many different ways; property relations can be organized differently; different fiscal and educational regimes are possible; problems of public and private debt can be handled differently.”94 The legal coding of capital that emerges in the United States in the early 19th century originates within an ideological con- text that Piketty calls “slave society,” which he equates with a historical period of extreme inequality premised upon the “quasi-sacrilization of pri- vate property in the nineteenth century.”95 The American ideological com- mitment to the system of slavery grew increasingly profitable and remained relatively stable from 1800 to 1860. Restrictions in cotton production in the French colony of Saint-Domingue in 1790 stimulated interest in the Southern United States cotton production market. According to Piketty, from 1800 to 1860 the number of slaves increased by a factor of four, and cotton output by ten.96 The recursive relationship between British textile manufacturing and American cotton production was so extensive that just prior to the commencement of the Civil War, Britain was purchasing 75 per- cent of its cotton from the United States.97 Why does this matter? Because it was this political, economic, and cultural nexus, contextualized by the ideology of slavery and aided by coded capital, that combined to lead to the commencement of the Industrial Revolution. The sustained growth of the Southern plantation economy, however, would by 1860 begin to con- front a juvenescent wage labor economy emerging in the manufacturing sec- tors of the North. Northern economic power, while more diversified than in the South, parasitically fed upon Southern slavery through a system of bank loans made to Southern plantation owners seeking funds to purchase new slaves. In fact, not only did the commodification of agriculture and technology create new financial instruments, but as Beckert and Rockman establish, “[T]he story of plantation finance … [added] a second layer of commodities – enslaved human beings – to the nation’s financial history.”98 Loans were made to plantation owners with slaves used as collateral. Those funds would then be used to purchase additional land and slaves.99 So prof- itable was the cotton production trade that during the late 1830s the most powerful banks in the United States – Barings, Browns, and Rothschilds – each made significant loans to Southern plantations. Beckert and Rockman argue that the practice of implementing lending instruments supporting cot- ton production enabled it to facilitate trade with Great Britain, France, and Germany.100 When it came to slavery, there appeared to be few unstained regions of the country. The slave trade grew so profitable that in 1860, “the market value of slaves exceeded 250 percent of the annual income of the Southern states and came close to 100 percent of the annual income of all the states.”101 Moreover, when compared with wage laborers in the North, “the market price of a slave was generally about ten to twelve years of an equivalent free worker’s wages.”102 Such was the political, economic, and cultural context of the Antebellum South, which recoiled when confronted with President Lincoln’s Emancipation Proclamation, Reconstruction, the Reconstruction Amendments, and the Northern-inspired wage labor movement. As a participant in the making of contractual relationships, each individ- ual was embodied as an agent of their own circumstance and choosing. As a linguistic and juridical expression of human freedom, liberty of contract possessed, as its highest virtue, its dialectical opposition to prior modes of production under slavery, feudalism, and indentured servitude. Moreover, in the United States, the liberty of contract doctrine was intricately bound up with the manifestation of liberal economic and political theory comprising a constitutional republic wherein normative legal coding provided for the supremacy of contract and protection of private property. The mythological American origin story presents individualism, private rights, civil society, free labor, and a free economy as constitutive of American exceptionalism, a “natural” outgrowth of a people unfettered by the intrusion of an oppres- sive state.103 Law’s hegemonic function legitimates state power and authority,104 espe- cially United States Supreme Court opinions.105 By doing so, it generates a sense of normativity (what ought to happen) with regard to the principles articulated by statutes and case law. This sense of normativity leaves the purpose behind plea bargaining open to obfuscation. How? By locating the privilege to plea bargain within the language of Homo economicus – free choice, i.e., the right to engage in contractual negotiations over one’s punish- ment.106 This superficially “free” choice is couched in the economic language of liberty of contract and the mandate under a capitalist mode of production for each member of society to negotiate the terms of their own working rela- tionship. In previous work on this subject,107 I have provided the following assessment of Homo economicus. Homo economicus – economic man – of classical economic theory is said to possess the following characteristics: “(1) maximizing (optimiz- ing) behavior; (2) the cognitive ability to exercise rational choice; (3) indi- vidualistic behavior and independent taste preferences.” A less charitable description of homo economicus might frame him as being “cold and calculating, worries only about himself, and pursues whatever course brings him the greatest material advantage.” Homo economicus is a single-minded, wealth-maximizing automaton, who does not take into account “morality, ethics, or other people.” Important for our purposes, the adoption of the ideological rationalization of human beings as homo economicus leads to confronting juridical problems through the applica- tion of cost-benefit analysis, where solutions are framed as incentives and disincentives. The framing of homme juridique as homo economicus pro- vides the jurisprudential legitimization for plea bargaining.108 In some ways, it is true that the ability to negotiate the conditions of one’s own labor and compensation required a larger political and ideological com- mitment to liberty as expressed through republican government. The two, it seems, historically went hand in hand, especially in the United States. What is not discussed in the context of plea bargaining is the extent to which capitalists and politicians employed law in the service of their own profit- maximizing needs, social control, and expressions of cultural superiority.109 For W.E.B. Du Bois, the onset of industrial capitalism meant the oppression of all workers regardless of race/ethnicity. The new industry had a vision not of work but of wealth; not of planned accomplishment, but of power. It became the most conscienceless, unmoral system of industry which the world has experienced. It went with ruthless indifference towards waste, death, ugliness and disaster, and yet reared the most stupendous machine for the efficient organization of work which the world has ever seen.110 American ideology mystifies the power of the state to regulate private and public relations by “downplay[ing] the more historical and ‘artificial’ role of collective decision-making, public law, government, and regulation in American political-economic development.”111 Counter to mythological rhetorical expressions of laissez-faire capitalism, for example, 19th-century governmentality was so pervasive, argues Shaw, that “the one common and striking characteristic of this huge collection of new [19th century] statutes is its utter disregard of the laissez-faire principle.”112 The state has at its com- mand the power to create the legal tools that lawyers apply to political and economic regulation and the power necessary to coerce adherence to those regulations. The indeterminate and contested relationship between system reproduction and law must be revealed through historically situated statu- tory and case law research. Consider the role played by the United States Supreme Court, functioning as a system-reproducing steering mechanism to perpetuate the capitalist mode of production by reference to the liberty of contract doctrine. While the liberty of contract doctrine was at least initially developed and implemented in the nascent industrial economy of the North, from its founding as a nation the United States coded slavery and subsequent white supremacy into law governing freed men and women in the South. As we have learned, the liberty of contract doctrine manifested in the South dur- ing Reconstruction, especially as it related to the abolition of plantation paternalism. According to the doctrine, freed men and women would now be viewed as similarly situated to wage labor workers in the North insofar as their status related to the application of the fellow-servant rule, assumption of risk doctrine, and freedom to contract for work. But as was revealed in the previous section of this chapter, in addition to their new status as wage laborers, freed men and women would confront the vulgarity and indignity of white supremacy as coded into the law of Southern capitalism. It is in this way that the Southern power bloc comprising producers of cotton, food, tur- pentine, coal, tobacco, textiles, and lumber engineered a system of political, economic, and cultural oppression that relied upon the semiotic construc- tion of a legal code consistent with capitalism’s slavery – Jim Crow laws. In dialectical opposition to the liberty of contract doctrine, we find Marxist economic theory. In the section to follow, I will present a brief over- view of Marx’s theory of value since it presents a theory of human thriving at odds with the evolution of liberal economics and with natural law’s physi- ocratic emphasis upon individual autonomy. As we will see, this is impor- tant because Marx was able to articulate a theory of the economy and the state that exposed the legal coding of capital as an oppressive move that would have dramatic effects well beyond the economic sphere. Moreover, and in keeping with the political economy theme of this book, Marx’s the- ory exposes the intersection of the capitalist mode of production with the need to discipline wage labor to the dictates of profit maximization. This section will provide the context for the substantive deconstruction of con- tract law as applied to the plea, where beginning during Reconstruction, the plea served as an efficient legal technology for promoting social control over white and black wage laborers in both the North and the South. Marx’s Theory of Value and the Coding of Capital

#### Utilitarian centric punishment causes the commodification of justice and abstraction of suffering, allowing “objective” utility maximization that causes predictive policing and racial subjugation

Epstein 21 [Daniel Epstein, PhD candidate in Political Science at the University of Chicago, 2021, “Commodified Justice and American Penal Form,” Journal of Law and Political Economy, https://heinonline.org/HOL/P?h=hein.journals/jlolwadpl2&i=77]/Kankee

IV. Second-Order Commodification: Punishment-Utility Equivalence Pashukanis hoped that, in transcending the bourgeois legal form, the Soviet Union could succeed in "transforming punishment from retribution into a measure of expediency for the protection of society and into the reform of individuals who are a threat to society" (Pashukanis [1924] 2003, 185). In this section, however, I argue that such consequentialist approaches to punishment, no less than retributive ones, are rooted in commodification-in this case, through the mediating value of social utility. I refer to this punishment-utility equivalence as the second-order commodification ofjustice. It corresponds to the second aspect of commodified justice, whereby appropriate response to believed wrongdoing itself has quantifiable value. The canonical statement of the utilitarian theory of punishment comes from Jeremy Bentham. Unlike the retributivists discussed above, who locate the justness of a punishment in its relationship to a specific wrongful act, Bentham argues that punishment is justified to the extent that it brings about an increase in total social utility by optimizing punishment's role as a deterrent. He writes: "[T]he general object which all laws have, or ought to have, in common, is to augment the total happiness of the community; and therefore, in the first place, to exclude, as far as may be, anything that tends to subtract from that happiness" (Bentham [1789] 2011, 57). Because both crime and punishment tend to subtract from the total happiness, punishment is "only to be admitted in as far as it promises to exclude some greater evil" (ibid.). Crime and punishment, therefore, are both reckoned against another "universal equivalent"-utility for society. The Benthamite lawmaker must quantify crime and punishment in these terms so as to calibrate the latter for maximal total utility. This is the conceptual core of the second-order commodification of justice. At first, this second-order commodification might seem mutually exclusive with the first-order commodification described above. Punishment is no longer "bought" by offending, nor is offending "paid for" by punishment; both acts retain their independence and are considered from a social perspective in light of their use-values-their utility/disutility for the broader community. However, a closer look at Bentham's theory suggests less an elimination of first-order commodification than its displacement from the law itself to the minds of the individuals it governs. Bentham's first rule for penal legislation is that "the value of the punishment must not be less in any case than what is sufficient to outweigh that of theprofit of the offence" (ibid., 63; emphasis in the original). The efficacy of Bentham's theory, then, depends on the extent to which a given offense and the possibility of a corresponding punishment are legible as commodities to individuals, such that they can weigh their relative "values" and maximize their overall "profit." Moreover, as it is the law that will specify punishments so that individuals will recognize criminal actions as unprofitable, its makers must also engage in this commodification, at least as a theoretical exercise, so as to set those punishments at appropriate levels. Hence the "second- order" character of this strain of commodified justice: it presumes first-order commodification in concept-that offense and punishment can be equated-and seeks to quantitatively valorize different prospective offense-punishment equilibria against each other through the medium of utility. Cesare Beccaria, another Enlightenment-era penologist of utilitarian leanings, usefully links these ideas, albeit in reverse order: "the obstacles that deter men from committing crimes must be more formidable the more those crimes are contrary to the public good and the greater are the incentives to commit them. Thus, there must be proportion between crimes and punishments" (Beccaria [1764] 2008, 17). Much like retributivist ideas, Benthamite principles of crime and punishment also saw a resurgence around the 1970s, most prominently in Gary Becker's (1968) landmark article "Crime and Punishment: An Economic Approach," and the broader Law and Economics movement this article helped to launch. Indeed, Richard Posner, perhaps the best-known exponent of this mode of legal thought, subtitled a descriptive essay on it "from Bentham to Becker" (Posner 2001, 31-61).8 For Becker, who saw himself as "resurrect[ing]" and "moderniz[ing]" the economic-minded penology of Beccaria and Bentham (Becker 1968, 209), utility provides the law not only a metric to assign proper punishments to categories of offenses but, more broadly, away to reckon the value of punishment in general against other government projects, given costs and resource scarcity. Becker announces his aims thusly: The main purpose of this essay is to answer . . . how many resources and how much punishment should be used to enforce different kinds of legislation? Put equivalently, although more strangely, how many offenses should be permitted and how many offenders should go unpunished? The method used formulates a measure of the social loss from offenses and finds those expenditures of resources and punishments that minimize this loss. (Becker, 170; emphasis in the original) While the retributive theorist and Benthamite legislator, each in their own way, concern themselves with the proper rate of exchange between crime and punishment, Becker is primarily occupied with another kind of exchange: that of punishment for other prospective social goods, given that resources are finite. Expenditures on punishment are to be set so as to minimize "the social loss from offenses." This requires that these expenditures, and the gains they may bring, be precisely quantified in terms of this social loss, a "universal equivalent" capable of bridging all other possible resource expenditures, penal and otherwise. With Becker, then, the second-order commodification of justice is articulated in its most complete form: the commodification of justice as the output of an overall penal regime, evaluated with attention to its operating and opportunity costs. None of the above is to say that second-order commodification is restricted to utilitarian theories, even if it does find its paradigmatic statement therein. Retributivism, too, as Richard Lippke convincingly argues, is necessarily subject to second-order commodification, since retribution also inevitably occurs against a background of resource scarcity and necessary trade-offs (Lippke 2019). It costs money to punish, so punishment itself must be assigned explicit value in a manner that allows for comparisons with other prospective uses for that money. Most retributive theorists do not weigh such issues, but applying their theories in practice demands at least implicit efforts to do so (ibid., 55-56). Both first- and second-order commodification, then, can be found in at least some proportion in penal regimes animated by either utilitarian or retributive principles. This second-order commodification has also done a great deal to shape criminal justice policy in the United States over the past half-century. If the retributive shift of the 1970s helped spell the end of the "clinical" model of punishment, in which sentences were determined by the "subjective judgment of experienced decision-makers" (Harcourt 2007, 269 n. 48), mindful of rehabilitation, it also cleared ground for new consequentialist forms of penality to emerge in an "actuarial'guise, characterized by "statistical correlations between group traits and group criminal offending rates" (ibid., 18). In seeking to predict crime and/or recidivism, such methods serve an end only thinkable in the wake of the second-order commodification of justice: to make effective punishment optimally cost-efficient, to "buy" as much as possible for the least expense in utility elsewhere. Indeed, such actuarial methods lie at the core of "predictive policing," now common in departments across the country, whereby police employ advanced analytics to determine precisely where they should devote resources and when. Second-order commodification also contributes to the racism that pervades American penal law at every level. Many have critiqued predictive policing for justifying racist patterns of policing under the guise of objective utility maximization (Harcourt 2007, 147-168; Wang 2018, 247-250; Jefferson 2018; Browning and Arrigo, 2021). Race, by statistical proxies like geography or by structuring uneven patterns of surveillance that skew sampling, figures as an implicit input in a grand, Beckerian calculus, determining the precise exchange-value of various police actions. Such an operation yields a veneer of formal neutrality-now understandable as an effect of the abstraction of the commodity form-which produces what Naomi Murakawa and Katherine Beckett have called "the penology of racial innocence," whereby "the operation of racial power in penal practices and institutions" is "obscure[d]" (Murakawa and Beckett 2010, 696). And in turn, mass criminalization plays a constitutive role in the construction of race more broadly (Van Cleve and Mayes 2015). Indeed, Henry Louis Gates takes Posner to task, specifically, for neglecting the "racial stigmata" imposed on all Black people, not just those who suffer from specific discrimination, in perceiving them in terms of their probability of committing a crime (Gates 1992, 337-341, quote on 341). Such "stigmata," of course, were not first fashioned by Law and Economics scholars; Khalil Gibran Muhammad has argued that the "statistical language" of social science played a crucial role in producing the popular association between Blackness and criminality in the United States as early as the late nineteenth century (Muhammad 2011, 1). In any case, this bidirectional relationship between racism and legal punishment seems reinforced by the second-order commodification of the latter; it launders racism in statistical generality, allowing its particulars to disappear into the apparent objectivity of quantity. First- and second-order commodification are distinct, to be sure, but they can also operate in tandem. Such is the case in the institution of plea bargaining-a ubiquitous practice in American penal law, used to resolve an overwhelming majority of cases. Robert E. Scott and William J. Stuntz, who explicitly analogize the practice of plea bargaining to contractual exchange, provide a succinct summary of this practice and its significance: Most cases are disposed of by means that seem scandalously casual: a quick conversation in a prosecutor's office or a courthouse hallway between attorneys familiar with only the basics of the case, with no witnesses present, leading to a proposed resolution that is then "sold" to both the defendant and the judge. To a large extent, this kind of horse-trading determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it is the criminal justice system. (Scott and Stuntz 1992, 1911-1912)

#### Plea bargaining is commodity fetishism based on abstractions of suffering, punishment debt, guilt/innocence uncertainty, a cruel optimism of seeking to quantify all aspects to maximize justice while simultaneously negating it

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Against this backdrop, as well as the uncertainty associated with going to trial, parties engage in a kind of speculation, bargaining away their chance at the best possible outcome in order to mitigate the chance of the worst (ibid., 1914). Practiced attorneys learn to recognize the "market price" of a particular case (1923), leading to swift bargains, or what is sometimes referred to, revealingly for our purposes, as "assembly line justice" (Blumberg 1969, 22). Indeed, while justice by plea bargain may seem in one sense a departure from first-order commodification-it distorts the "price" deemed appropriate in the law-in another sense it is a furtherance thereof, commodifying crime not only in cases of demonstrated guilt, but whenever there has been a charge. The plea bargain effectively creates a price for being accused of a given crime, whether one is in fact guilty or innocent, actuarily adjusted for the strength of the case in question and facts about the defendant's history. Whereas a trial must at least dwell at length on the particulars of the case before commodifying it at sentencing, a plea deal requires no such detour; the fact of particularity has been itself commodified and priced into the exchange in the form of probabilistic uncertainty. To extend a metaphor: the artisanal practice of trial litigation gives way to quasi-automated "assembly line" production. This perfected first-order commodification is part of what permits the plea bargain to become the dominant site of the second-order commodification of justice in the United States today. Assembly line production does more than impose uniformity on its products; it also minimizes overall costs. In a system as busy as the American one, in which all parties (especially public defenders) are at constant grips with what Lawrence Blumberg calls "economies of time, labor, expense" (Blumberg 1969, 23), the plea bargain allows for the cheap resolution of cases, allowing more "justice" to be bought for the same investment of resources. The plea bargain is therefore both a case-specific exchange between lawyers and the result of similar exchanges at the level of policymaking between a penal regime and other state priorities. For it to fill both roles, it must presume that justice can be abstractly calibrated, quantified, and accumulated, and that it is reducible to a metric that makes it naturally commensurable to other goods. It must presume, in other words, both the first- and second-order commodification of justice. V. Consequences: The Carceral Fetish in American Culture

#### Rejecting justice’s commodity fetishism is key to end the carceral state – the hollowness of abstraction means we’re never satisfied with punishment, fueling the “punishment imperative” driving the prison-industrial complex

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In this way, what Robert Knox observes about race and value, and Brenna Bhandar about race and property, applies also to race and criminality: the two are co-constituted through the medium of abstraction, born of the commodity form and codified in the legal form (Knox 2016, 109-110; Bhandar 2014, 212; Bhandar 2018, 8). Scholars of "racial capitalism" have exposed many of the myriad and complex ways that race and capitalism are entangled with one another (see, for instance, Robinson [1983] 2000; Johnson 2013; Johnson 2020; Melamed 2015; Gilmore 2017; Bhattacharya 2018). These brief reflections suggest a specific role for the commodity form-and its corollary penal legal form in this entanglement. Attention to this entanglement might, in turn, shed some light on differences between the United States' penal regime and culture and those of other wealthy capitalist countries. While this claim is beyond the scope of this article, it is perhaps a particular intensity and centrality of anti-Blackness in the United States that helps explain its greater investment in the "immutability" of criminality. In the end, commodified justice fails to satisfy even the punitive public that yearns for it. As in the Madoff case, the seeming transcendence of the number presumably arises from its apparent subsumption of the particular "social character" of the concretely experienced harm, whose negation it purports to immanentize in abstract, quantitative form. But this "religious" presence belongs to the aforementioned imperceptible aspect of commodified justice-indeed, is only present insofar as it is imperceptible, as the magic that claims to convert quality to quantity. What is left, in the end, is a raw number, bereft of promised meaning, an icon of false transcendence. Certainly, the commodity fetish constitutes a kind of "enchant[ment]" of its own (Balibar [1994] 2007, 60), but, rife with the abstract distortion of social relations, this enchantment tends to prove hollow and unsatisfying. Aladjem identifies a failure of the formal law to provide, in the end, a suitable theodicy, showing that "frustration with justice" often leads to extra- or even anti-legal revenge fantasies (Aladjem 2008, 65). At the same time, it seems also to plausibly explain deepened investment in the penal law, stronger commitments to long and invariable sentences. It might be, then, that some Americans relate to commodified justice in terms of what Lauren Berlant calls "cruel optimism," whereby "something you desire is actually an obstacle to your flourishing" (Berlant 2011, 1). Danielle Sered, an anti-carceral writer and restorative justice practitioner, powerfully narrates the experience of victims of harm in terms like this: If I do come to believe the story [that carceral punishment brings healing], then when I am harmed, I want the person arrested and sentenced because I believe it will bring me relief ... I call the police and I participate in the process, and, if I am like most victims, at the end of doing so, I am still unhealed, I still feel unsafe, and my appetite for justice is still unsatisfied. But now, unlike before I sought that remedy, I am heartbroken. (Sered 2019, 38) Sered goes on soon after: [When victims like this] testify at parole boards that even ten years of a defendant's incarceration has made no dent in their pain, many people assume that the problem is simply that the person has not been incarcerated long enough, as though one day . .. we will reach the juncture where incarceration will finally help the victim, despite no indication that it has contributed to their well-being thus far. (ibid., 40) The particular needs of Sered's victim have been neutralized in the cold generality of the prison sentence; to use Taussig's language, the "life-force" that first seemed to pulsate from this response has dissipated, leaving only the "inert thing" and disappointment. But this disappointment, rather than prompting reevaluation of the practices that led to it, seeks resolution in a magnification of them. I expect a similar story could be told about those who have not been victimized themselves, but who seek theodicy in punishment as Aladjem suggests (indeed, as Sered's telling implies, what we think of as the "victim's perspective" might sometimes originate from such non-victims anyway). 9 Frustrated with justice, some Americans double down, hoping the void they feel will be filled with more punishment, more justice (more effacement of particularity, more racialized demonization); there can be no other solution, because, as the Marxist theorist Georg Lukics writes, the cognitive "reification" typical of modern capitalism "requires that a society should learn to satisfy all its needs in terms of commodity exchange" (Lukics [1923] 1971, 91). In doing so, however, these Americans affirm precisely the form of justice that produced such dissatisfaction in the first place, laying the groundwork for another cruelly optimistic doubling-down to come. As Sered laments, "We will punish more and more harshly, as if to prove that we were not wrong about who 'those people' are-because if we were wrong, if we are wrong, then we have done an unimaginably terrible-even an irreparable?-thing" (Sered 2019, 250). Commitment to commodified justice, then, performs the "smoothing work" is-a- vis the psychically intolerable that Lisa Wedeen, drawing on Zizek and Frederic Jameson, identifies as a central function of ideology (Wedeen 2019, 5-7). Here, though, this "smoothing work" operates though perpetual intensification, as it is precisely the always-insistent possibility of its own ultimate emptiness and depravity that commodified justice, qua ideology, must continually work to stave off. It is not surprising that such a society, caught in the grips of this vicious cycle, should become obsessed with punishment. Criminologist Gordon Bazemore, observing the prison boom of the late twentieth century, speaks of a "policymaker addiction to punishment" (2007, 653), and other commentators note a tendency to see "concrete and steel cages as catch-all solutions to social problems" (Gilmore and Kilgore, 2019, n. p.). Evidence of this obsession is readily present not only in the law books, but in the media and entertainment industries (Novek 2011). Police procedurals, courtroom dramas, stories set in prison, true crime narratives-all these and more are ubiquitous in American entertainment, dramatizing the commodified processes described above. This omnipresence of punishment in the American political psyche and in its cultural forms can perhaps be understood by what Guy Debord, leader of the Situationist International and maybe the foremost post-war theorist of the commodity fetish, conceptualizes as "the spectacle," the perceptible world under conditions of the total commodification of social relations, from which persons are alienated. For Debord, "the spectacle corresponds to the historical moment at which the commodity completes its colonization of social life ... commodities are now allthere is to see; the world we see is the world of the commodity" (Debord [1967] 1995, 29). The inhabitants of this world-the Beckerian penal policymaker, the victim of harm, the theodicy-hungry citizen, and the everyday consumer of culture-are confronted, in different ways, with a spectacularized brand of justice, where, truly, "commodities are all there is to see." And awe-inspiring as these spectacles may sometimes seem, they offer, Debord writes, only "a specious form of the sacred" (ibid., 20). In the final analysis, there is nothing behind the mist. VI. Conclusion: Where We Go from Here What, then, is to be done? While commodified justice is an ideological phenomenon, merely adjusting our beliefs and expectations about punishment in awareness of its existence will not be sufficient to solve it. Understanding ideology as form means that one must speak of commodified justice as I have as a material distortion and not merely a subjective delusion; "it constitutes . . . the way in which reality . . . cannot but appear" under conditions of capitalism (Balibar [1994] 2007, 60). As I have sought to show in this article, commodified justice in the United States is not a mere metaphor; the conceptual grammar of justice really is the conceptual grammar of commodification and commodity exchange. This does not mean that this grammar is intractable, but rather that it must be eliminated at its root by ending the practices that give rise to it (Pashukanis [1924] 2003, 188). To overcome the commodification of justice, in other words, justice itself must be done differently. The rudiments of an alternative perhaps already exist. In recent decades, activists, grassroots organizers, and reformers have begun to enact and theorize paradigms of "restorative" and/or "transformative" justice, which respond to harm and conflict in ways that involve guided encounter and dialogue between harmed parties, responsible parties, and other relevant stakeholders, for the purposes not of abstract retribution or deterrence but of interpersonal repair and, ideally, social/communal transformation.10 Restorative and transformative justice thereby resist the commodification outlined above by refusing to abstract from the particular and qualitative aspects of harm and justice," both interpersonally and societally. In this way, restorative and transformative justice plausibly militate against many of the ills of commodified justice described above. First, while commodified justice alienates both wronged parties and wrongdoers from themselves by assimilating their unique personhoods, experiences, reasons, needs, and obligations to abstract, totalizing categories, restorative and transformative justice center particular stakeholders, allowing them to decide on an appropriate response, one that optimizes for "use-value" as they recognize it. Second, while commodified justice furthers various forms of oppression both by concealing racism in utilitarian algorithms and by facilitating acute racial demonization by means of the penal system, restorative and transformative justice undercut this logic. Indeed, if racial capitalism-as Jodi Melamed, drawing on Ruth Wilson Gilmore, suggests-is "a technology of antirelationality'(Melamed 2015, 78-79, 82), then restorative justice and transformative justice, by emphasizing "the fact of relationship, of our connectedness" as central to justice (Llewellyn and Philpott 2014, 18; see also Kaba 2019), resist it. Moreover, by involving the responsible party, considering his or her needs, and honoring his or her capability to make appropriate repairs, restorative and transformative justice militate against demonization as such, and so too its racialized character. Finally, while commodified justice alienates all persons from justice in general by making it fetishistic, sterile, and "spectacular"-often related to in cruelly optimistic terms-restorative justice and transformative justice potentially provide a form of public justice that may be felt, meaningful, and fulfilling, because they are responsive to real social relations, not fetishistic abstractions. Debord writes that "the spectacle is the opposite of dialogue" (Debord [1967] 1995, 17); restorative and transformative justice, which make dialogue a foundational principle, therefore may provide one manner of unmaking it. Certainly, such frameworks are themselves threatened by logics of commodification in certain configurations and applications (Koen 2013; Harney and Moten 2013, 63; Joseph 2014, 57-58)- particularly restorative justice, which has been more open to dilution and cooptation than its counterpart (Kaba 2021a, 148-149). Nonetheless, criminologist Raymond Koen, in his Pashukanian analysis of restorative justice, maintains that even this paradigm retains a revolutionary core. Though "partial forms" may be neutralized and coopted by capitalism, capitalism "cannot countenance" "comprehensive restorative justice," which "accords with the legal morality of socialism" (Koen 2013, 228). He continues: "It seems, then, that the realisation of the revolutionary potentialities of restorative justice in its comprehensive aspect will require a socialist revolution against the hegemony of capitalism and the dictatorship of the bourgeoisie. In other words, if our future justice is to be restorative, our future society would probably have to be socialist" (ibid., 228-229). Committed proponents of restorative and transformative justice, then, should also be anti-capitalist; to do justice differently, at least at scale, a new kind of society may be required. This is not to say, however, that advocating and organizing for restorative and transformative justice should be seen as politically secondary to broader anti-capitalist efforts. To the contrary, disrupting the commodification of justice, and its attendant reinscription of capitalist ideology, would seem a potentially important prerequisite to the eventual achievement of a post-capitalist world. Therefore, anti-capitalists should support present projects of restorative and transformative justice. The two imperatives-de-commodifying justice and dismantling capitalism-are mutually reinforcing

#### The hollowness of commodified justice demands the construction of social demons to punish, reproducing black social death

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V. Consequences: The Carceral Fetish in American Culture So far, I have sought to demonstrate the deep relationship between modes of punishment in the United States and the commodity form. In this section, I consider the consequences of this diagnosis for the social meaning of crime and punishment in the United States. I therefore shift the main site of analysis from penal theory and policy to culture and popular ideology. The analysis here is somewhat speculative and certainly not exhaustive. Nevertheless, it seeks to illuminate some consequences of commodified justice in the United States. Marx considers the lived relationship between human beings and commodities in his famous discussion of "commodity fetishism." Primarily, this phrase refers to a particular kind of distorted perception necessitated by capitalist relations. In a commodity, "the social character of men's labour appears to them as an objective character stamped upon the product of that labour" (Marx [1867] 1978, 320); quality disappears into quantity, and is only perceptible through this mediation. In this sense, the qualities of a commodity "are at the same time perceptible and imperceptible by the senses" (ibid., 320-321). As an existing thing with some use, a commodity is necessarily given to perception, but insofar as it is defined by its abstract exchange-value, this perception cannot contain the whole of its meaning. Partaking of the "transcendent," simultaneously in and out of existence, a commodity is experienced as "a very queer thing, abounding in metaphysical subtleties and theological niceties" (319-320). As the anthropologist Michael T. Taussig (2010) puts it, capitalist subjects have a "schizoid attitude" toward commodities, "an attitude that shows itself to be deeply mystical. On the one hand, these abstractions are cherished as real objects akin to inert things, whereas on the other, they are thought of as animate entities with a life-force of their own akin to spirits or gods" (ibid., 4-5). The relation to commodities that takes place in these "mist-enveloped regions of the religious world" is the commodity fetish (Marx [1867] 1978, 321). The way the fetish organizes the meaningful world forms an important piece of the "horizon of the taken-for-granted," to repeat Stuart Hall's artful phrase from the introduction; it is one part of the material structure of ideology under capitalism, the lived conditions that shape cognitive a prioris about "what the world is and how it works, for all practical purposes" (Hall 1988, 44). We can readily apply the idea of the commodity fetish to the relationship between persons and commodified justice in the United States. Legal processes, as we have seen, also convert the concrete and particular into the general and abstract, such that-in first-order commodification-the sentence becomes the "objective character" stamped onto the particular event in question. Indeed, ready-to- hand bits of folk wisdom-that "crime doesn't pay," and that to spend time in prison is to "pay one's debts to society," for instance-demonstrate how central this fact is to the subjective meaning of justice to many Americans. One need only observe the public reaction when a high-profile sentence is handed down to perceive the power and pathos contained in the number, which seems to overflow its semantic quantitative significance. For example, consider the 2009 sentencing of Bernie Madoff, who ran the largest Ponzi scheme in American history, to 150 years in prison. In his comments at sentencing, Judge Denny Chin admitted that, given Madoff's advanced age, "any sentence above 20 or 25 years would be largely, if not entirely, symbolic." Transcript of Sentencing Hearing at 46-47, United States v. Madoff, No. 09-213 (S.D.N.Y. March 12, 2009). Nonetheless, Chin insisted that "the symbolism is important" for its retributive message, deterrent force, and value to the victims (ibid., 47-49). As a New York Times reporter editorialized, "[Chin] seemed to find away to translate society's rage into a number" (Weiser 2011). Madoffs sentence, then, seems a classic case of fetishistic distortion. Use-value-Madoffs real wrongs and the real impact of his punishment-is articulated as exchange-value-150 years in prison-which then stands in fetishistically for the use-value it displaces; Madoff "deserves" 150 years (Sentencing Transcript, 47), a sentence that the same judge affirms, only lines above, can have no real meaning in human terms. And yet it appears to be from this very symbolic conversion-and the excess it enables while purporting to contain-that the sentence derives its gravity. The spirit of justice inheres, it seems, in the frisson of quantitative abstraction itself. The "metaphysical subtleties and theological niceties" of prison sentences are rarely so apparent, but this is not to say they are not routinely present. Indeed, Terry K. Aladjem theorizes that punitive cultural attitudes in the United States amount to the "rudiments of an American theodicy," a quasi- religious attempt to find meaning in and justification for the evil apparent in the world (Aladjem 2008, especially 68-72, 92; the quoted phrase comes from the chapter title). This search, of course, can do great harm to those it typifies as "evil." It involves operations upon the abstract figure of the "criminal," which, facilitated by the commodification of crime and punishment with which it is associated, has itself become a kind of exchangeable commodity, a "blank, transparent, blamable individual" (ibid., 59). Indeed, if Isaac Balbus is right that a certain "fetishism of the Law" leads persons to "affirm that they owe their existence to the Law" (Balbus 1977, 583), then it is easy to surmise how persons who violate this law may be regarded: as, in a way, without existence, or at least underserving thereof. The criminal becomes, in a way, inhuman, defined by the "objective character" that has been "stamped upon" him or her. Joshua Kleinfeld argues that the culture of punishment in the United States differs from those of Europe in its tendency to understand criminality as "immutable and devaluing"-a mark of definitive "evil" or dangerousness (Kleinfeld 2016, 943). The distribution of these marks of "evil" is, of course, highly racialized, and this racism makes a crucial contribution to the punitive cultural theodicy that Aladjem diagnoses. Indeed, Adam Kotsko suggests in his "political theology of late capital" that the neoliberal United States requires the construction of certain social demons, a role it has assigned to (among others) Black people as a racial group, presumptively associated with crime and requiring punishment (Kotsko 2018, 91-93; quoted material comes from the book's subtitle). Associations between Blackness and criminality of this kind can be facilitated, as we've seen, by the actuarial techniques associated with the second-order commodification of justice. We are now in a better position than before, however, to recognize the fetishistic aspect of this linkage, the way it exceeds contingent epistemic error and operates as a general ideological touchstone. For Angela Davis, probabilistic considerations surrounding release from prison render "real human beings . . . in a seemingly race-neutral way . . . fetishistically exchangeable with the crimes they have already committed or will commit in the future" (quoted in Joseph 2014, 31)-a race-neutrality that Davis is well aware is illusory. The sociologist Avery Gordon affirms this link: "African Americans are treated as a criminal race, whose ontology what they were, what they are, what they could be-is reduced to its essential criminality, their supposed basic nature" (Gordon 2017, 202). For such an equation to be made, "Blackness," like the commodified figure of "the criminal," must be rendered inert and abstract, divested of particularity and available for an "objective character" to be "stamped" on it. The critical race and legal scholar Anthony Paul Farley goes even further, positing Blackness-in resonant terms for our current purposes-as "the apogee of the commodity . . . the point . . . at which the commodity becomes flesh" (Farley 2004, 1229). In this way, what Robert Knox observes about race and value, and Brenna Bhandar about race and property, applies also to race and criminality: the two are co-constituted through the medium of abstraction, born of the commodity form and codified in the legal form (Knox 2016, 109-110; Bhandar 2014, 212; Bhandar 2018, 8). Scholars of "racial capitalism" have exposed many of the myriad and complex ways that race and capitalism are entangled with one another (see, for instance, Robinson [1983] 2000; Johnson 2013; Johnson 2020; Melamed 2015; Gilmore 2017; Bhattacharya 2018). These brief reflections suggest a specific role for the commodity form-and its corollary penal legal form in this entanglement. Attention to this entanglement might, in turn, shed some light on differences between the United States' penal regime and culture and those of other wealthy capitalist countries. While this claim is beyond the scope of this article, it is perhaps a particular intensity and centrality of anti-Blackness in the United States that helps explain its greater investment in the "immutability" of criminality. In the end, commodified justice fails to satisfy even the punitive public that yearns for it. As in the Madoff case, the seeming transcendence of the number presumably arises from its apparent subsumption of the particular "social character" of the concretely experienced harm, whose negation it purports to immanentize in abstract, quantitative form. But this "religious" presence belongs to the aforementioned imperceptible aspect of commodified justice-indeed, is only present insofar as it is imperceptible, as the magic that claims to convert quality to quantity. What is left, in the end, is a raw number, bereft of promised meaning, an icon of false transcendence

#### Reject abolition that neglects rejecting the justice commodity fetish and capitalism. Anti-capitalism comes first

Epstein 21 [Daniel Epstein, PhD candidate in Political Science at the University of Chicago, 2021, “Commodified Justice and American Penal Form,” Journal of Law and Political Economy, https://heinonline.org/HOL/P?h=hein.journals/jlolwadpl2&i=77]/Kankee

Certainly, such frameworks are themselves threatened by logics of commodification in certain configurations and applications (Koen 2013; Harney and Moten 2013, 63; Joseph 2014, 57-58)- particularly restorative justice, which has been more open to dilution and cooptation than its counterpart (Kaba 2021a, 148-149). Nonetheless, criminologist Raymond Koen, in his Pashukanian analysis of restorative justice, maintains that even this paradigm retains a revolutionary core. Though "partial forms" may be neutralized and coopted by capitalism, capitalism "cannot countenance" "comprehensive restorative justice," which "accords with the legal morality of socialism" (Koen 2013, 228). He continues: "It seems, then, that the realisation of the revolutionary potentialities of restorative justice in its comprehensive aspect will require a socialist revolution against the hegemony of capitalism and the dictatorship of the bourgeoisie. In other words, if our future justice is to be restorative, our future society would probably have to be socialist" (ibid., 228-229). Committed proponents of restorative and transformative justice, then, should also be anti-capitalist; to do justice differently, at least at scale, a new kind of society may be required. This is not to say, however, that advocating and organizing for restorative and transformative justice should be seen as politically secondary to broader anti-capitalist efforts. To the contrary, disrupting the commodification of justice, and its attendant reinscription of capitalist ideology, would seem a potentially important prerequisite to the eventual achievement of a post-capitalist world. Therefore, anti-capitalists should support present projects of restorative and transformative justice. The two imperatives-de-commodifying justice and dismantling capitalism-are mutually reinforcing. This integrated praxis need not be invented ex nihilo. It is already operative in movements for the abolition of the prison-industrial complex (PIC), which since last summer's historic uprising have seen their popular currency increase considerably. Like no other present political formation, PIC abolitionism recognizes that reimagining justice in restorative/ transformative terms (see, for instance, Davis 2003, 113-115; Kaba 2021b, 3-4) and "the founding of a new society" beyond capitalism (Harney and Moten 2013, 42) imply one another. Indeed, Ruth Wilson Gilmore (2020) emphasizes that abolition must be "red," aligned with anti-capitalist objectives, and abolitionist organizers Mariame Kaba and Kelly Hayes perhaps intuit much of the analysis in this article when they bemoan the PIC's grounding in "the commodification of human beings" (Kaba and Hayes 2021, 24). A way beyond commodified justice therefore emerges. Through bold, abolitionist politics, we can hope to change justice by "chang[ing] everything" (Kaba 2021b, 5; Gilmore forthcoming).

#### Abolition must be an anticapitalist project – the penal state is defined by its reification of class and its control of superfluous labor

Burnett 25 [Jon Burnett, Lecturer in Criminology at the University of Hull, 2025, "7 Marxism and the Political Economy of Abolitionism", Bristol University Press, https://www-jstor-org.ezproxy.library.unlv.edu/stable/jj.12348235.12?seq=1]/Kankee

Political economies of punishment Thus, as the preceding discussion makes clear, while it is commonly asserted that Marx had little to say about crime and punishment, he was central to contributing a framework through which to question and interrogate notions of crime and punishment under capitalist conditions, as defined through the state and dominant cultural apparatus. Indeed, as de Giorgi (2007: 18) has noted, the Marxist ‘materialist approach, which sees processes of social change as shaped by the structural relationship between modes of production and legal/political institutions’, has ‘represented a powerful framework for critical sociologies of punishment’. And these ‘critical sociologies’ have proved germane to abolitionist praxis. For they provide one way of interpreting how prisons, and dominant modes of punishment more broadly, operate beyond notions of crime as they are officially defined in the first place. Central to this mode of analysis has been studies of the political economy (or economies) of punishment, not least Punishment and Social Structure, published in 1939 and written by Georg Rusche and Otto Kirchheimer, exiles from Nazi Germany. Punishment and Social Structure built on and developed Rusche’s earlier 1933 essay, ‘Labor Market and Penal Sanction’, in which he had argued that: ‘Often, legal historians are guided not by an unprejudiced analysis of social laws, but by an evolutionary conception of the development of legal institutions: from barbaric cruelty to the humanitarianism of the relatively perfect legal system which we supposedly enjoy today’ (Rusche, 1978 [1933]: 5). Rusche suggested that such accounts were naïve, failing to comprehend the ‘social functions of crime and criminal justice’ and the way these ‘are shaped by various forces’. Prime among these social forces was the broader fluctuations of labour markets (and indeed dominant modes of production) and the overall position of the lowest strata of the proletariat. ‘Naturally, the scarcity or surplus of workers does not unequivocally determine the nature of the labor market’, he argued (Rusche, 1978 [1933]: 4), and in the same manner he never suggested that this would unequivocally determine criminal justice either. But his analysis was that as this scarcity or surplus changed, so too would the criminal justice apparatus ‘have to meet different tasks’. Taken up in Punishment and Social Structure, the basic proposition was that ‘[e]very system of production tends to discover punishments which correspond to its productive relationships’ (Rusche and Kirchheimer, 2008 [1939]: 5), and what became known as the Rusche-Kirchheimer thesis argued that at times of increased surplus labour, punishment becomes explicitly and expressively violent (with corporal and capital punishments abounding), whereas at points of labour scarcity, punishments utilizing the labour of those convicted of crimes predominate. In a historical overview stretching from the Middle Ages to the point of the book’s publication in the 20th century, this schema is utilized to explore punishments including (among other things) banishment, houses of correction and prisons (see Garland, 1990: 93). Embedded within the analysis is an interpretation and attempted demonstration of the function(s) of criminal justice and punishment as instruments of class control, and, as Aviram (2015) states with reference to this analysis: Given that criminal enforcement was, and still is, geared almost invariably to the poor, it served as a tool for managing surplus labor or providing access to forced working hands. The uniqueness of criminal law in serving this function lies in its dual role: not only does enforcement and punishment constitute an effective instrument of oppression, but they also come with seemingly class-neutral, moral, ideological justifications, thus giving legitimacy to the prevailing mode of production and quelling protest and uprising. (Aviram, 2015: 16) Now, the criticisms of Punishment and Social Structure have been wide-ranging. As Garland has noted, for example, it is ‘sometimes lightly dismissed by critics as nothing more than crude reductionism’ (Garland, 1990: 89), while criticisms have also emphasized the ways in which it is not attuned to (for example) the gender dynamics of punishment (see Howe, 1994). But at the same time, it has been integral to a trajectory of Marxist and neo-Marxist thought and organizing which has understood its flaws, built from them and sought to address them. In the 1960s, 1970s and 1980s, for instance, its central messages were taken up within segments of academia – in some cases connected to social movements – challenging the dominant organizing principles of their respective disciplines (in sociology, criminology, social history and so on) in ways reminiscent of Rusche’s criticisms of legal historians in the 1930s. For example, Steven Box noted in 1981 that conflict and labelling theories as applied to criminal justice ‘need to be supplemented by a wider, more historical and macro view’ (Box, 1981: 200) in order to interpret the function of legal systems in preventing ‘the weakening of ideological and social hegemony’ and facilitating the control of those interpreted as ‘problem populations’ (Box, 1981: 200). And drawing on Spitzer’s analysis of such populations as those whose ‘behaviour, personal qualities and/or position threaten the social relations of production in capitalist societies’ (Spitzer, 1975: 642), he highlighted how the economically marginalized are ‘treated more harshly by the judicial system not simply because of who they are, but also because of what they symbolize, namely the perceived threat to social order posed by the threat of the permanently unemployed’ (Box, 1981: 200). In other words, his research was one example of analyses exploring the relationship between labour market conditions, criminalization and punishment (see the discussion in Chiricos and Delone, 1992). At the same time, a trajectory of work examining the relationships between punishment, labour markets and capitalist conditions has (among other things) demonstrated the dual-regulatory functions of punishment and incarceration. In doing so, this has expanded beyond examining correlations between employment (or unemployment) and punishment, exploring the ancillary functions of punishment more broadly. As Melossi and Pavarini (1981: 17) demonstrated, for instance, in The Prison and the Factory, workhouses in the 17th century were utilized to both bend incarcerated peoples to the most precarious strata of the emergent capitalist conditions and also discipline the nascent working class more broadly, who, it was feared, could threaten social order if they engaged in revolt. Coalescing in parts with and developing the analysis of Punishment and Social Structure, the principle of less eligibility central to the poor laws was integral to the analysis here, with the shadows of the workhouse and later the prison stretching well beyond their walls (see also Peck, 2001: 41–42). But as would also be foregrounded, it is subordination that was the hallmark of the ‘modern’ prison as it emerged, a key factor of the ‘penitentiary relationship’ both then and now (Melossi and Pavarini, 1981: 187). For, as Melossi (2008: 242) would later argue, the ‘permanent lesson’ of the penitentiary is to ‘submit’ to the ‘bearers of power’. Indeed, this needs to be borne in mind while the broader rationalities of punishment fluctuate, not least with regard to structural changes within capitalist economies themselves. As de Giorgi (2018) has demonstrated, for example, analyses of political economies of punishment need radical reexamination at points where the dominant modalities of political economy are themselves undergoing shifts. Foregrounding neoliberalism’s making explicit of capitalism’s class war from above, he highlights how the ‘punitive turn’ within many countries in the Global North (not least, but not only, the UK and America) from the 1970s onwards was (and is) related to structural shifts in political economy. Certainly, this does not mean that penal policies prior to this point were not punitive: a hagiography sometimes sustained by narratives of a 20th-century ‘rehabilitative ideal’ (for discussion, see Bailey, 2019 and Sim, 2009). However, as de Giorgi and indeed many others have explored, the neoliberal juncture has coalesced with a frontal assault on working conditions, protections and organizing (Bogg, 2016); solidified, reworked and reproduced gendered, racialized and disablist social relations (Ryan, 2019; d’Atri, 2021); and foregrounded and reworked carceral logics and the development of carceral states (Lamble, 2013). Against this backdrop, prisons operate as one aspect of a much broader assemblage of institutions and dynamics: ranging from the satellite forms of detention, dispersal and deportation of irrregularized migrants (Bowling and Westenra, 2020), to the targeted policing and ‘management’ of racially minoritized groups (Williams and Clarke, 2016), to the punitive utilization of welfare as a form of control (Mills, 2019) for contemporary surplussed populations (see Burnett, 2015; Haiven, 2020). This is of course not exhaustive, but for de Giorgi (2018: 11–12), one of the most pressing tasks facing analyses of political economies of punishment has been to take stock of such developments, while simultaneously formulating a ‘non-reductionist … structural critique of penal power that is capable of overcoming the false alternative between structure and culture at the same time as it addresses some important theoretical concerns emerging from different theoretical paradigms within the sociology of punishment’ (de Giorgi, 2018: 11–12). At a point where the ‘dramatic increase under neoliberalism in the capacity of states to carry out policing, carceral, border, and military violence, domestically and globally, is linked to the need to manage surplus populations – and … is racially coded’ (Kundnani, 2021: 65), this is an urgent task. Marxism and abolitionist praxis So, drawing from the preceding discussion, how have Marxist ideas informed broader traditions and contemporary forms of penal abolitionism? How are Marxist frameworks situated within penal abolitionism? In the first instance, as Thomas Mathiesen demonstrated more than half a century ago, Marxist frameworks are vital in understanding the ways in which prisons and punishment obscure the harms of capitalist power and the realities of capitalist order(s). In The Politics of Abolition (Mathiesen, 2015 [1974]), he explains how prisons perform multiple interrelated ideological functions in capitalist societies: an expurgatory function (‘housing’, managing and in some contexts ridding societies of those deemed ‘unproductive’ or surplussed); a powerdraining function (geared towards rendering those incarcerated subservient to the bearers of power); a diverting function (from the harms of the powerful); and a symbolic function (by stigmatizing those punished, reaffirming the legitimacy of capitalist orders themselves). To that, he later added an action function which, through building, expanding and reproducing expansive penal power, confirms to societies that something is ‘being done’ about crime; while other institutions perform some of these functions, the prison, he argued, coheres them together in a way that is unique. Indeed, despite the persistent failure to perform its stated roles (‘rehabilitation’, prevention of offending and so on), it is this cohering of functions in real terms which ensures the prison survives as an institution while other institutions performing some of these functions are dismantled (see Mathiesen, 2006: 141–142). As such, Mathieson’s analysis makes clear that when taken together, these functions have the effect of making prisons and dominant forms of punishment appear meaningful and legitimate. Such is the paradigmatic power of the prison, he argues, that it is simultaneously seen as a central reason why and when crime rates fall, while simultaneously articulated as more necessary when crime rates rise. In other words, ‘disparate events and actions become meaningful in light of it’ (Mathiesen, 2006: 56) and the prison thus maintains its hegemonic position, despite its failures on its own terms. Of course, this process is aided by a whole range of political figures and professionals, and segments of the media and the intelligentsia, working routinely to normalize the prison. But, as he continues, what is distinct in capitalist orders is the materialist underpinnings of these ideological functions. For example, as Joe Sim has demonstrated, Marxist frameworks are integral for deconstructing the notions of crime and criminalization themselves. For prisons are mechanisms for ‘punishing the poor’, he argues, which ‘along with the wider criminal justice system [are] corrosive sites for the “churning” of vast, increasingly racialised, numbers of the dispossessed, pauperised and destitute’ (Sim, 2020: 25–26). Criminalization was, and remains central to this process, he continues: often violent, and involving ‘state and media-driven focus on policing the behaviour, morals, families and communities of the poor and the powerless’ (Sim, 2009: 9). Yet contrast this, he further maintains, with the ‘non-criminalisation and non-policing of the powerful, and their systematic criminality’ (Sim, 2017). Tombs (2015), for instance, has documented in detail the concerted deregulation (or re-regulation) of corporate harms and violence which have come to exist as hallmarks of Britain’s neoliberal project(s): involving a defunding and, in real terms, close to neutering of regulatory agencies such as the Health and Safety Executive and Environment Agency, to the point where they are in many cases no longer able to carry out their statutory duties. Grenfell Tower in London is emblematic of the costs of this assault, with the deaths of more than 70 people and immeasurable damage to hundreds of others as the building burned in 2017 – some of Britain’s poorest residents living in one of its wealthiest areas – indistinguishable not just from the local authority cost-cutting leading to palpably unsafe cladding, but also the dismantling of regulatory structures which ultimately facilitated the continued circulation of electrical goods, known to be dangerous, from which the fire most likely originated (Tombs, 2020). Due to the sheer scale of death, Grenfell Tower could not be ignored, although it should be noted that survivors and their families continue to be treated with contempt (see Kale, 2022). But much of the damage, death and violence routinely caused by forms of ‘state-corporate violence’ (Tombs, 2016: 3) in Britain – the 50,000 deaths a year related to work, the 29,000 deaths a year related to air pollution or the 500 deaths a year due to foodborne illnesses – are ‘virtually ignored, not only within the worldview of liberal reform groups but also within mainstream criminology and, not surprisingly, within the state itself’ (Sim, 2009: 9). Some 15 per cent of those in prison are homeless prior to their incarceration. Almost two thirds of those in prison have been unemployed immediately prior to their incarceration. Almost half of those in prison were expelled from school as children. Around 90 per cent have a ‘mental disorder’, and over half of all women prisoners have previously experienced emotional, physical or sexual abuse (see Birmingham, 2003; Scott and Codd, 2010; Williams, Poyser and Hopkins, 2012; Prison Reform Trust, 2016, 2021; Wyld, Lomax and Collinge, 2018). And that this is the case is related to the way in which the state’s focus is frequently trained on the ‘poor and the powerless whose depredations, it is argued, need to be controlled through criminal justice interventions, one of which is the prison’ (Sim, 2009: 9). As Reiman (2004 [1979]) explained over 40 years ago, ‘the rich get richer and the poor get prison’, and this is because the functions of the prison cannot be explained simply through crime as a social category. Rather, the prison is connected intimately ‘with the reproduction of an unequal and unjust social order divided by the social lacerations of class, gender, “race”, age and sexuality’ (Sim, 2009: 8). As such, Marxist and neo-Marxist frameworks have been instrumental in demonstrating how the prison reproduces such forms of social order, not least through forms of conjunctural analysis associated most clearly with the work of Stuart Hall. Hall and Massey described the conjuncture as the ‘period during which the different social, political, economic and ideological contradictions that are at work in society come together to give it a specific and distinctive shape’ (Hall and Massey, 2010: 57). By developing conjunctural analyses which cut ‘across political, economic, social and ideological level’ (Danewid, 2022: 26), this in turn situates the particularities of the present ‘within the antagonisms and ruptures of the historical longue durée’ (Danewid, 2022: 26). In this regard, Marxist penal abolitionists – or those speaking to Marxist analyses of criminalization and punishment – have situated the prison materially, symbolically and instrumentally. For example, analyses have emphasized how the utilization of incarcerated people’s labour power – fundamental to the origins of the prison – has largely been abandoned in the neoliberal conjuncture, where a core function of the prison has been to warehouse people, not least the swelling ranks of contemporary surplussed populations (see, for example, Wacquant, 2012). However, more recent analyses indicate that this could be elaborated further still, for a resurgent commitment to utilizing work in prisons (and also in immigration detention) does not contradict this notion of warehousing so much as develop understandings of it. Work roles in large part operate as mechanisms for constructing order within carceral institutions. While in some cases (in prisons) opened up to broader labour markets, work roles are utilized more frequently (and in conjunction) as mechanisms of social control within carceral sites. Here, work demands to be understood in terms of broader labour market functions, but also beyond them: by way of labour processes and what might be described as forms of pacification (see Burnett, 2022). Yet, in doing so, this further demands analysis of the ideological functions and rationalizations of carceral spaces; for work, in certain sites in particular, is held up as central to market-led notions of ‘rehabilitation’ and, in the process, rationalizes the continued growth of the prison itself. For instance, the symbiotic relationship between liberal notions of reform and authoritarian ideals of punishment and control intersect spatially and materially at points where prison expansion is underpinned by claims of getting ‘prisoners skilled up, and getting them into work’ (Raab, 2022) and providing ‘thousands of jobs for local communities, boosting economies’ (Ministry of Justice, 2022). Judah Schept (2015) has documented extensively how liberalism is central to carceral reshaping and expansion, making absolutely clear how notions of reform and of ‘progressive’ punishment can exist symbiotically with punishing, punitive policies and practices to buttress carceral states. His work – on things like the euphemistically named ‘Justice Campuses’ in the United States – clearly shows how liberal ideals or perspectives operate seductively through reformist rationalizations for expansions of state power, while in turn, he foregrounds the importance of analyses of place and of space, which cannot be differentiated from such broader ideological positioning. Indeed, as his and other Marxist geographical analysis has demonstrated, at local levels carceral power is shaped materially, embedded within urban restructuring, labour deregulation, gender governance, and broader economic and social relations (Story, 2019: 5). And it is within such contexts that Marxist abolitionist analyses can have significant purchase. For the labour market functions of carceral logics do need foregrounding, but in terms of the real as opposed to the imagined social order (see Pearce, 1976). As has been demonstrated elsewhere, prisons ‘drain resources from other areas of social life, such as hospitals, schools, housing or social services’ (Drake and Scott, 2017). As ‘fixes’ for crises of land, capital and state capacity (see Wilson-Gilmore, 2007), they operate as ‘warehouses of suffering and death’, according to Scott (2017), and as they absorb people, he continues, it is imperative to foreground that they are, at heart, ‘designed to inflict pain and suffering’ (Scott, 2018: 207). Conclusion Ultimately, then, Marxist frameworks have provided and continue to provide ‘ways of seeing’ (to use Berger’s [2008 (1972)] terminology) which are integral for abolitionist praxis. Underpinning a range of activist interventions and organizing, these frameworks have emphasized the ways in which the prison operates as one part of a ‘mutually reinforcing web of social relationships’ (Hart and Schlembach, 2015: 291) reproducing and shaping dominant forms of capitalist social relations. They have documented the ways in which the prison operates as one part of a broader form of ‘revanchist common sense’ (Camp, 2016: 9), legitimizing and naturalizing state power in the face of threat or revolt. In doing so, such frameworks have necessarily been attuned to continuities and discontinuities in penal policies and the broader social relations they reproduce, for ‘having a longer historical perspective suggests some very different strategy interventions and policy conclusions compared with an analysis which focusses on relatively short-term historical trends’ (Sim, 2020: 25). Indeed, what is distinctive about Marxist abolitionism in this regard is its ability to forge conjunctural analyses connecting contemporary and historical struggles dialectically and waging them organically. For example, in their landmark neo-Marxist British Prisons (first published in 1979), Fitzgerald and Sim made it absolutely clear that ‘to understand the role that imprisonment plays, prisons must be seen within the wider social, political and economic system in which they have been developed’ (Fitzgerald and Sim, 1982: 23). Continuing, they demonstrated how imprisonment serves a ‘class-based legal system’: reinforcing it, legitimizing it and reproducing it symbiotically, all at once. Discussing the notion of a ‘prison crisis’ at that particular conjuncture, Fitzgerald and Sim (1982: 165) drew on Marxist conceptual frameworks to show how in contrast to the analyses of a range of political figures and liberal prison reform groups, ‘the crisis in British prisons … is the crisis of reform’. In other words, the contemporary prison system ‘is the reformed prison system’, they argued, and, as such, the seeds of this crisis of reform were sown ‘in the early nineteenth century as part of the wider struggle to impose new forms of class domination’. It is against such backdrops that Marxist frameworks have been integral to building the conceptual tools necessary to build, dialectically, the nonreformist reforms which foreground the primacy of human need while simultaneously delegitimizing carceral sites and logics. Indeed, these are among the lessons and tools taken up either implicitly or explicitly by abolitionist campaigns and activist movements today. Foregrounding the ways in which racialization, bordering and the reproduction of violent social relations have been integral to the formation of carceral states, Marxist frameworks have been and are vital in struggles to ‘meet human need and valorise the right to life for all’ (Scott, 2020: 227). Providing materialist analysis of carcerality itself, neo-Marxist analyses such as those of Mathiesen (1974) and Fitzgerald and Sim (1982) speak directly to contemporary abolitionist voices while dialectically revealing how Marxism itself must incorporate an abolitionist imagination in order for it to be emancipatory. At the current conjuncture – marked by murderous inequality, multiple intersecting oppressions and repressive state violence bound up directly with dominant forms of accumulation – these lessons have a particular, profound urgency. But within Marxist abolitionist praxis, there are conceptual tools which contribute to ensuring that this is an urgency that can be met. For there can be no abolition within capitalism.

#### Mass plea bargaining destroys democracy with incentivized hyper incarceration to fuel carceral capitalism

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As applied to contemporary plea bargaining, the accused is confronted with an “oath” of sorts, in that they must assert their guilt before a pros- ecutor and a judge. In addition, as with criminal procedure in the Middle Ages, defendants confronting a plea have no right to know who bore witness against them (United States v. Ruiz). But at least contemporary defendants will know the charges against them, right? As I presented in Chapter 1, sort of. When prosecutors engage in charge stacking, meaning they accu- mulate as many charges as they can possibly squeeze from the known facts regardless of whether they can prove those charges beyond a reasonable doubt at trial, they engage in a practice of “hiding the ball” that was com- mon in European ecclesiastical courts. Opposite from the experience of our European ancestors who were not informed of the charges they faced, currently in the United States defendants are overwhelmed with too many charges. The result, however, is the same: decisional ambiguity generated by the legitimate representative of state power – the prosecutor. The reasons for supporting plea bargaining are circular. As I argued in this book, it is legislatures in each of the states that control the naming of behavior as criminal and who erect sentencing ranges for each category of crime. So, why are there “too many cases” to prosecute? Because legislatures tend to add to the list of criminal behaviors rather than reducing them. The hydraulic effect is to require more arrests from police and more cases to con- sider for adjudication by prosecutors. The cycle is now complete. Prosecutors, defense attorneys, and judges will each be positioned to rightfully claim that there are simply too many cases before them and not enough trial-related resources for each case to realize its constitutional promise. This statement is both true and not true. It is true that the sheer quantity of cases will increase over time as legislatures add more crimes requiring adjudication. It is also true that the additional cases will place significant pressure upon criminal legal system actors and resources. However, in two important ways, it is not true. First, prosecutors should adhere to the American Bar Association guidelines regarding plea bargaining.4 Second, as I established in Chapter 7, legislatures signify the power of the state through governmentality and they should act in a way that decriminalizes non-violent crimes, especially those relating to marijuana possession and distribution, which across the United States account for a significant proportion of felony convictions. In addition, as I presented in Chapter 5, legislatures engage in the “coding of capital” through their con- struction of draconian sentencing ranges. In order to generate a rupture in the circular argument that justifies plea bargaining, subjects acting within the civil society-lifeworld must organize a power bloc to pressure legislatures to sig- nificantly reduce mandatory maximum sentences. With mandatory maximum sentences reduced to a more reasonable amount of incarceration (say 15 years for homicide), the criminally accused will no longer be required to confront the coercive trial tax when considering whether to assert their right to trial. It is my contention that once the trial tax is removed from consideration, the United States may return to a greater sense of democratic due process. In so doing, criminal defendants will be able to realize their constitutional rights protections under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments. In addition to the obvious equal protection and due process rights that are fully activated, each case will include a check on executive branch power by the person of the judge. Our system of procedural checks and balances at trial is by no means perfect. However, turning the Constitution and the Bill of Rights on their respective heads and eschewing them for the efficiency and predictability of contract-inspired plea bargaining has gener- ated a role within the criminal legal system for prosecutors that places them squarely within the ambit of the Star Chamber. No more transparency. No more objection to coerced confessions. No more thorough discovery of case facts. No more procedural right to know who is making a claim against you, or whether there is any material impeachment evidence. No real investiga- tion. And perhaps most important of all, there exists no institutional check on the executive power of the prosecutor to serve as judge and jury. Contemporary defendants are exposed to a model of the criminal legal sys- tem premised upon the factory production line, where efficiency and predicta- bility of outcomes are generated through routinized institutional autopoiesis. The plea is the norm. It has emerged over the course of the last two centuries to contaminate the democratic administration of justice like a slow-boiled frog. Incrementally, over time, and not without support from the afflicted, as can be expected from a hegemonic force, Americans have become par- ticipants in the creation of what Weber referred to as their own “iron cage.” In the case of plea bargaining and incarceration, Weber’s warning is both literal and figurative as the plea has accomplished both its social control and profit-maximizing functions. With regard to the latter, while we no longer exist in a world that is dominated by industrial capitalism, carceral capital- ism has emerged to perpetuate continued profit maximization through mass or hyper-incarceration.5 With formal indentured servitude, surety systems, and vagrancy laws no longer providing nascent capitalism with a steady stream of marginal and impoverished bodies to exploit for profit, the politi- cal economy of the criminal legal system transitioned to criminal incarcera- tion as an emerging profit-maximizing enterprise.6 For Zatz, “racialized mass incarceration enables new forms of economic exploitation that simultaneously operate outside conventional forms of soci- oeconomic regulation even while being integrated into conventional mar- kets.”7 With the ease of conviction constitutive of plea bargaining, criminal legal system actors serving as agents of governmentality, wittingly or not, provide contemporary capitalist enterprises associated with the preserva- tion and perpetuation of hyper-incarceration as a means to capital growth. This efficient institutional technology facilitates the needs of capital by pro- viding a predictable flow of bodies (recall Foucault and his emphasis upon bio-power) that, under the twin powers of governmentality and economics, realizes the nation-state’s interest in social control, all the while greasing the criminal legal system assembly line necessary to the facilitation of profit maximization characteristic of a necrotic stage of neoliberalism.

### Contention 9: Youth Plea Bargaining

#### Juvenile justice ought to not be bargained - it undermines rehabilitation

Teske 19 [Steven Teske, chief judge of the Juvenile Court of Clayton County and adjunct professor at Pima Community College in Tucson with a J.D., M.A., and B.I.S. degrees from Georgia State University, 12-3-2019, "The Contrariness of Plea Bargaining in Juvenile Courts", Juvenile Justice Information Exchange, https://jjie.org/2019/12/03/part-1-the-contrariness-of-plea-bargaining-in-juvenile-courts/]/Kankee

These distinguishing characteristics explain why we created juvenile courts, and why we don’t believe that kids in general should be subjected to the adult criminal justice system. It should go without saying that by creating a different justice system for kids, how we treat them will also be different, and that should include how we bargain for admissions. My solution is simple. Eliminate plea bargaining in juvenile court. Plea bargaining is one of those legal mechanisms that has no place in the juvenile justice system. This is the first of five columns about plea bargaining, its harmful effect on youth and the community, and strategies on how to replace plea bargaining with a process that will improve youth outcomes and enhance public safety while simultaneously minimizing a congestion in court dockets. But the conversation about the concerns with plea bargaining drives a larger conversation around why a system of justice would be married to a problematic technique that proves more harmful than helpful for our kids and for the community. In short, this series of columns calls for juvenile justice systems, which are still married to the traditional plea-bargaining approach of sentencing, to replace that with evidence-based tools that a growing number of courts employ today. These tools include, for example, validated risk and need instruments that identify which youth should be diverted from the courtroom and those who require supervision. But more important is identifying what works that will reduce the risk of recidivism. The use of these tools is prohibited before arraignment on charges because it requires soliciting personal and family-related information. Some of that could be incriminating, which would violate the youth’s Fifth Amendment right against self-incrimination. This means that a system that employs the traditional plea-bargaining process in which the prosecutor offers the youth a sweet deal to influence an admission and avoid a trial is far less likely to identify the needs of the youth in order to fashion a disposition that is best suited for the youth and public safety. This will rock the world of prosecutors and defense attorneys who are steeped in the traditional use of plea bargaining because no longer will they play a significant role in fashioning a disposition order on how the kid will be treated on probation, or whether the kid should be committed to state custody. And at the risk of offending them, they must be removed from negotiating what’s the best strategy to restore the youth because they have no clue what’s the best strategy for that youth. And, if prosecutors and defense attorneys are negotiating rehabilitative conditions wearing a blindfold, how is that protecting the public? It’s not! This also means that prosecutors (And I am talking about those who don’t understand the rehabilitative goals of the juvenile justice system) can no longer threaten harsher punishers to coerce an admission by offering a sweeter deal if the kid admits. Wouldn’t it be something to have a system for kids that allows them to admit because they know they are guilty, and not because they’re afraid of getting slammed by the judge for exercising their constitutional rights set forth in In re Gault. It’s losing the quid pro quo, or “something for something,” negotiating a disposition, that scares prosecutors and defenders alike, but for different reasons. Prosecutors enjoy threatening a harsher punishment in exchange for an admission to avoid a time-consuming trial. Defenders enjoy receiving a sweet deal from the prosecutor to prevent harsher sentencing. Prosecutors don’t have time to prosecute every case and defenders have an obligation to represent their youthful client zealously, and that means lighter sentences. “Really?” they say out loud to my face, “Are you crazy?” Maybe I am, but it’s a “good crazy” I tell them with a smile. It only looks crazy because it’s a gigantic shift in practice, but it’s a good shift because it benefits the kids and the community at the same time. No longer is a juvenile sentence fashioned blindly by two lawyers jockeying for the best quid pro quo. In lieu of a disposition process driven by two people bargaining for less than altruistic goals, a youth would be engaged by a process that is constitutionally friendly. If they are adjudicated by admission or trial, they are subjected to an objective and individualized assessment to determine what will work to improve the trajectory of the youth and in turn enhance the safety of the community. Recommendations provided at a disposition by a court officer using evidence-based tools remain subject to scrutiny by the prosecutor and defender, including the right to present separate or controverting evidence. Now that you know where I am going with this, and a little bit about why, let’s stop for now and take up the why in greater detail later. I believe it to be advantageous to some, especially those unfamiliar with plea bargaining (there are more folks than not who work in the juvenile justice system outside the courtroom) to understand the how, what, when and why of plea bargaining in order to understand why plea bargaining in its traditional sense has no place in the juvenile justice system. This series on plea bargaining can be likened to landing a plane. This first column begins at the highest altitude by taking a comprehensive look at plea bargaining, discussing its historical development and the arguments for and against its use. The columns to follow are analogous to the plane descending to its destination, as each is devoted to a specific and exclusive facet of plea bargaining to help the reader appreciate how plea bargaining works and explain in what ways it is harmful, but also what a better system looks like and what strategies work to transition to a better disposition process. Part 2 looks at the dynamics of how plea bargaining plays out and the role of the judge, prosecutor, defense attorney and the law in the plea-bargaining process. These dynamics can result in unintended consequences as I will show by dissecting the true story of Mariah Charles’ brush with the law and her principled stand against the prosecution. By the end of Part 2, the reader should be familiar enough with plea bargaining to transition in Part Three to understand how plea bargaining is contrary to the rehabilitative goals of the juvenile justice system. Part 3 will delve into what works to prevent delinquency and how plea bargaining compromises what works for kids. Parts 4 and 5 focus on practical approaches to implement the best practices shared in Part 3 and what an evidence-based juvenile court process looks like without plea bargaining. In the beginning no plea bargaining

#### Juvenile plea bargaining convicts innocent children, depriving them of both familial bonds and rehabilitation

Teske 20 [Steven Teske, chief judge of the Juvenile Court of Clayton County and adjunct professor at Pima Community College in Tucson with a J.D., M.A., and B.I.S. degrees from Georgia State University, 1-13-2020, "Plea Bargaining Hurts Both Guilty and Innocent Kids", Juvenile Justice Information Exchange, https://jjie.org/2020/01/13/plea-bargaining-hurts-both-guilty-and-innocent-kids/]/Kankee

It is a case of mistaken identity, and unfortunately you happen to be in the wrong place at the wrong time, which circumstantially lends credence to the eyewitness account that you committed the crime. Pause — yes, this could really happen to you. It happens more than you think. One study showed that 99.5% of all convictions are correct, but the 0.5% wrongfully convicted totaled approximately 11,000 people. The percentage of wrongful convictions may be low, but the raw numbers are astronomical. Ironically, while drafting this essay I watched with incredulity a news story of a young man wrongfully arrested and jailed merely because he had the same name as the offender, but the accuser gave the wrong date of birth, which matched that of the person wrongfully accused. And so, it turned into a case of the po-po doing a no-no and an innocent man going to jail. It wasn’t until he got into the courtroom that the accuser said, “This isn’t him,” but not until after he spent a month in jail that cost him his job. Back to you. After several months in jail (unless you can afford bail, if you’re granted a bail amount, that is), your attorney informs you that the prosecutor is “offering,” which is a kinder and gentler word for “threatening,” to reduce the charge and cut the length of prison time in half if you enter a guilty plea knowing full well that if you reject it the state’s recommendation at sentencing is the maximum penalty, or close to it. “But I didn’t do it. They have the wrong guy,” you shout. “I understand that,” says your lawyer, “but you look guilty. They have an eyewitness and you were near the scene.” In disbelief you angrily say to your lawyer, “So you’re telling me that if I don’t take the plea, the jury is likely going to find me guilty?” “That pretty much sums it up,” says your lawyer. Been there, done that as a criminal defense lawyer. The dynamics of plea bargaining This scenario typically plays out on the eve of trial. Most courts schedule pretrial conferences the week before trial to establish the case is ready for trial and to motivate defendants to enter a guilty plea. In my day of practicing law, it was on Fridays. The defense attorneys sat in the courtroom waiting for the bailiff to bring us back to the judge’s chamber, and as you turn the corner and enter the chambers, there they are, the judge and prosecutor, lying in wait. I don’t mean to make the entire ordeal sound like a conspiracy when it’s not, but to those attorneys who are representing one of those 11,000 innocent folks who need a shot at a jury to convince them of their innocence, plea bargaining isn’t a blessing, it’s a curse. It’s within that context of representing the innocent that walking into the judge’s chamber makes me a bit uneasy with this set-up, and sometimes it does feel like a set-up. In most other cases when representing a guilty client and the evidence is beyond a reasonable doubt and there are no legal objections like unreasonable searches and seizures and inadmissible confessions, plea bargaining can be a friend to everyone, including my client. But when you know you have one of those few and far between innocent clients, plea bargaining is no longer a friend, but your enemy. And in those cases, the judge and prosecutor look like co-conspirators. They don’t mean to look that way, but the plea-bargaining game makes it look that way. The object of the game for the most part is to lighten the docket and move cases, and because most defendants are guilty, they all look guilty. If they all look guilty, they need to take advantage of the state’s gracious recommendation to lay off the harshest punishment and enter what we call a “negotiated plea.” In my state of Georgia, and in the federal system, judicial participation in the plea negotiation process is prohibited, and for good reason. The U.S. Supreme Court in Boykin v. Alabama held that a guilty plea must be knowingly and voluntarily entered. This requires the judge to make inquiries of the defendant to determine if he or she understands the nature of the charge, the rights being waived and the consequences of the plea. Prohibiting judicial involvement in plea negotiations removes the risk that the defendant may rely on a comment made by the judge that could induce the defendant to enter the guilty plea. An example of judicial participation gone awry occurred in a death penalty case in a neighboring county of mine involving a seasoned and veteran judge whom I have tried cases before on numerous occasions. The judge told the prosecutor and defense counsel in the presence of the defendant that he most likely would not impose the death penalty if he were doing the sentencing. The defendant withdrew his not guilty plea and waived his right to a jury for the sentencing phase. Apparently, the judge changed his mind and sentenced the defendant to death. Our state supreme court unanimously reversed. That wasn’t a tough call. The court explained that “Due to the force and majesty of the judiciary, a trial court's participation in the plea negotiation may skew the defendant's decision-making and render the plea involuntary because a defendant may disregard proper considerations and waive rights based solely on the trial court's stated inclination as to sentence.” No doubt prohibiting judicial participation is a good thing, but it is understood in the system that entering a guilty plea will be rewarded. The judge may not be directly involved in the negotiation process, but he or she is a tacit partner in the process, waiting in the wings for the negotiated plea to be delivered for sanctioning. Judges play role in guilty pleas Our Georgia rules for sentencing expressly allow judges to be lenient to those defendants who enter a guilty plea. Judges can’t participate in the negotiation, but they are allowed (and the overburdened dockets encourage them) to sanction lighter sentences, which fuels plea bargaining. You can’t negotiate pleas if you don’t have a system that invites judges to accept what was negotiated. No matter how many rules and court opinions are issued limiting the direct participation of judges in the negotiation process, they do play a role that encourages defendants to enter a guilty plea. And I am not saying that is a bad thing. For the most part it is a good thing. I play this role out when I am taking pleas in adult court. But what is an innocent but guilty-looking defendant to do in a system that rewards those who enter a guilty plea with a lighter sentence and punishes the others who go to trial? And I also wonder if any of those defendants entering a guilty plea in front of me were innocent. A lawyer once said, “There is no client as scary as an innocent man.” That is true, and to a judge there is no defendant as scary as an innocent one. There is no way for a judge to determine for sure that the defendant standing before him or her entering a negotiated plea is guilty. While plea negotiations are taking place in the halls of the courthouse, us judges are sitting on the bench looking “fat, dumb, and happy,” passively awaiting the next plea to walk into the courtroom. All we can do is ask the statutory and constitutional questions of the defendant: if he is entering his guilty plea freely and voluntarily after first explaining his right to a trial, the state’s burden of proof, his right against self-incrimination and so on. So long as the defendant understands their rights and acknowledges that their plea is freely and voluntarily made, the judge has no choice but to accept it. We will never know those attorney-client conversations. I think comedian Lenny Bruce aptly described our criminal justice system when he said, “In the halls of justice, the only justice is in the halls,” especially considering the fact that most criminal cases are disposed of by negotiated pleas worked out in the halls of courthouses. It doesn’t take long once you start practicing criminal defense to discover there is no guarantee that when you come across the innocent client that the jury will believe they are innocent. After all, the burden on the state isn’t to prove that the defendant is guilty beyond all doubt, but beyond a reasonable doubt. Stated another way, and to place this in perspective, the state doesn’t have to prove that you are guilty, only that you look guilty enough for a jury not to have reasonable doubt. There is room for error in our system of criminal justice, and that degree of error can send people to prison for life, or to their grave. Take, for example, how many people have been wrongfully convicted on eyewitness testimony, sent to prison and later exonerated on DNA evidence. The Innocence Project has used DNA evidence to exonerate 358 defendants. These are people who fell through the margin of error crack in our criminal justice system. Imagine the thoughts and feelings these 358 people endured as they sat in jail awaiting trial and sentencing knowing they were innocent of the crime they were accused of. Many opted to plead guilty because they were threatened with a sentence they couldn’t bear if they opted to go to trial. Innocent mother pleaded guilty I recently presided over a dependency case involving a mother accused by her daughter of physical abuse. The police arrived and arrested the mother for felony cruelty to children. The state’s attorney presented a certified copy of the mother’s sentence to five years’ probation, a sentence she pled guilty to. In dependency court the standard of proof is clear and convincing evidence, which is less than the highest standard used in criminal cases — beyond a reasonable doubt. The mother’s guilty plea was enough to support a finding of dependency in juvenile court. But I want to know more because I want to know why. I can’t fix the problem unless I know why people did what brought them before me. If we don’t ask why, our responses to fixing the problem will always be limited to the symptoms and not the reasons that manifest the symptoms. By asking why, I learned additional undisputed facts that created a legal justification for the mother to use force to restrain her daughter. It turned out the daughter was running away to an adult male to have sex. Mom had called the police twice that day to find her and bring her home. They did, but once the police left, the mother caught the daughter sneaking out for a third time and so she did what any concerned and loving parent would do, she blocked her daughter from leaving. The daughter wasn’t about to let anyone, including her mother, keep her away from the man she loved. Poor girl, she was afflicted by that age-old adolescent syndrome called puppy love, but had no clue that the adult man had other things in mind with her, and romance, love and affection was not part of that repertoire of things. So the daughter attacked her mother, but in the mother’s attempt to restrain her they fell to the ground and a physical struggle ensued, causing scratches to the daughter. During the struggle it was the mother who directed her son to call 911, and he did. When the police arrived, they arrested the mother because of the marks on the daughter. In Georgia, reasonable discipline is an affirmative defense to a crime alleging battery or something similar, and using reasonable force to restrain one’s child from running away into the bedroom of an adult male would constitute reasonable discipline or force. I asked the mother why she entered a guilty plea after having been told by her attorney that she could argue to the jury that she was justified to restrain her daughter from running away again. “I can’t afford to take that chance and end up in prison for one year,” she replied as she was holding back tears. “I wanted to go home and that was important to me at the time.” I dismissed the dependency case against her, concluding the evidence was not enough to meet the clear and convincing standard. If it wasn’t enough to convict her in my court, it wasn’t enough in criminal court. But what is an innocent defendant to do when threatened with prison if she doesn’t accept the plea and there is no guarantee that a jury will return a verdict of not guilty? There is something devilish about a system that relies on rewards, threats and coercion to operate a system that in theory promotes justice, a concept in American jurisprudence that we give a lot of lip service to. Not all outcomes match what comes from our lips. Mariah Charles: Principle over convenience This “devilish” sentiment about plea bargaining brings me full circle to Mariah Charles, who I referenced in my previous column] to begin this discussion on the inherent evils of plea bargaining, especially in the juvenile court. Mariah was walking to school with her friend when they were stopped by two police officers with the New York Police Department. They asked the two girls where they were going and Mariah pointed to her school a half-block away and said, “To school.” Apparently, the fact that they were walking in the direction of a school that was visible a half-block away, and that they were carrying book bags, was not enough to convince the officers that the girls were walking to school. So the officers asked for identification, which Mariah didn’t have (and state law doesn’t require she possess an ID). Mariah explained she didn’t have identification but told them they could accompany them to the school, whereupon she proceeded to walk toward the school. Mariah was willing to offer them the best evidence to show her intent to walk to school and that she and her friend were not truants, which the officers would later claim was their purpose in stopping them. But having a legitimate purpose to stop a person on the street becomes irrelevant when the direct evidence, obvious to the officers, reveals no crime has occurred or is about to occur (i.e. walking with book bags in direction of school that is in plain sight). And in what way was Mariah’s offer for them to follow her half a block to the school unreasonable? It wasn’t, and it’s decisions like this made by just enough officers that has created the problem facing police today — lack of legitimacy. To make it worse, one of the officers grabbed Mariah by the arm and forcibly stopped her in her tracks. Mariah again told them she was walking to school and that they could follow her. She continued to walk toward the school. How dare a teenage girl tell the police what is best, so they both grabbed her, physically restrained her, took her to the ground and threw her in the back of the patrol car. The irony of Mariah’s situation is that she can resist arrest when the arrest is not authorized. States vary on when a person can resist arrest, but New York Penal Code § 205.30 states that “A person is guilty of resisting arrest when he intentionally prevents or attempts to prevent a police officer or peace officer from effecting an authorized arrest of himself or another person.” In other words, for a person to be guilty of resisting arrest, the police must have reasonable suspicion that the person committed a crime. The appellate courts in New York have set forth a “... well established principle that whether the police have reasonable suspicion depends on the entire circumstances of each case.” These same courts in New York have held that the fact a person is seen leaving or even fleeing from a scene is by itself not enough to create reasonable suspicion. There must be more. Mariah was arrested for resisting arrest, but not for any underlying crime that would create the reasonable suspicion required to arrest Mariah. No crime, no reasonable suspicion. It begs the question of why Mariah was arrested for merely walking away from the officers. Unlike the facts in the appellate cases cited above in which people ran from the police and the arrests were still found unlawful, Mariah was polite and asked the officers to follow her to the school. In other words, the prosecutor didn’t have a case in the first place that allowed them to offer any recommendation of any kind to Mariah, but they did so anyway. They offered the lightest punishment under the law: An Adjournment in Contemplation of Dismissal, or commonly referred to as an ACD in New York. It’s a deferred prosecution program, also called a diversion. In New York it means that if you keep your nose clean for six months after pleading guilty, the charge is dismissed. This didn’t smell right to Mariah. I can imagine Mariah thinking to herself upon hearing the prosecutor’s offer, “Sure, it may sound great, and it may look a lot better than probation or jail, but I am not guilty.” I think of my own daughter in Mariah’s shoes. As a father my response would be a bit unpolished — “Hey, don’t piss on my shoes and tell me it’s raining.” I would likely throw into the mix of my inflammatory commentary, “My daughter already has a case against the officers for violating her civil rights pursuant to 42 US Code §1983. Keep pushing it and she’ll have another one against you [prosecutor] for malicious prosecution.” But that is part of the problem with plea bargaining. The accused usually don’t have legal training and they don’t have fathers like me who were trial attorneys who specialized in civil rights cases (I did work for our Attorney General’s Office representing state employees in Section 1983 lawsuits). They are scared, and if they are innocent, they are frightened, and when they are frightened, they freeze and give in to the threats of the prosecutor. Mariah may be youthful and without legal skills, but what she does have is an incorruptible and principled character. That style of character is a source that delivers courage, which she displayed by rejecting the “sweet” deal and risking a stiffer penalty and a criminal record. Fortunately for Mariah, the prosecutor blinked and dismissed the charge. But not all prosecutors are wise enough to always recognize when their zealousness becomes too zealous and blinds them. When this occurs, they can’t separate the forest from the trees, or in the case of prosecutors, they can’t separate the justice from the injustice. Where do we go from here? What does it say about how we do justice in the hallways of our courthouses knowing that about 11,000 people are wrongfully accused each year? It begs the question of whether there is a better way of doing plea negotiations. But knowing that innocent folks are pleading guilty to crimes they didn’t do — because they are afraid of what will happen to them if they exercise their Sixth Amendment right to a jury trial — what does that say to those of us in juvenile justice where systems still employ a traditional plea-bargaining process? It’s one thing to do this to adults, but to allow it to happen to kids should be intolerable. And I don’t want to hear the excuse that the impact is not harmful because the juvenile justice system is rehabilitative and we don’t punish. That’s hogwash! Try explaining that to a kid who is told by his attorney that the state will not recommend commitment to state custody if he enters an admission to the burglary, but will instead recommend probation and he can stay at home. If he one of those 11,000 innocent souls, what he hears instead is this: “If I say I am guilty to something I didn’t do, you won't rip me away from my family, friends, and school and send me to some far-off place with strangers.” There is nothing rehabilitative about this scenario regardless how much we repeat to ourselves that the system is rehabilitative. No innocent person, young or old, should be removed from their home for a crime they didn’t do. We can’t rehabilitate someone who doesn’t need rehabilitation because they’re innocent in the first place. But it’s more than ripping away an innocent kid from the arms of his family. It’s also about the kids who are guilty and restoring them to a healthy existence. Plea bargaining deprives those who are guilty from receiving the best rehabilitative services. It is impossible to negotiate what works for any given youthful offender, which is explained in the next column.

#### Rehabilitation comes first for juvenile justice because adolescent brains are uniquely moldable to lower recidivism, plea bargaining prevents rehabilitation

Teske 20 [Steven Teske, chief judge of the Juvenile Court of Clayton County and adjunct professor at Pima Community College in Tucson with a J.D., M.A., and B.I.S. degrees from Georgia State University, 1-31-2020, "To Use Evidence-based Programs For Kids, Get the Lawyers Out of Here!", Juvenile Justice Information Exchange, https://jjie.org/2020/01/31/to-use-evidence-based-programs-for-kids-get-the-lawyers-out-of-here/]/Kankee

Prosecutor: Nope. Not on a battery on a teacher. Take the offer to your client. If he wants a trial, that’s his right, but it’s my right to ask that he be committed to the state. The law requires the attorney to inform the client of an offer made by the prosecutor. Most likely Johnny will succumb to the prosecutor’s threat and admit to the battery on a teacher, despite the fact that the other kid is a bully and physically attacked Johnny. People, especially kids, will do about anything to avoid going to jail or prison. Even though there is no guarantee that the judge will follow the prosecutor’s recommendation, who really wants to roll the dice to find out? Don’t forget what I said in my previous column about us judges. These conversations are taking place outside our hearing in the courthouse hallways. We’re on the bench sitting there “fat, dumb and happy,” waiting for the next admission to enter the courtroom. Now, I seriously doubt that I would commit Johnny to the state even if the prosecutor recommended it, but here is the rub: Johnny doesn’t know that because I am in the courtroom looking fat, dumb and happy and have no clue what’s transpiring in the so-called “halls of justice.” Johnny will be scared into admitting to a crime he is innocent of based on the legal defense of justification. By the time he walks into my courtroom, all I know is that he will be admitting to a felony battery on a teacher, which sounds pretty awful, and the recommendation is probation, which seems understandable given the nature of the offense. The prosecutor during the plea colloquy will give a factual basis to support the battery charge, but he or she isn’t going to include the bullying drama leading up to the school fight. And so, we can add another soul to the 11,000 wrongfully convicted each year. There is too much at stake when gambling with your freedom, and especially when it comes to kids. The idea of being taken away from family and friends takes a toll on the adolescent psyche. The scenario above is no different than what happens in adult court in those cases where the defendant is truly innocent. Whether you’re a kid or an adult, a system that allows for threats and coercion to force an innocent person to plead guilty is a dysfunctional system to some extent. Treating juveniles differently is fair But it’s at this juncture that the adult and juvenile courts diverge slightly because negotiating sentencing options within the juvenile justice context takes on a more sinister role. What makes juvenile courts unique from adult courts is the nature of the adolescent brain. Despite the highly intelligent and creative functioning of the teenage brain, there are valid reasons why we don’t allow teens to drink until they reach 21 and restrict their access to other “adult”-type enjoyments. The U.S. Supreme Court in Miller v. Alabama acknowledged the uniqueness of teens, stating that adolescence is marked by “transient rashness, proclivity for risk, and inability to assess consequences,” and concluded that these are factors that should mitigate the punishment received by juvenile defendants. Teenagers are highly intelligent humans, but neurologically wired to do stupid things. I don’t mean any disrespect to teens when I say this about them, because doing stupid things is a far cry from being stupid. The teenage brain is a paradox because research shows that our brains possess the most fluid intelligence during our teens, while the prefrontal cortex, which translates emotion into logic, is not developed, leading to a proneness for risk-taking behaviors and making poor choices. Examples of this paradox includes Mark Zuckerberg, who created Facebook by age 20; Albert Einstein, whose first contemplations of the law of relativity began at 16; and then there is Taylor Swift for the country music fans. She left home at 14 and headed to Nashville to begin her music career. Despite the brilliance and creativity of these teenagers, they still were not allowed to buy an adult beverage (except maybe Einstein) until their 21st birthday. Their teenage brilliance has improved our quality of life in different ways, but their prefrontal lobe cortex is why they couldn’t enjoy certain adult allowances. Similar to why laws exist that limit teens from enjoying adult gratifications, our legislatures have created a separate juvenile justice system to accommodate this neurological paradox that allows for two things to occur: 1) mitigation in sentencing that is age appropriate by taking into consideration that teens are still under neurological construction; and 2) treatment is emphasized over punishment to take advantage of the teenager’s neurological maturation process. In other words, if the teen brain is under construction, it also means it’s more amenable to redirection, provided we do so using what works. This requires juvenile justice systems to know what works to prevent and treat delinquency. And for courts that wish to implement what works with fidelity, the rub is that plea bargaining becomes an obstacle because it occurs before the information that is needed about the kid can be gathered to determine what will work for him. Like the proverbial cart without a horse, the system will not be able to move the restorative needle in a positive direction if it depends on two lawyers negotiating how to respond to a kid’s delinquent conduct without first assessing whether the kid requires court intervention in the first place. And assuming the kid does require court intervention, the lawyers have no clue what that intervention should look like other than their instinct. In an evidence-based juvenile justice system, objective risk and needs assessment instruments are essential to informing the court on the best response to address a kid’s delinquent conduct. Does the kid need to be diverted from the formal process and if not, does the kid require supervision in the community or out-of-home placement? The nightmare for any judge is to place an innocent kid on probation, or worse, remove him from his family and friends, but it’s also harmful to place kids who were delinquent on probation who don’t need it. And it’s also harmful to place kids on probation who do need it, but don’t get the appropriate services to address the underlying causes of their conduct. There is great risk in negotiating dispositions as part of a process to secure a guilty plea because it’s the blind leading the blind when there are no tools to guide the decision-making process. The remainder of this column is dedicated to understanding evidence-based systems, or what is dubbed the “What Works” literature. But ironically, the path to “What Works” began with an article dubbed “Nothing Works.” From nothing works to what works

#### Plea bargaining causes youth crime – overresponse to low level crime, and decreased focus on high level crime. Georgia proves

Teske 20 [Steven Teske, chief judge of the Juvenile Court of Clayton County and adjunct professor at Pima Community College in Tucson with a J.D., M.A., and B.I.S. degrees from Georgia State University, 1-31-2020, "To Use Evidence-based Programs For Kids, Get the Lawyers Out of Here!", Juvenile Justice Information Exchange, https://jjie.org/2020/01/31/to-use-evidence-based-programs-for-kids-get-the-lawyers-out-of-here/]/Kankee

How plea-bargaining can harm public safety I can’t tell you how often probation administrators around the country have expressed to me their frustration over kids placed on probation who have no business under supervision. Many are the result of these negotiated pleas. I recall one administrator complaining, “I don’t know what they [prosecutors, defenders and judges] expect us to do with some of these kids who don’t need our services. It’s a waste of our time and it doesn’t help the kid.” These well-informed administrators are referring to a phenomena I’ve coined “hyper-recidivism,” which results when a system responds to low-risk juvenile offenders with hyper-responsivity (more treatment than is required) that aggravates the offender’s psyche and induces a greater risk to reoffend that was not present in the beginning. When this occurs, the system is responsible for increasing crime. The administrator’s reference to “a waste of our time” is the flip side of this coin. The one side influences hyper-recidivism that turns kids into criminals while the other side dilutes the supervision of high-risk youth by flooding probation with low-risk youth who don’t require supervision. Probation officers are not able to deliver the supervision needed for high-risk youth when they are spinning their wheels watching over low-risk youth who are likely not to reoffend, and if they do it’s another minor offense. When the former occurs, the system fails to reduce the risk of reoffending among high-risk youth and when the latter occurs, the system produces higher-risk youth. It’s a double whammy on public safety. The “What Works” research has informed many of us who are paying attention that this two-sided coin of plea bargaining prescribes a double dose of medicines that don’t work. It wouldn’t be a problem if the medicines were ineffective, but sadly they work together to act as deadly toxins that adulterate the juvenile justice system and endanger public safety. It makes for more victims, not fewer. If this were the practice of medicine, doctors would be losing their licenses for committing medical malpractice, which begs this question: Considering the fact that there exists a body of evidence-based studies supporting what works to prevent delinquency and reduce recidivism, is it time to create minimum standards of practice in the field of juvenile justice? That discussion is for another day, but for now it’s safe to say that we can avoid systemic negligence that endangers public safety by implementing evidence-based programs while simultaneously building an infrastructure that ensures implementation with fidelity. The first step in that direction requires the elimination of plea bargaining. For example, when I became a judge in Clayton County, Ga., in 1999, juvenile crime was on the climb and recidivist rates among probationers were a staggering 76%. It took me through 2002 to figure out what to do with the help of juvenile justice consultants like former Denver juvenile court Judge Ted Rubin and folks at the Annie E. Casey Foundation leading the Juvenile Detention Alternatives Initiative like Bart Lubow and Gail Mumford, and a number of JDAI leaders including Rick Jensen in Multnomah County, Ore. (Portland); Scott MacDonald of Santa Cruz, Calif.; Michael Rohan and William Siffermann of Cook County, Ill. (Chicago) and others. My point is that no one owns their own revolution that leads to sweeping changes. Those waging war on harmful traditions (the establishment) are inspired by others who have waged revolutionary changes in their own land. I already had a fire underneath me burning for change, but these folks threw more gas on my fire and by 2003 it was time to call out our system for what it was — a sham! And it was time to take those flames and torch the old system and rebuild from scratch. The first thing I did was eliminate the negotiation of dispositions and institute an evidence-based disposition process in which our newly validated risk and needs instrument would drive the recommendations for disposition. To this day, the recommendations generated from the assessment tools create a rebuttable presumption, meaning the recommendation becomes the disposition unless rebutted by evidence presented by the state’s attorney or the defender or upon the court’s own motion. This change coupled with others reduced the number of kids placed on probation by 72% between 2003 and now, which reduced the average caseload size from 125 to 25 probationers. Probation officers target only high-risk youth with intensive services because these are the youth identified by the risk and needs assessment tool. By reducing probation caseload size from 125 to 25, the officers enjoy more time to engage the youth and families one-on-one through family conferencing. Each youth is matched to an evidence-based program according to the risk factors identified through their assessments. These changes strengthened the supervision of high-risk offenders by ending the flow of lower-risk kids to probation that distracted officers from providing the intensive services required to effect a positive change in high-risk kids. The strength in supervision is evidenced by the reduction in recidivist rates by 36% among probationers in Clayton County between 2003 and now. There is no doubt that stopping the flow of low-risk offenders to probation by increasing diversion in Clayton County has influenced the reduction in delinquency filings by 82% between 2003 and now. More significant is the reduction of felony filings by 64%. Consider what these numbers mean within the context of public safety; that a 64% reduction in felonious crimes committed by juveniles means there are 64% fewer victims today than the day before we implemented our reforms, which included the elimination of wholesale plea bargaining. These reductions are not unique to my county. Other places have experienced astonishing reductions in juvenile crime. The most significant factor is keeping kids from entering the juvenile justice system in the first place. Mike Males, who is senior research fellow for the Center on Juvenile and Criminal Justice in San Francisco, wrote several columns about juvenile crime plummeting in California: “State and local juvenile detention systems that subject youth to abuses and wasted days don’t deserve credit for decreasing crime. Once they enter the system, the recidivism rates of youth remain the same as in the past. Rather, crime fell because hundreds of thousands fewer youth in California are entering the system in the first place, particularly at the youngest ages.” Juvenile justice systems will never reduce juvenile crime unless they work on both ends of the system. On the front end they must stop allowing so many kids to enter the system; plea bargaining is a contributing factor, among other reasons. On the back end they must target only high-risk youth using appropriate programs that meet the needs of the youth, and again plea bargaining is an obstacle to this occurring. But how does this happen? It doesn’t happen without political will. And assuming enough political will can be mustered by community stakeholders, the process of change to an evidence-based system requires what I call the Three Ps that make up the backbone of system reform: partnership, persistence and patience. These three Ps will sustain political will to keep the effort moving forward indefinitely, which is the key to inevitable success to change systems. The next column takes this plane to the ground where we discuss the practical and concrete strategies for system change.

#### Post-plea bargaining youth treatment solves crime by addressing criminogenic needs found out during trials – minimal info, conduct focused plea deals don’t discover what the individual problem is, making the generalized treatment fail

Teske 20 [Steven Teske, chief judge of the Juvenile Court of Clayton County and adjunct professor at Pima Community College in Tucson with a J.D., M.A., and B.I.S. degrees from Georgia State University, 1-31-2020, "To Use Evidence-based Programs For Kids, Get the Lawyers Out of Here!", Juvenile Justice Information Exchange, https://jjie.org/2020/01/31/to-use-evidence-based-programs-for-kids-get-the-lawyers-out-of-here/]/Kankee

We can’t negotiate evidence-based programs, practices A growing number of juvenile courts have introduced evidence-based programs and practices thanks to initiatives to reform juvenile justice systems on a statewide basis. Public policy and research foundations over the past decade were either invited by a governor to render assistance to reform their juvenile justice system or persuaded by them. These statewide reforms introduced evidence-based programs and in so doing necessitated a change in process and procedure. Like many things that work, they require certain prerequisites before implementation, and what works to reduce reoffending among offenders is no exception. For example, we know that there are several specific underlying causes of criminal behaviors that are referred to as criminogenic needs. For juveniles they include family function, cognition, peers, substance abuse, weak problem-solving skills and school-connectedness. I predict that — with the growing body of research on adverse childhood experiences — childhood trauma may one day be included, or at least factored into the family function risk factor. Stated in another way, the “What Works” research has identified protective buffers that minimize the risk of delinquent conduct, which are the criminogenic needs. By knowing what factors reduce the risk of offending, we can identify in each child, using a risk and needs assessment tool, which of these protective buffers are lacking and target them using evidence-based programs designed to enhance and strengthen them. This preliminary evaluation stage is essential because there is no way to determine what program will work for any given youth without first knowing what caused the behavior. For example, if the assessment shows family function is a risk factor, then we know that certain evidence-based programs like family functional therapy or multi-systemic therapy are appropriate. Applying a program that doesn’t match the kid’s criminogenic needs is a waste of taxpayer monies and is not only ineffective to reduce the delinquent conduct but may also aggravate the circumstances and make the child worse. What we do to rehabilitate a youth is no different than how epidemiologists study diseases for prevention and eradication. They identify the at-risk population and become familiar with the affected population to determine the underlying causes of the disease. This allows them to identify individual treatment modalities. Although behaviors are not diseases, they behave like them. Like diseases, delinquent behaviors do not occur by chance and they are not randomly distributed. There are always underlying determinants for delinquent behaviors. Delinquent behaviors are a symptom of something else. Historically the problem with our justice system is that we respond to symptoms and not causes, and so the symptoms (behaviors) persist. This is where Martinson got it right though he didn’t know it. There are programs that work, but we had not found them yet because we were focused on symptomology and not causality. When kids do bad things and we don’t ask why, our tendency will be to always respond to the conduct and not to the cause, which typically will take the shape of punishment and not treatment. This explains why recidivism rates are higher in a system that doesn’t employ evidence-based practices and programs, and this gets us back to plea bargaining. How can a system that employs evidence-based programs do so with fidelity if the disposition has already been negotiated by a prosecutor and defender without knowing the kid’s risks and needs? It can’t. And the system can’t deliver to them information that can only be obtained during the disposition stage of delinquency proceedings, which comes after the guilt/innocence stage. Plea bargaining occurs in the guilt/innocence phase. Gathering information on the youth occurs during the disposition phase after which the youth is adjudicated guilty. This is because accused kids are presumed innocent until proven guilty, which means they remain silent and no one can force information from them. If they’re silent, that means evaluative tools like risk and needs, psychological evaluations and other disposition reports are strictly prohibited because it is violative of the kid’s Fifth Amendment right against self-incrimination. Some may argue that their system isn’t negatively affected by plea negotiations because negotiated recommendations are limited to the type of supervision status, such as probation or commitment to state custody, and the type of treatment is left to the probation agency or facility. But this presupposes that risk and needs instruments don’t recommend probation or commitment, and many do. In Georgia, for example, a kid can’t be committed to state custody without a risk and needs assessment having been performed. Our risk and needs assessments do make recommendations on whether the kid should be placed on community supervision or commitment to state custody, and for how long. Still, many states prohibit probation authorities, who generally are part of the local or state executive function, to direct a probationer to participate in a program not ordered by the court. Beyond the general conditions of probation that apply to all probationers, such as report times, curfew or refraining from using alcohol and drugs, only a court can add a special condition to participate in a program that targets a criminogenic need. This prohibition exists because it conforms to the separation of powers doctrine as well as basic due process requirements. Regarding the former, an executive authority cannot add conditions of probation without court approval because it’s an order and that is strictly a judicial function. Regarding the latter, the juvenile defendant has a right to know what is expected of him while serving probation, which mandates the judge to give him notice and an opportunity to be heard. Should the defendant resist the request to add a special condition, but the judge concludes that the condition is reasonably related to the kid’s rehabilitation, the judge may opt to take another pathway, such as commitment to state custody. Probation is not a right, it’s a privilege that can be denied or later revoked. No matter how it’s sliced, the best practice supporting a system utilizing evidence-based programs is one that excludes the lawyers from negotiating the disposition. The evidence-based tools used to develop a recommended disposition guides the judge to the ultimate issue, which only the judge can decide — what is the most appropriate response that will rehabilitate the youth? The state, by and through the prosecutor, and the accused youth, by and through the defender, has the right to challenge the recommendation and controvert its finding by presenting evidence and making arguments, but they don’t have the right to negotiate the disposition before the evidence-informed recommendation has been tendered. Nowhere in the Constitution is plea bargaining a sanctioned procedure, and just because it has become a custom and practice doesn’t make it an effective practice when it comes to protecting public safety.

#### Youth plea bargains are extra coercive given their less-developed brain, smaller knowledge base, and bias from family

Birnbaum and Haney-Caron 23 [Aliya Birnbaum, researcher at the Department of Psychology, John Jay college of criminal Justice at CUNY, and Emily Haney-Caron, researcher at the Department of Psychology, John Jay college of criminal Justice and the Graduate center at CUNY, 2023, “What advice do parents give their children about plea bargains? Understanding the role of parent race, attorney race, and attorney recommendations,” Journal of Ethnicity in Criminal Justice, https://www-tandfonline-com.ezproxy.library.unlv.edu/doi/full/10.1080/15377938.2023.2207171#abstract]/Kankee

Plea-bargaining, in which the prosecution offers a reduced sentence to a defendant in exchange for a guilty plea (Zottoli et al., Citation2016), is used to settle the vast majority of criminal and juvenile cases in the United States (Durose & Langan, Citation2005). Although plea-bargaining is the most common method of juvenile adjudication, youth in the legal system present a special challenge because they may lack the understanding of legal concepts and the basic decision-making skills necessary to function effectively in plea bargain contexts (Daftary-Kapur & Zottoli, Citation2014; Kaban & Quinlan, Citation2004).Youth as a class have reduced capacity to understand and appreciate plea processes, which may increase with age and experience in the legal system—and therefore they may be unable to make informed plea decisions independently (Daftary-Kapur & Zottoli, Citation2014; Grisso et al., Citation2003; Kaban & Quinlan, Citation2004). Youth also are more likely to make risky decisions—and their decisions mainly focus on short-term gain, with less emphasis placed on long-term consequences (Fountain & Woolard, Citation2017). Perhaps because of youths’ developmental immaturity, research suggests they may over-weight the opinions of others in making decisions regarding plea deals (Fountain & Woolard, Citation2017; Viljoen et al., Citation2005). Given the extent to which youth are susceptible to the influence of authority figures (Richardson et al., Citation1995) and the degree to which they rely on their legal guardians and attorneys for advice in legal proceedings (Fountain & Woolard, Citation2017; Viljoen et al., Citation2005), factors that influence these advisors may ultimately bear a substantial impact on youth decisions. In other words, youths’ decisions cannot be fully understood without also considering the advice they are receiving from adults and factors shaping these adults’ recommendations and perceptions of youth plea processes. These factors may be complex and interrelated. For example, as attorneys work with youth clients and parents, attorneys likely shape youth thinking as well as how parents think about what is best for their child. Parents, in turn, communicate their own understanding and recommendations to their child. Attorney recommendations may thus be driving parental plea recommendations to their children, which implies that understanding how parents are influenced is imperative to developing an accurate picture of the juvenile plea process. Research aimed at improving our understanding of adult influences on youth pleas must account for the reality that the legal system does not exist in a racial vacuum, as race shapes every aspect of the legal process (Haney-Caron & Fountain, Citation2021). Therefore, to explore the ways in which parental and attorney interactions may influence youth plea decisions, racial interactions such as racial similarities and differences must also be assessed to understand their bearing on this complex process. Including race in the analysis is necessary to building a nuanced understanding of parental perceptions of youth plea bargaining. This vignette-based study examines parental recommendations to youth regarding plea decisions in juvenile court, accounting for the influence of defense attorney advice and the complex role of race in shaping legally based interactions. Understanding these aspects of youth plea bargaining could provide helpful information for how attorneys could approach discussion of the plea bargain process with youth clients and their parents to increase the likelihood that youth will make independent plea decisions. Additionally, the results of this study provide initial information on the impact of attorney race—and attorney/parent racial similarity—on decisions to accept or discount attorney recommendations. Youth plea decision factors Plea decisions must be made knowingly, intelligently, and voluntarily to be Constitutionally valid and accepted by the court (Boykin v. Alabama, Citation1969). However, youth making plea decisions may not have all of the pertinent information they should have amassed (i.e., understanding the charges, the consequences of the plea decision, and the rights they are waiving) in order to make a knowing, intelligent, and voluntary decision (e.g., Fountain & Woolard, Citation2017; Viljoen & Roesch, Citation2005). Additionally, youth are prone to risky and impulsive decisions (Blakemore & Robbins, Citation2012; Chein et al., Citation2011), that focus more on the pressures felt from others like their parents and attorneys (Viljoen et al., Citation2005), and less on the actual future implications of accepting a plea bargain. Younger youth especially (ages 15 and under) are more likely to acquiesce to the suggestion of authority figures (i.e., attorneys and parents; Grisso et al., Citation2003), which may be because youth are primed to want to please authority figures and may assume that an authority figure will point them in the right direction (Riggs et al., 2010). Since youth are legally required to make their own plea decisions (National Juvenile Defender Center (NJDC), Citation2012), attorneys likely approach conversations with youth in a way that attempts to ensure the youth’s decision-making authority is not usurped, while accounting for youths’ developmentally limited reasoning abilities (Henning, Citation2005). Specifically, because youth are especially responsive to the opinions of authority figures, attorneys may be extra careful when discussing plea options and opinions with youth clients in an attempt to safeguard their right to an autonomous plea decision (Henning, Citation2005). However, often attorneys choose to include parents in the conversation to help ensure the plea is accepted by the judge (Fountain & Woolard, Citation2021) since plea offers can include terms that impact parents, as well (e.g., curfews, electronic monitoring, restitution fees, family therapy). This could mean that parental involvement leads to plea negotiations skewing more toward parental interests instead of the best interests of the child, especially if the collateral consequences of the plea impact the family (e.g., loss of public housing, sex offender registration; Fountain & Woolard, Citation2021; Pinard, Citation2005). It is important to understand how parents’ perceptions and opinions come into play in these interactions. As we know, youth rely on parental plea recommendations to make these decisions (Viljoen et al., Citation2005), and since attorneys commonly include parents in the plea discussion, we need to understand the attorney-parent relationship (Fountain & Woolard, Citation2021), to ensure parents do not overly rely on attorney opinions. If parents are also heavily influenced by attorney recommendations, and in turn influence their child, then even if an attorney is careful to avoid overly influencing the child that same influence may exert itself through the parent. Examining the degree to which parents follow their child’s attorney’s advice is important to informing attorney practices and may help attorneys better safeguard the rights of young clients. Juvenile/Parent-Attorney relationships

#### Parental domineering over the child’s individual decision makes the choice unfree and coerced

Birnbaum and Haney-Caron 23 [Aliya Birnbaum, researcher at the Department of Psychology, John Jay college of criminal Justice at CUNY, and Emily Haney-Caron, researcher at the Department of Psychology, John Jay college of criminal Justice and the Graduate center at CUNY, 2023, “What advice do parents give their children about plea bargains? Understanding the role of parent race, attorney race, and attorney recommendations,” Journal of Ethnicity in Criminal Justice, <https://www-tandfonline-com.ezproxy.library.unlv.edu/doi/full/10.1080/15377938.2023.2207171#abstract]/Kankee>

\*NOTE: this is a rehighlighted version of the below Birnbaum and Haney-Caron card to focus on parental involvement

Discussion This study assessed parental plea bargain recommendations based on attorney advice and expands the literature to include how attorney race may shape this juvenile plea bargain process. Contrary to expectations, trust and perception of attorney alliance did not mediate the relationship between racial similarity of the parent and attorney and acquiescence to the attorney’s advice. However, trust in the attorney and perception of attorney alliance did mediate the relationship between parent race and attorney acquiescence, but only when the attorney was advising that the juvenile take the plea deal. It seems that when the attorney encourages taking the plea deal, White parents, who have a higher trust in the attorney and higher perceptions of attorney alliance, were more likely to acquiesce to the attorney’s recommendation. White parents, with this high level of trust and the feeling that the attorney is on their side, may believe that the attorney would only be recommending them to take the plea deal because he does not think they would win at trial. Going to trial is risky, therefore if the attorney they trust believes it is too big of a risk, the parents may think the odds of winning the trial are minuscule. The finding that White parents overall were more likely to tell their child to take the plea bargain, regardless of attorney race, contradicted our initial hypotheses. Past research has been inconsistent with findings on how adults plead in their own adjudicative cases with some research pointing to Black people as being less likely to accept a plea offer, due to the less favorable plea agreements they are likely to receive (Frenzel & Ball, Citation2008; Subramanian et al., Citation2020), and others finding no difference by race (Quickel & Zimmerman, Citation2019). This finding adds support for the relationship between race and plea bargaining being a complex one. Because this study was the first to directly explore parental plea recommendations, we considered that parents may advise their children in different ways than they themselves would plead, as they would likely want their child to avoid jail time at all costs. We expected that, as a result of the validated cynicism of the legal system, Black parents would be more fearful of advising their child to go to trial, as they might view their child as being less likely to win. Contrary to these expectations, Black parents were more likely to advise their child to go to trial regardless of attorney race and attorney plea recommendation. Black parents have the onerous responsibility of teaching their children how to survive in a society built upon racist structures and institutions, while also teaching them to thrive in this society through development of a positive racial identity (Thomas & Speight, Citation1999). The Black parents in this study may have seen the vignette scenario as a way to racially socialize their children to the oppressive legal system. Furthermore, since Black parents were more likely to advise their child to go to trial, they may have been attempting to teach their child about challenging the racism of the legal system, and not giving up their rights without a fight. White people are, in general, more trusting in the legal system due to a blindness of the privilege their race allots them (Quickel & Zimmerman, Citation2019), whereas Black people tend to be less trusting in the legal system due to awareness of the harsher punishments they are more likely to receive (Smith & Hattery, Citation2010). Thus, the finding that White parents overall viewed the attorneys to be significantly more trustworthy than Black parents is consistent with past research. Interestingly, Black attorneys were viewed as more trustworthy than White attorneys no matter the attorney recommendation. White attorneys may be seen as being part of “the system” (King, Citation2008), while Black attorneys may be perceived as trying to fight the system from within. White parents randomly assigned to Black attorneys were more likely to follow advice when encouraged to take the plea deal, but less likely to follow advice when urged to go to trial, compared to other racial parent/attorney dyads. One possible explanation for this finding could be that White parents may assume Black attorneys to be more skeptical of the legal system, and therefore assume a Black attorney would not be encouraging the parent to recommend the plea deal, unless they knew that the deal was especially favorable. Past research has shown parents often believe that they have the final say on their child’s legal case even if that opinion differs from the juvenile’s decisions (Fountain & Woolard, Citation2017). This perception can impact how youth make plea decisions if the child holds a similar misunderstanding on who gets the last word, despite the youth ultimately having the legal right to make the decision and having to endure the consequences of this decision. The results of this study found that while many of our participants believed they or other legal actors (i.e., judge, attorney) made the final plea decision, a small majority of participants declared they would allow their child to make the decision. In accordance with the current literature (Fountain & Woolard, Citation2017), less than half of the parent participants understood that legally this decision is ultimately up to the child. Parents with this assumption may end up pressuring their child to make a plea decision the youth does not want, making their plea decision involuntary. Therefore, this study provides further support that parents misinterpret their role in the juvenile plea bargain process. However, research has shown that children’s developmental immaturity, specifically their prefrontal cortex, which is needed for higher level functioning (e.g., decision making), leads to deficits in their adjudicative competency (Viljoen & Roesch, Citation2005). The expectation of youth to make a plea decision in the absence of their parents’ advice is unrealistic and incongruent with developmental literature (e.g., Daftary-Kapur & Zottoli, Citation2014; Grisso et al., Citation2003). Despite parent assumptions that the final decision is theirs to make, they do have a heavy influence over their child during plea bargain decision-making. Laws on juvenile plea bargaining should reflect the limits of youths’ cognitive capacities and consider including parents or guardians in the pleading process. Presently legal requirements fail to consider norms of collectivist cultures, including Black American cultures, as it is customary to seek advice from family members (Guess, Citation2004) and instead favor White cultural norms, which are typically individualistic in nature. Revising laws to include collectivist cultural norms could provide an alternative and superior approach that would allow youth to account for their developmental disadvantages. The questionnaire used in this study collected open-ended responses in which participants explained their reasoning for their plea recommendations. Many participants cited reasoning such as not wanting their child to go to jail, trusting the attorney’s recommendation, or believing their child to be innocent and feeling that justice will prevail. However, of note, several Black participants pointed out that plea deals are commonly used as a way to coerce Black people into falsely admitting guilt. These participants discuss the legal system profiting off of these scare tactics, especially with Black youth, and not wanting their child to become a victim of this racist structure. These responses coupled with the finding that Black participants were less likely to take the plea deal and trust their attorney’s echo the results found in Woolard et al. (Citation2008), in which Black participants, especially young adults, had higher rates of cynicism about the justice system, which correlated to being less likely to fully disclose information to public defenders, and less likely to accept a plea deal. Implications for attorney practice Parents, undeniably, play a heavy role in their child’s plea decision making, which is why it is imperative to study their reasoning behind their plea recommendations. Because both White and Black parents found Black attorneys to be more trustworthy, White attorneys should work to rectify this gap in trust. Earning their client’s trust may be done with a variety of different approaches; one possibility is that White attorneys should try to not directly recommend a plea decision, but instead should discuss the advantages and disadvantages of either taking or rejecting a plea offer. Additionally, White attorneys should be candid when discussing the racial disparities of the legal system, as the recognition can help earn a Black client’s trust (Henning, Citation2017). Acknowledging the racial bias of the legal system not only with the client, but also as an argument within the courtroom can help other legal actors account for this prejudice in their own legal decision making and will, in turn, increase the feeling of loyalty and alliance with Black clients (Henning, Citation2017). Black parents tended not to trust attorneys in general; thus, when an attorney has a Black juvenile client, they should work rigorously to prove their alliance to their client by not pressuring the plea decision and advocating for trial when the client is innocent. Parents have been shown to have distorted perceptions of their role in their child’s plea decision (Fountain & Woolard, Citation2017), which this study supported. It is essential for defense attorneys to explain the legal requirements of a knowing and voluntary plea for a youth’s plea decision to both the youth and the parent, to avoid the parent pressuring the child into a specific plea decision. Explaining to the parent that their child can, but does not have to, consider the parent’s opinions can help resolve this misunderstanding. Supplementary resources for parents, such as pamphlets explaining the plea process, may help attorneys juggle their time restraints with their obligation to their clients. Directions for future research

#### Black distrust of mostly white attorneys causes them to overly reject pleas

Birnbaum and Haney-Caron 23 [Aliya Birnbaum, researcher at the Department of Psychology, John Jay college of criminal Justice at CUNY, and Emily Haney-Caron, researcher at the Department of Psychology, John Jay college of criminal Justice and the Graduate center at CUNY, 2023, “What advice do parents give their children about plea bargains? Understanding the role of parent race, attorney race, and attorney recommendations,” Journal of Ethnicity in Criminal Justice, https://www-tandfonline-com.ezproxy.library.unlv.edu/doi/full/10.1080/15377938.2023.2207171#abstract]/Kankee

\*NOTE: this is a rehighlighted version of the above Birnbaum and Haney-Caron card to focus on race

Discussion This study assessed parental plea bargain recommendations based on attorney advice and expands the literature to include how attorney race may shape this juvenile plea bargain process. Contrary to expectations, trust and perception of attorney alliance did not mediate the relationship between racial similarity of the parent and attorney and acquiescence to the attorney’s advice. However, trust in the attorney and perception of attorney alliance did mediate the relationship between parent race and attorney acquiescence, but only when the attorney was advising that the juvenile take the plea deal. It seems that when the attorney encourages taking the plea deal, White parents, who have a higher trust in the attorney and higher perceptions of attorney alliance, were more likely to acquiesce to the attorney’s recommendation. White parents, with this high level of trust and the feeling that the attorney is on their side, may believe that the attorney would only be recommending them to take the plea deal because he does not think they would win at trial. Going to trial is risky, therefore if the attorney they trust believes it is too big of a risk, the parents may think the odds of winning the trial are minuscule. The finding that White parents overall were more likely to tell their child to take the plea bargain, regardless of attorney race, contradicted our initial hypotheses. Past research has been inconsistent with findings on how adults plead in their own adjudicative cases with some research pointing to Black people as being less likely to accept a plea offer, due to the less favorable plea agreements they are likely to receive (Frenzel & Ball, Citation2008; Subramanian et al., Citation2020), and others finding no difference by race (Quickel & Zimmerman, Citation2019). This finding adds support for the relationship between race and plea bargaining being a complex one. Because this study was the first to directly explore parental plea recommendations, we considered that parents may advise their children in different ways than they themselves would plead, as they would likely want their child to avoid jail time at all costs. We expected that, as a result of the validated cynicism of the legal system, Black parents would be more fearful of advising their child to go to trial, as they might view their child as being less likely to win. Contrary to these expectations, Black parents were more likely to advise their child to go to trial regardless of attorney race and attorney plea recommendation. Black parents have the onerous responsibility of teaching their children how to survive in a society built upon racist structures and institutions, while also teaching them to thrive in this society through development of a positive racial identity (Thomas & Speight, Citation1999). The Black parents in this study may have seen the vignette scenario as a way to racially socialize their children to the oppressive legal system. Furthermore, since Black parents were more likely to advise their child to go to trial, they may have been attempting to teach their child about challenging the racism of the legal system, and not giving up their rights without a fight. White people are, in general, more trusting in the legal system due to a blindness of the privilege their race allots them (Quickel & Zimmerman, Citation2019), whereas Black people tend to be less trusting in the legal system due to awareness of the harsher punishments they are more likely to receive (Smith & Hattery, Citation2010). Thus, the finding that White parents overall viewed the attorneys to be significantly more trustworthy than Black parents is consistent with past research. Interestingly, Black attorneys were viewed as more trustworthy than White attorneys no matter the attorney recommendation. White attorneys may be seen as being part of “the system” (King, Citation2008), while Black attorneys may be perceived as trying to fight the system from within. White parents randomly assigned to Black attorneys were more likely to follow advice when encouraged to take the plea deal, but less likely to follow advice when urged to go to trial, compared to other racial parent/attorney dyads. One possible explanation for this finding could be that White parents may assume Black attorneys to be more skeptical of the legal system, and therefore assume a Black attorney would not be encouraging the parent to recommend the plea deal, unless they knew that the deal was especially favorable. Past research has shown parents often believe that they have the final say on their child’s legal case even if that opinion differs from the juvenile’s decisions (Fountain & Woolard, Citation2017). This perception can impact how youth make plea decisions if the child holds a similar misunderstanding on who gets the last word, despite the youth ultimately having the legal right to make the decision and having to endure the consequences of this decision. The results of this study found that while many of our participants believed they or other legal actors (i.e., judge, attorney) made the final plea decision, a small majority of participants declared they would allow their child to make the decision. In accordance with the current literature (Fountain & Woolard, Citation2017), less than half of the parent participants understood that legally this decision is ultimately up to the child. Parents with this assumption may end up pressuring their child to make a plea decision the youth does not want, making their plea decision involuntary. Therefore, this study provides further support that parents misinterpret their role in the juvenile plea bargain process. However, research has shown that children’s developmental immaturity, specifically their prefrontal cortex, which is needed for higher level functioning (e.g., decision making), leads to deficits in their adjudicative competency (Viljoen & Roesch, Citation2005). The expectation of youth to make a plea decision in the absence of their parents’ advice is unrealistic and incongruent with developmental literature (e.g., Daftary-Kapur & Zottoli, Citation2014; Grisso et al., Citation2003). Despite parent assumptions that the final decision is theirs to make, they do have a heavy influence over their child during plea bargain decision-making. Laws on juvenile plea bargaining should reflect the limits of youths’ cognitive capacities and consider including parents or guardians in the pleading process. Presently legal requirements fail to consider norms of collectivist cultures, including Black American cultures, as it is customary to seek advice from family members (Guess, Citation2004) and instead favor White cultural norms, which are typically individualistic in nature. Revising laws to include collectivist cultural norms could provide an alternative and superior approach that would allow youth to account for their developmental disadvantages. The questionnaire used in this study collected open-ended responses in which participants explained their reasoning for their plea recommendations. Many participants cited reasoning such as not wanting their child to go to jail, trusting the attorney’s recommendation, or believing their child to be innocent and feeling that justice will prevail. However, of note, several Black participants pointed out that plea deals are commonly used as a way to coerce Black people into falsely admitting guilt. These participants discuss the legal system profiting off of these scare tactics, especially with Black youth, and not wanting their child to become a victim of this racist structure. These responses coupled with the finding that Black participants were less likely to take the plea deal and trust their attorney’s echo the results found in Woolard et al. (Citation2008), in which Black participants, especially young adults, had higher rates of cynicism about the justice system, which correlated to being less likely to fully disclose information to public defenders, and less likely to accept a plea deal. Implications for attorney practice Parents, undeniably, play a heavy role in their child’s plea decision making, which is why it is imperative to study their reasoning behind their plea recommendations. Because both White and Black parents found Black attorneys to be more trustworthy, White attorneys should work to rectify this gap in trust. Earning their client’s trust may be done with a variety of different approaches; one possibility is that White attorneys should try to not directly recommend a plea decision, but instead should discuss the advantages and disadvantages of either taking or rejecting a plea offer. Additionally, White attorneys should be candid when discussing the racial disparities of the legal system, as the recognition can help earn a Black client’s trust (Henning, Citation2017). Acknowledging the racial bias of the legal system not only with the client, but also as an argument within the courtroom can help other legal actors account for this prejudice in their own legal decision making and will, in turn, increase the feeling of loyalty and alliance with Black clients (Henning, Citation2017). Black parents tended not to trust attorneys in general; thus, when an attorney has a Black juvenile client, they should work rigorously to prove their alliance to their client by not pressuring the plea decision and advocating for trial when the client is innocent. Parents have been shown to have distorted perceptions of their role in their child’s plea decision (Fountain & Woolard, Citation2017), which this study supported. It is essential for defense attorneys to explain the legal requirements of a knowing and voluntary plea for a youth’s plea decision to both the youth and the parent, to avoid the parent pressuring the child into a specific plea decision. Explaining to the parent that their child can, but does not have to, consider the parent’s opinions can help resolve this misunderstanding. Supplementary resources for parents, such as pamphlets explaining the plea process, may help attorneys juggle their time restraints with their obligation to their clients. Directions for future research

#### Plea bargains contribute to the racialized youth industrial complex

Birnbaum and Haney-Caron 23 [Aliya Birnbaum, researcher at the Department of Psychology, John Jay college of criminal Justice at CUNY, and Emily Haney-Caron, researcher at the Department of Psychology, John Jay college of criminal Justice and the Graduate center at CUNY, 2023, “What advice do parents give their children about plea bargains? Understanding the role of parent race, attorney race, and attorney recommendations,” Journal of Ethnicity in Criminal Justice, https://www-tandfonline-com.ezproxy.library.unlv.edu/doi/full/10.1080/15377938.2023.2207171#abstract]/Kankee

Race and the plea bargain process Scholarship and research on juvenile-attorney relationships have largely failed to address the impact of race. The legal system’s racial disparities are substantial, as youth of color are disproportionately involved in the legal system at every stage (Haney-Caron & Fountain, Citation2021); for example, 52% of the youth arrested for violent juvenile crime in 2016 were Black (U.S. Department of Justice, Federal Bureau of Investigation [FBI], 2016), even though the Black community only makes up about 13% of the United States population (U.S. Census Bureau, Citation2017). However, although legally involved youth are often youth of color, their defense attorneys are overwhelmingly likely to be White. For example, one study of juvenile defense attorneys reported that 78% of attorney participants were White (Fountain & Woolard, Citation2018). Additionally, in a self-report study using 163 juveniles in correctional facilities, 70% of the youth were Black, but they reported that 90% of the attorneys representing them were White (Pierce & Brodsky, Citation2002), which further exemplifies the racial disparity. The limited research available suggests a complex impact of race on attorney relationships with their clients and their parents. In one study on juvenile trust of defense attorneys, when White defendants were less knowledgeable, they showed a larger distrust of their attorneys, whereas when Black defendants were more knowledgeable, they showed a larger distrust in their attorneys (Pierce & Brodsky, Citation2002). This could be attributed to the stigma of the legal system and its overt racial disparities. Since Black people are more likely to be profiled by law enforcement and receive harsher punishments (Kovera, Citation2019), Black individuals with more knowledge of the legal system would be right to exercise caution with regard to legal actors. White individuals also tend to be blind to the privilege they receive in the legal system and are more likely to think that the system is “working” due to said blindness (Quickel & Zimmerman, Citation2019). Race may also more directly impact youths’ experiences of the plea bargain process, thus impacting parents as they help navigate the system with their child. Research in one jurisdiction illustrated that Black juveniles were less likely to be offered a plea bargain in general; this inequity is even more pronounced when coupled with being a female and committing a violent crime, compared to their white female counterparts (Lowery, Citation2019). Since these youth are less likely to receive plea deals, they have higher instances of being transferred to adult court, as well as being subjected to detention facilities and confinement (Burrow & Lowery, Citation2015; Cheesman et al., Citation2010). Although the impact of juvenile race on the plea-bargaining process has been studied, literature on the impact of attorney race or the interaction between attorney and parent race on juvenile plea decisions has not been examined yet. Research thus far has focused mainly on the racial impact on adult plea-bargaining decisions, however, this too has not been widely studied. Nonetheless, scholarly literature on racial impact on adult plea-bargaining decisions can provide an initial framework to understand how parents would navigate this system if they were the defendant, which can help better determine what factors they would consider. First, pretrial discrimination may impact the plea bargain process in general due to the differences in multiple factors that lead to individuals ending up in the legal system (Johnson & Richardson, Citation2019). For instance, the decisions to arrest an individual could shape the pool of applicants for a plea bargain, because those disparities in arrest will lead to disparities in cases referred to prosecutors. There are certain variables that influence plea making decisions for adults that appear to differ by race, as well. For instance, being represented by court-appointed counsel and presence of physical evidence are associated with a greater likelihood of pleading guilty for Black defendants (Albonetti, Citation1990), and an extensive criminal record and the severity of the offense were associated with a lesser likelihood of pleading guilty for Black defendants (Metcalfe & Chiricos, Citation2018). Overall, limited available research suggests that Black defendants may be less likely than White defendants to plead guilty (Albonetti, Citation1990; Frenzel & Ball, Citation2008; Metcalfe & Chiricos, Citation2018), although a vignette-based study of adult plea decisions reported that the decision to plead did not significantly differ by race (Quickel & Zimmerman, Citation2019). With this literature in mind, it is crucial to determine if adult plea recommendations to their children mirror adult plea decisions about their own pleas, or if they would consider different factors when making recommendations to their child. Current study

#### Juveniles are rushed through in minutes – no safeguards exist to ensure informed consent to avoid coercion

Redlich et al. 22 [Allison D. Redlich, Distinguished University Professor in the Department of Criminology, Law and Society at George Mason University and the past President of the American Psychology-Law Society, Kirsten Domagalski, graduate researcher and PhD candidate at UC Irvine with an MA in psychological science from UC Irvine, Skye A. Woestehoff, assistant professor at Coastal Carolina University with a Ph.D. in General Psychology from the University of Texas at El Paso, Amy Dezember, Senior Research Associate at the Office of Research and Data at the US Sentencing Commission from a PhD in criminology from George Mason University, and Jodi A. Quas, Professor of Psychological Science and Nursing Science at UC Irvine with a Ph.D. from UC Davis, 2022, “Guilty Plea Hearings in Juvenile and Criminal Court,” American Psychological Association [https://psycnet.apa.org/manuscript/2023-10211-001.pdf]/Kankee](https://psycnet.apa.org/manuscript/2023-10211-001.pdf%5d/Kankee)

\*NOTE: this card is a reformatted version of the same card from the topic analysis

Guilty Plea Hearing Characteristics A simple but informative way to understand plea hearings is to evaluate their descriptive characteristics. First was their length. As anticipated, plea hearings were incredibly quick, consistent with observational studies spanning up to four decades (e.g., Miller et al., 1978; Sanborn, 1992). The hearings lasted about 6 to 8 min in juvenile court and about twice as long, but still only 13 min, in criminal court. Although the plea hearings we observed were longer than misdemeanor arraignment hearings (about 3 min; Smith & Maddan, 2011), is it possible that plea validity can be adequately—much less comprehensively—addressed in a matter of minutes? As a result, even juveniles, who regularly fail to fully understand many aspects of their legal case (e.g., Grisso et al., 2003; Zottoli et al., in press), ceded their rights and were convicted, often of felony crimes, in mere minutes. In contrast, the length of a criminal jury trial is 11 hr and 7 min (or 667 min; Sipes et al., 1988). Thus, the time it takes to convict a juvenile by trial is roughly 95 times longer than the time it takes to convict them by plea, and 51 times longer for an adult. Hearing length could be construed as a proxy for a number of other facets of the hearing, including defendant engagement, plea validity review, or discussion of evidence and/or charges. Indeed, hearing length was positively correlated with defendant participation and review of details of all three of the plea validity components, an important finding given that such a review is a core purpose of the hearing itself. However, a closer examination revealed that this latter pattern held only in the Virginia criminal court, suggesting that, for the juveniles, longer hearings did not result in more detailed discussion of the plea, its meaning, or its implications for the juveniles. Those discussions in criminal court, as well, may have contributed to the plea hearings‘ generally longer length in criminal relative to juvenile court. In juvenile court, it is possible that judges focus on tangential but related elements to the plea, such as parental/guardian understanding and acceptance of the plea conditions (see Fountain & Woolard, 2021) or the juveniles‘ prior criminal history, which may affect their current charges and sentence. As found by Rodriguez (2010), detained youth are more likely to have prior charges than those not detained; at the Virginia juvenile court, we found that plea hearings were longer for defendants in custody than those not in custody, though this pattern did not emerge at the California juvenile or Virginia criminal courts. Other hearing characteristics that differed between courts may also have contributed to variations in length and, more importantly, to defendants‘ likely understanding of their case, the plea, and its consequences. Evidence was reviewed, for instance, in the overwhelming majority of criminal cases but quite rarely in juvenile courts. To our knowledge, a proffer (or presentation) of evidence is not a required part of plea hearings. The American Bar Association‘s (1999) Criminal Justice Standards for plea discussions and agreements does not mention reviews of evidence in its listed responsibilities for judges, prosecutors, and defenders. Yet research has consistently demonstrated that stronger evidence increases the likelihood that individuals, including adolescents, will accept a plea (Peterson-Badali & Abramovitch, 1993; Redlich et al., 2016; Viljoen et al., 2005). And while we do not know whether defense attorneys reviewed evidence with juveniles before the hearings, a lack of review by judges is a striking omission given the value that knowledge of the evidence may play and given that judges in criminal court regularly provide such a review. Likewise, in both the Virginia criminal court and the California juvenile court, most defendants heard the charges read at the start, whereas in the Virginia juvenile court, this occurred in only 6% to 19% of the cases, depending on the severity of offenses to which the juvenile pleaded. Even if defense attorneys explained the charges to Virginia juvenile before the hearing, a re-review by the judge would serve only to enhance juveniles‘ understanding, an especially crucial need given consistent findings that highlight significant gaps in minor defendants‘ knowledge of legal proceedings, including the plea (see Grisso et al., 2003; Redlich et al., 2019; Zottoli & Daftary-Kapur, 2019). Without substantial explanation, it is unlikely that juveniles fully understand the process and the consequences of the plea, a view shared by some courtroom actors (Sanborn, 1992; Woestehoff et al., 2019).

#### Threat of adult court is also coercive and harm black and brown adolescents

Orleans 23 [Rebecca Orleans, Public defender at Brooklyn Defender Services, 2023, “Exposing The Backroom Shakedown: The Weaponization Of Adult Prosecution In Juvenile Court Plea Negotiations,” NYU Review of Law & Social Change, https://socialchangenyu.com/wp-content/uploads/2023/02/2-Orleans.pdf]/Kankee

ABSTRACT During the 1980s and 1990s, fear of a juvenile crime wave spurned legislation that expanded the reach of adult criminal court. An “adult time for adult crime” ideology took hold, and between 1992 and 1997, 44 states and the District of Columbia enacted or expanded provisions to transfer children to adult courts. Although in the past two decades courts and state legislatures have exhibited a deeper understanding of the neurological differences between children and adults, most states have retained the ability to criminally prosecute children under 18 if they are charged with certain crimes. As a result, prosecutors can often use the threat of adult criminal charges as a bargaining chip against children in juvenile court plea negotiations. This practice drastically raises the stakes in a process that adolescents are developmentally ill-equipped to handle. In this article I consider how juvenile defenders might mount an attack against prosecutors who wield the threat of adult prosecution against children in juvenile court. I argue that the practice of threatening children with adult prosecution is likely to disproportionately harm Black and Latinx youth, who are routinely seen as older, more dangerous, and more responsible for their actions than their white peers. Additionally, I review findings that adolescents struggle to make risk-reward calculations in situations characterized by high emotion or stimulation, thereby indicating that adolescents are at a distinct disadvantage in the plea bargaining process. I discuss promising Supreme Court decisions rooted in adolescent neuroscience that limited the most extreme sentences for youth— capital punishment and juvenile life without parole in non-homicide offenses— after recognizing that children are fundamentally different from adults. These decisions provide a strong basis for bringing prosecutorial vindictiveness claims against prosecutors who wield the threat of adult charges against children in juvenile court. Although the Supreme Court in its newest composition has not explicitly overruled these decisions, its most recent decision on youth sentencing, Jones v. Mississippi, seriously undermined them. Jones poses a grave danger to children in the adult criminal legal system, making it all the more important to keep them out of it. INTRODUCTION D, a 15-year-old Black boy, allegedly took a pack of cigarettes from an unlocked car in 2019. The state of Louisiana charged him with simple burglary and placed him in juvenile detention. When I met him during the summer of 2020, he was still locked up on this charge. At the time I was working as a legal intern at a children’s defense office in Louisiana, and I assisted with D’s representation. When D was initially arrested, he appeared before a juvenile court judge who placed him in juvenile detention. However, the judge failed to conduct a continued custody hearing within three days of D’s entry. This failure violated Article 819 of the Louisiana Children’s Code. Accordingly, D was entitled to release pursuant to the article, which states If a child is not released to the care of his parents, the court shall set and hold a hearing within three days after the child’s entry into the juvenile detention center or shelter care facility . . . . If the hearing is not held, the child shall be released.1F 1 When D’s attorney explained to the prosecutor that she was going to move for his release on these grounds, the prosecutor made a threat. He said that if D’s attorney petitioned for D’s release, he would use another charge that D was facing in a separate case to transfer D to adult court. Unrelated to the simple burglary, D had been charged with aggravated battery. While aggravated battery is not a transferrable offense under the Louisiana Children’s Code, attempted murder is.2F 2 The prosecutor said that if D’s attorney moved for his release on the stolen cigarettes case, he would increase D’s aggravated battery charge to an attempted murder charge and then transfer that case to adult court. As D’s mother remarked, the prosecutor was playing dirty. A conviction in criminal court commonly entails a longer sentence, a public criminal record and its associated collateral consequences, and incarceration in adult prison, where the chance of violence against youth is high.3F 3 Transfer to adult court is therefore so consequential that our client—and most young people—would go to great lengths to avoid it. In the face of this threat, D and his attorney decided against moving for his release. Therefore, as COVID-19 was wreaking havoc in prisons and jails across the country, D remained locked up when he was entitled to release. D’s experience is an example of the weaponization of adult transfer in juvenile proceedings, which goes virtually unchecked. A wealth of transfer provisions enacted during the 1990’s “Tough on Crime” era grants prosecutors enormous discretion in transfer decisions, leaving them the power to transfer kids to adult court with almost no oversight.4F 4 Prosecutors can and do use the threat of adult prosecution as a bargaining chip. Typically, plea negotiations take place under a time crunch, demand a weighing of immediate reward against remote risk, and require trust between adolescents and their attorneys—issues the adolescent brain is developmentally ill-equipped to handle.5F 5 Combined with the threat of adult prosecution, the plea bargaining process becomes downright coercive.6F 6 Furthermore, evidence concerning racial disparities at all stages of the juvenile legal system indicates that prosecutors wield the threat of adult prosecution disproportionately against children of color.7F 7 When I explained D’s situation and the prosecutor’s threat to a friend, she raised a question that I ask almost daily: How on earth are they—prosecutors— allowed to do that? D had a statutory right to his release. How was a prosecutor permitted to pressure him into relinquishing that right? In Blackledge v. Perry, the Supreme Court held that malicious or bad faith increases in punishment threatened by prosecutors constituted “vindictiveness,”8F 8 and that “the fear of such vindictiveness may unconstitutionally deter a defendant’s exercise” of their due process rights.9F 9 Perry concerned a writ of habeas corpus. Mr. Perry had been convicted of a misdemeanor, which carried a six-month sentence. He had then filed an appeal. In response, the prosecutor brought felony charges against Perry for the same incident, “subjecting him to a significantly increased potential period of incarceration.”10F 10 In the face of these new charges, Perry withdrew his appeal and pled to a five-to-seven-year sentence. The Court held that the prosecutor’s potentially vindictive behavior violated Perry’s due process rights.11F 11 Therefore, the Court affirmed habeas relief. Unfortunately, the Supreme Court gutted its own vindictiveness doctrine just four years later in Bordenkircher v. Hayes.12F 12 In that case, Hayes challenged a charge brought against him under the Habitual Criminal Act, which carried a mandatory life sentence.13F 13 The prosecutor had only filed this charge after Hayes refused to take a plea offer on a lesser charge. In his brief for the Court, Hayes argued that this practice constituted prosecutorial vindictiveness: The potential for impermissible vindictiveness exists when a prosecutor is allowed to bring an enhanced indictment against a defendant who has refused to plead guilty to the unenhanced charge in exchange for the State’s offer of leniency. Due process was offended by placing Mr. Hayes in fear of retaliatory action for insisting upon his right to plead not guilty. Consequently, Mr. Hayes’ conviction as an habitual offender must be vacated because it is the product of the prosecutor’s constitutionally impermissible retaliatory act.14F 14 The Bordenkircher Court disagreed. According to the Court, the prosecutor had not exhibited vindictiveness—he had simply bargained.15F 15 This ruling presents a significant obstacle to D or people like him who might hope to bring a vindictiveness claim. However, I argue that Supreme Court decisions rooted in adolescent brain science have created an avenue for challenging Bordenkircher’s applicability in juvenile proceedings. Lawyers can draw on the Supreme Court’s holdings in Roper v. Simmons,16F 16 Graham v. Florida,17F 17 Miller v. Alabama,18F 18 and J.D.B. v. North Carolina,19F 19 to undermine Bordenkircher’s applicability in juvenile court. These cases recognize that “children are different”20F 20 and require courts to take into account the mitigating factors of youth in sentencing decisions and analyses of Miranda warnings.21F 21 Recently, however, in Jones v. Mississippi, the newly comprised Supreme Court claimed to uphold these cases while simultaneously subjecting adolescents in the criminal legal system to harsher punishment.22F 22 The 2021 decision, authored by Justice Brett Kavanaugh for a 6-3 majority, has been characterized as “one of the most dishonest and cynical decisions in recent memory.”23F 23 Writing for the dissent, Justice Sonia Sotomayor stated that “the Court is fooling no one” in its claim that the decision adhered to precedent.24F 24 Personally, I find it maddening when the Supreme Court proclaims to uphold precedent while simultaneously undermining it. In this case, however, the practice has a silver lining: the Court’s insistence that it has not departed from precedent leaves open the pathway for defenders to mount an attack against Bordenkircher in juvenile court. Part I of this paper will outline the history of the juvenile court and explain how the boundary between juvenile and criminal courts has blurred over time. Part II will describe how an influx of transfer provisions during the Tough on Crime era shifted the power to transfer from judges to prosecutors. Prosecutors took on the role of gatekeeper to the juvenile system and accordingly possess inordinate power in the plea bargaining process. Part III will explain how adolescents are at a developmental disadvantage in the plea bargaining process. This Part also discusses the likelihood that adult prosecution is weaponized disproportionately against children of color. Finally, Part IV addresses how to stop prosecutors from using the threat of adult court to bolster their power in juvenile court. This Part proposes that a prosecutorial vindictiveness claim, rendered mostly defunct by Bordenkircher v. Hayes, can prevail in circumstances in which prosecutors weaponize transfer in plea bargaining proceedings. Although the Supreme Court in its current composition has demonstrated its unwillingness to expand protections for adolescent offenders,25F 25 some state courts have proven susceptible to creative arguments.26F 26 It is critical for defenders to use every tool at our disposal to thwart prosecutors’ attempts to use adult prosecution as a bargaining chip in juvenile court. I. THE HISTORY OF JUVENILE COURT

#### Stats prove high false guilty plea rates for minors – police interrogation and developing brains

Malloy et al. 13 [Lindsay C. Malloy, researcher at Florida International University, Elizabeth P. Shulman, researcher at University of Pennsylvania and Temple University, and Elizabeth Cauffman, researcher at University of California, Irvine, 2013, “Interrogations, Confessions, and Guilty Pleas Among Serious Adolescent Offenders,” Law and Human Behavior, https://unlv-primo.hosted.exlibrisgroup.com/permalink/f/6tvje6/TN\_cdi\_proquest\_miscellaneous\_1692289956]/Kankee

In the present study, we examined (a) the prevalence and characteristics of youths’ true and false admissions (confessions and guilty pleas), (b) youths’ interrogation experiences with police and lawyers, and (c) whether youths’ interrogation experiences serve as situational risk factors for true and false admissions. We interviewed 193 14- to 17-year-old males (M 16.4) incarcerated for serious crimes. Over 1/3 of the sample (35.2%) claimed to have made a false admission to legal authorities (17.1% false confession; 18.1% false guilty plea), and 2/3 claimed to have made a true admission (28.5% true confession; 37.3% true guilty plea). The majority of youth said that they had experienced high-pressure interrogations (e.g., threats), especially with police officers. Youth who mentioned experiencing “police refusals” (e.g., of a break to rest) were more likely to report having made both true and false confessions to police, whereas only false confessions were associated with claims of long interrogations (2 hr) and being questioned in the presence of a friend. The number of self-reported high-pressure lawyer tactics was associated with false, but not true, guilty pleas. Results suggest the importance of conducting specialized trainings for those who interrogate youth, recording interrogations, placing limits on lengthy and manipulative techniques, and exploring alternative procedures for questioning juvenile suspects. At the age of 13 years, Tyler Edmonds of Oktibbeha County, Mississippi, made a shocking confession to police— he had shot and killed his sister’s husband. Later, Tyler claimed to have falsely confessed to protect his 26-year-old sister. Tyler was tried as an adult and sentenced to life in prison. Four years later, the Missis- sippi Supreme Court overturned his conviction (Edmonds v. State of Mississippi, 2007), and Tyler was acquitted in a subsequent retrial. This high-profile example of an innocent juvenile defen- dant confessing to a crime is not an isolated incident. It is impos- sible to pinpoint precisely how often false confessions occur; however, proven cases from juveniles and adults have been doc- umented around the world (Kassin et al., 2010). In addition, there are many known cases of juvenile and adult defendants opting to plead guilty to crimes they have not committed (see Redlich, 2010a, for a review), typically to avoid facing a harsher penalty if convicted at trial. In approximately 25% of the Innocence Project’s (n.d.) DNA exonerations in the United States (n 305), a false admission of guilt contributed to the wrongful conviction. Admissions of guilt are powerful. People are so predisposed to believe confessions that their existence tends to interfere with potential jurors’ and investigators’ evaluation of other relevant evidence (e.g., eyewitness identifications, forensic science; Hasel & Kassin, 2009; Kassin, Bogart, & Kerner, 2012). When individ- uals decide to plead guilty, they forego the right to a jury trial and several other legal protections (e.g., the right to confront and cross-examine witnesses; Redlich, 2010a). Thus, the question of whether admissions of guilt (confessions and guilty pleas) are diagnostic of actual guilt is critical. Over the last two decades, research on false confessions has mushroomed (see Kassin et al., 2010; Lassiter & Meissner, 2010; Leo, 2008, for reviews). As police interrogations have moved toward psychological manipulation rather than exertion of brute force (Thomas & Leo, 2012), researchers have tried to elucidate the aspects of interrogations (i.e., situational risk factors) that may induce false confessions. Despite a growing interest in the topic, especially concerning adolescents and other vulnerable popula- tions (e.g., persons with mental illness; Redlich, 2004), very little is known about the prevalence or characteristics of false confes- sions among juveniles or the interrogation techniques to which young suspects are subjected. Furthermore, although most criminal convictions (over 90%) are determined via guilty plea rather than trial (Cohen & Reaves, 2006), research on false guilty pleas has lagged behind research on false confessions (Redlich, 2010a). Moreover, virtually nothing is known about juveniles’ decisions to admit guilt truthfully. To increase the potential for distinguishing true from false admissions, it is imperative to examine true admis- sions as well. The Importance of Examining Interrogations, Confessions, and Guilty Pleas Among Youth Adolescents, due to their relative immaturity, may be more prone than adults to make both true and false admissions of guilt. Indeed, proven exoneration cases (Drizin & Leo, 2004; Gross, Jacoby, Matheson, Montgomery, & Patil, 2005), self-report studies (Gudjonsson, Sigurdsson, Sigfusdottir, & Young, 2012), labora- tory paradigms (Redlich & Goodman, 2003), and hypothetical vignettes (Goldstein, Condie, Kalbeitzer, Osman, & Geier, 2003) demonstrate that youth are particularly vulnerable to providing false confessions compared with adults. Of youth who have been interrogated by the police, the self-reported rates of false confes- sion vary from 0% to 13.8% (e.g., Gudjonsson, Sigurdsson, As- geirsdottir, & Sigfusdottir, 2006; Sigurdsson & Gudjonsson, 1996). The desire to protect a peer and attempts to avoid punish- ment or custodial pressure are common motivations for false confession (see Gudjonsson, 2010). All but one (Viljoen, Klaver, & Roesch, 2005) of these self-report studies were conducted in Europe, however. Given the distinctiveness of U.S. interrogation practices (see Gudjonsson & Pearse, 2011), these prior findings may not generalize to U.S. populations. Developmental characteristics such as impulsivity, susceptibil- ity to social influence, lower status relative to adults, and immature judgment may explain the greater propensity of adolescents to admit to offenses of which they are accused, especially if psycho- logically manipulative and high-pressure techniques are used (Cauffman & Steinberg, 2000; see Owen-Kostelnik, Reppucci, & Meyer, 2006, for a review). Compared with adults, adolescents are more sensitive to immediate rewards and less sensitive to long- term negative consequences (Cauffman et al., 2010; Steinberg et al., 2009). In the context of an interrogation, this may mean that adolescents are excessively swayed by implications of lenient treatment for confessing and insufficiently attentive to the long range implications of confessing (e.g., a greater certainty of con- viction). Furthermore, adolescents tend to be highly susceptible to peer influence, placing great importance on peer relationships (e.g., Gardner & Steinberg, 2005). The desire to protect a peer may therefore be especially powerful for adolescents (e.g., Warr, 1993). In addition, adolescents tend to be more compliant with authority figures than adults (e.g., Grisso et al., 2003), as acknowledged in a Supreme Court decision, which noted that “[a] reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go” (J.D.B. v. North Carolina, 2011, p. 8). Furthermore, juveniles exhibit less legal competence than adults: They often fail to fully understand their legal rights, frequently waive their Miranda rights, and rarely request an attorney (e.g., Feld, 2013; Grisso et al., 2003; Viljoen et al., 2005). Consequently, juveniles’ legal decisions, including those related to admissions of guilt, may reflect poor legal abilities/ understanding, inappropriate reasoning (e.g., failure to consider the strength of the evidence against them), and/or developmental immaturity. The contexts in which youth decide to plead guilty may share many similarities with police interrogation contexts, including demands to make an immediate decision (e.g., one-time offer plea deals) and pressure from adult authority figures (e.g., lawyers; Drizin & Luloff, 2007; Redlich, 2010a). Thus, the same develop- mental characteristics that put youth at heightened risk for false confession may also influence their tendency to make a false guilty plea. However, the alternative is also possible: Juveniles may be unlikely to falsely plead guilty because their risk proneness drives them to take their chances at trial (Redlich, 2010b). False Admissions of Guilt The role of developmental immaturity in admission of guilt may be amplified in the United States, due to the use of high-pressure interrogation techniques (Kassin et al., 2010; Owen-Kostelnik et al., 2006) and the threat of increasingly punitive sentences for juveniles (Fagan, 2008). Generally, American interrogations are guilt presumptive, accusatorial, and confrontational, with officers frequently employing the Reid technique (Inbau, Reid, Buckley, & Jayne, 2013; Leo, 2008). Various techniques are used to induce confession, including maximization strategies that involve intim- idation tactics, such as accusing the suspect and presenting actual or fabricated evidence of guilt. Interrogators may also use mini- mization strategies in which police feign empathy with suspects and provide face-saving justifications for committing crime (e.g., armed robbery to provide food for loved ones). Both maximization and minimization are designed to make suspects feel that their best option is to confess (Ofshe & Leo, 1997). U.S. police are generally allowed and trained to question juve- niles in the same manner as adults (Inbau et al., 2013). The limited research evidence available suggests that they do: In a national survey (Reppucci, Meyer, & Kostelnik, 2010), substantial propor- tions of police officers who had interrogated in the last year reported using maximization techniques, such as the presentation of false evidence (23%), deceit (32%), and repeated questioning (58%), among other Reid-like techniques. Feld (2006) examined 66 recorded interrogations with 16- to 17-year-old suspects and found many similarities with Leo’s (1996) observational study of interrogations with adult suspects (e.g., 34% maximized the seri- ousness of the crime, 38% offered to help). Analyzing felony interrogations with juveniles in Minnesota, Feld (2013) found that police commonly used maximization tactics (69.1%), including confronting juveniles with evidence (54%), emphasizing the seri- ousness of the crime (14%), and accusing them of lying (33%). Furthermore, not only is it legal for youths to be questioned in the same manner as adults—some of the Reid technique’s interroga- tion themes are specifically designed to exploit youths’ develop- mental vulnerabilities. For example, police may suggest to a ju- venile suspect that his or her lack of parental supervision or temptation to abuse substances justifies the commission of the crime (Inbau et al., 2013). However, surveys of law enforcement and recorded interrogations may underestimate the full extent of high-pressure interrogation of young suspects: Police may under- report their use of particularly coercive strategies and/or use less extreme forms of them while under observation than in private. Notably, we also have limited knowledge concerning how youths’ interrogation experiences influence their confession and plea decisions. In laboratory studies and actual cases, evidence strongly suggests that certain techniques (e.g., lengthy interroga- tions, deceit/trickery) increase the incidence of false confession (e.g., Drizin & Leo, 2004; Redlich & Goodman, 2003; Russano, Meissner, Narchet, & Kassin, 2005). However, extant research is limited, in that it draws largely on cases of proven false confes- sions (e.g., DNA exonerees), which may not be representative of all criminal/delinquency cases (Redlich, Kulish, & Steadman, 2011). Less is known about false guilty pleas and their situational risk factors. Redlich (2010a) cogently describes the similarities and differences between false confessions and false guilty pleas. For example, to induce confession, police may use minimization to imply leniency, but are prohibited from promising it. In contrast, when reaching a plea agreement, explicit promises of leniency are allowed; plea agreements typically involve a decision to accept a lesser sentence than what is at stake if convicted at trial. (In laboratory studies, both implications and promises of leniency increase the rate of false confession [Kassin & McNall, 1991; Russano et al., 2005]). Redlich, Summers, and Hoover (2010) investigated false guilty pleas and false confessions among adult offenders with mental illness: The overall rate of false guilty plea (36.5%) was higher than the rate of false confession (22%). Both types of guilt admission were commonly made to end questioning, avoid jail, or go home, suggesting that similar psychological processes may operate in the decision to submit false confessions and false guilty pleas. Whether the same pattern holds for juve- niles—another group overrepresented among proven false confes- sion cases—remains unknown. True Admissions of Guilt

#### Any youth incarceration risks child rape – the neg’s minimization of false convictions and recidivism is key to prevent entry

Medina 18 [Sara Medina, JD candidate at the American University Washington College of Law, 2018, “Sexual Abuse of Juveniles in Correctional Facilities: A Violation of the Prison Rape Elimination Act,” American University Journal of Gender, Social Policy & the Law, https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1714&context=jgspl]/Kankee

INTRODUCTION Countless young adults are subjected to sexual abuse in juvenile correctional facilities. 1 “Ebony V.” describes her harrowing sexual abuse by a staff member: “[During the day] he’d come pick me up from the lunchroom . . . he took me back to the unit and had sex with me . . . [At night,] most of the time we went to the schoolhouse right next door to the unit or we went to his office.” 2 Unfortunately, Ebony V. is not alone in her experience. 3 The San Mateo County, California juvenile justice system became a hunting ground for a child psychiatrist, Dr. William Ayres.4 One victim described being raped by Ayres at the age of twelve at least seven to ten times. 5 Another victim reflected on the impact of Ayers’ sexual abuse and how the victim “fell into a cycle of turning [his] pain into anger and hurting others.” 6 Society views prison rape and sexual abuse of juveniles as an innate part of prison life. 7 Unfortunately, the sexual maltreatment committed by individuals who are in supervisory roles contributes to the improper normalization of sexual abuse of adolescent children in prison.8 Recent reports indicate the tragic truth about rape and sexual abuse by prison workers. 9 The National Survey of Youth in Custody by the federal Bureau of Justice Statistics (“BJS”) found that between 2007 and 2012, the rate of formal sex abuse allegations against staff in state juvenile justice facilities doubled, even as the number of children entering those systems dropped.10 The study also indicated that, among the young adolescents and children who were victims of staff sexual misconduct, roughly six of every seven reported multiple incidents and one in every five reported eleven or more incidents. 11 Juveniles are developmentally different from adults and, as such, they require heightened specialized care and treatment by well-trained staff.12 Atkins v. Virginia was foundational in recognizing juvenile’s rights when it held that juveniles have diminished mental capacities and are in need of additional protections.13 Juveniles’ physical and mental vulnerabilities increase the need for stronger protections in correctional facilities. 14 Despite laws like the Prison Rape Elimination Act (“PREA”), which protects prisoners against sexual abuse, the number of sexual assaults in correctional facilities continues to rise, especially in juvenile populations.15 This Comment argues that states are failing to adhere to PREA in juvenile correctional facilities, resulting in a violation of individuals’ Eighth Amendment constitutional right to be protected from cruel and unusual punishment. 16 Part II discusses PREA and summarizes the basic principles of Eighth Amendment jurisprudence. 17 Part III argues that states’ protections of juveniles in correctional facilities are insufficient, violate the Eighth Amendment, and do not follow PREA standards.18 Part IV recommends that states should implement policies that eradicate staff-on-inmate sexual abuse and create juvenile-specific oversight committees. 19 Part V concludes by reiterating that states’ failure to follow PREA standards is a violation of juveniles’ Eight Amendment right.20 I. BACKGROUND

#### Err neg – doing nothing to stop child sexual abuse is as bad as being a child rapist

Medina 18 [Sara Medina, JD candidate at the American University Washington College of Law, 2018, “Sexual Abuse of Juveniles in Correctional Facilities: A Violation of the Prison Rape Elimination Act,” American University Journal of Gender, Social Policy & the Law, https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1714&context=jgspl]/Kankee

\*NOTE: footnotes of page 17 included

When states do not hold facilities accountable, it allows detention officers to ignore jail standards and enter into juvenile female inmates’ cells unannounced, increasing the opportunity to sexually assault youth, which is both inexcusable and unlawful.130 According to the Oklahoma Jail Standards, any cell entry of a juvenile female requires two detention officers and one of them must be female. 131 Oklahoma implemented this law to properly safeguard juveniles from sexual assault as required under PREA.132 PREA standards also require that supervising officers properly oversee detention facilities.133 It is unlawful for an active supervisor of a juvenile detention facility to fail to fulfill his duty of ensuring the safety of a juvenile inmate. 134 Sheriff Stanley Glanz blatantly ignored Oklahoma Jail Standards and PREA.135 Sheriff Glanz’s inefficiency was demonstrated through his inaction after a reported incident in 2008, which involved a male nurse watching a fifteen-year-old female inmate showering.136 Appropriate action, such as installing video cameras, failed to take place after the incident.137 Video monitoring would have monitored any areas where staff or residents may be isolated and would have been a deterrent for staff members committing sexual abuse. 138 To be compliant with PREA, correctional facilities must use technological advancements as tools to protect juveniles from sexual abuse. 139 Failure to act is just as detrimental as committing the act itself.140 Turning a blind eye does not eliminate the problem of sexual abuse but actually condones it.141 Even though failure to act is not explicitly addressed in PREA, it is implied through its education and training policies, which ensure that youth detained in juvenile correctional facilities are free from sexual victimization.142 Employees are required to actively prevent, detect, and respond to sexual abuse. 143 When states violate PREA, they are causing unnecessary harm and unlawfully subjecting juveniles to sexual abuse in detention facilities.144 B. Sexual Victimization of Juveniles in Correctional Facilities is Unlawful Because It Violates an Individual’s Eighth Amendment Right 134. See Poore, 46 F. Supp. 3d at 1193-94 (detailing that Sheriff Glanz was responsible for providing adequate supervision and protection of juvenile inmates but illustrated poor judgment and violated both the Oklahoma Jail Standards and PREA). 135. See id. at 1195 (asserting that Sheriff Glanz was aware of the proper procedures and his actions of sexual misconduct were in direct defiance of the law). 136. See id. at 1198-99 (noting that after the incident was reported, no changes were made with respect to the supervision of the juvenile females). 137. See id. at 1199 (articulating that having video monitoring would provide internal oversight of staff); see also NPREC, supra note 39, at 11 (emphasizing that video monitoring would be a useful tool to confirm staff members’ movement and location, enhance accountability, and increase reporting of sexual abuse in juvenile facilities). 138. See 28 C.F.R. § 115.313(a) (2012) (recommending that facilities have video monitoring to protect juveniles from sexual abuse and ensure there is adequate supervision). 139. See id. (noting that video monitoring can provide tangible proof of any sexual misconduct committed by a staff member). 140. See Poore, 46 F. Supp. 3d at 1201 (stating that inaction leads to cyclic sexual abuse patterns). 141. See § 115.331(a) (articulating that employees have a duty to report sexual abuse and are responsible for adhering to policies and procedures). 142. See §§ 115.311(a), 115.331(a)(10) (mandating states to implement zero tolerance policies for sexual abuse and ensuring that employees comply with mandatory reporting laws).

### Contention 10: Answers to Court Clog

#### Reject consequentialist court clog arguments – justice is inherently inconvenient because the process, not merely the outcome, matters

Ivsan 17 [Inga Ivsan, Associate at Black, Srebnick, Kornspan & Stump with a J.D./LL.M from the University of Miami School of Law, 4-1-2017, “To Plea or Not to Plea: How Plea Bargains Criminalize the Right to Trial and Undermine Our Adversarial System of Justice,” North Carolina Law Review, https://archives.law.nccu.edu/cgi/viewcontent.cgi?article=1770&context=ncclr]/Kankee

Plea bargains are meant to process convictions rather than allow juries to decide the outcomes of cases, departing from the adversary approach to justice required under the Constitution.so The plea bargain process enables prosecutors to act on what would otherwise be inadmissible evidence at trial (e.g., hearsay) in order to fashion a plea bargain and make sentencing recommendations to the court.' A defendant in the modem American legal system faces two sets of injustices brought about by the use of prejudicial and inadmissible evidence: upon indictment and subsequently at sentenc- ing. 82 B. Plea Bargaining Is Merely a Tool of Expediency and Convenience, Not Justice Plea bargaining now purports to be an "inextricable part"8 3 of the modern criminal justice system, saving time and limited judicial and prosecutorial resources.84 Nevertheless, convenience and expediency cannot provide an adequate substitute for the guarantee of trial by an impartial jury under the U.S. Constitution. The United States District Court for the State of Massa- chusetts recently observed that: Plea bargaining is no longer a negligible exception to the norm of trials; it is the norm. Nor, given information deficits and pressures to bargain, can we simply trust in an efficient plea market that reflects full information about expected trial outcomes. Thus, plea bargaining needs tailored regu- lation in its own right, not simply a series of waivers of trial rights.8 5 Unfortunately, the modern purpose of plea bargaining is too administrative, dispensing of any determination whether the government has met the con- stitutionally required evidentiary burden of "beyond the reasonable doubt."8 6 This "nontrial mode of procedure" 7 does nothing to ascertain truth or serve justice. Almost all defendants in federal criminal cases are sentenced without the benefit of a jury trial, notwithstanding past admoni- tion by the U.S. Supreme Court: The Framers would not have thought it too much to demand that, before depriving a man of [] more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to the unanimous suf- frage of twelve of his equals and neighbors, rather than a lone employee of the State.8 9 In the eighteenth century, Sir William Blackstone90 foresaw en- ticements that now affect the way plea bargaining is conducted in the Unit- ed States. He noted that "[e]xpedience may induce 'secret machinations, which may sap and undermine' the jury trial . . . as doubtless all arbitrary powers, well executed, are the most convenient."91 Blackstone presciently pointed out that "delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters." 92 Implied in Blackstone's observation is the idea that sacrificing justice for the sake of expediency ultimately di- minishes liberty. The irony here is that, in civil practice, the United States Supreme Court has declared, under the doctrine of "unconstitutional conditions," that the government cannot require a person - for the sake of convenience or expe- diency - to give up a constitutional right in exchange for a discretionary benefit conferred by the government. 93 While analogizing Fifth and Four- teenth Amendment land use case law to the Sixth Amendment right to a jury trial escapes easy analysis, there is a core notion embedded in Supreme Court precedent: a property owner cannot be required to sacrifice constitu- tional rights at the discretion of government regulators where there is no nexus between the right sacrificed and the government objective being served. 94 In the context of plea bargains, one may reasonably question95 whether the government can exact a waiver of one's constitutional right to a jury trial for the mere sake of lightening the workload of prosecutors and judges.96 The adversary system that was meant to protect the average citizen from the tyranny of its own government is now being abandoned for the mere sake of expediency and the selfish career goals of some prosecutors. Transparency is missing from the current system given that plea bargains are typically negotiated outside open court proceedings. Inferentially, the government lacks sufficient evidence to meet the requisite burden of proof in 97% of criminal cases 97 by relying exclusively on plea bargains to obtain convictions. If prosecutors truly seek justice, they should not rely on the secrecy of plea bargain negotiations. The constitutionally required burden of proof for conviction was not an incidental development in law, but rather a thoughtful and necessary check to prevent abuse and government over- reach. If the plea bargaining process is not brought out into the clear light of day, there is no curb on this form of abuse. Notwithstanding the universal use of plea bargains to obtain convictions, there is practically no independent and unbiased oversight from the judici- ary, much less the free press. 98 Rather, "as the circle widens to ensnare ever more 'conspirators,' prosecutors trumpet their willingness to 'go wherever the evidence leads,' and the news media are, far more often than not, pre- pared to report such news without an ounce of insight or skepticism.99 C. Rise ofModern Plea Bargaining:The Impact ofSentencing Guide- lines and Mandatory Minimums

#### Plea bargains cause court clog by creating low-cost responses – plea bargaining’s efficiency causes more cases due to freed up resources, causing the mass prosecution of barely criminal actions and the criminalization of poverty

Hessick 21 [Carissa Byrne Hessick, Ransdell Distinguished Professor of Law at the University of North Carolina School of Law, where she also serves as the director of the Prosecutors and Politics Project, 2021, “Punishment Without Trial: Why Plea Bargaining Is a Bad Deal,” Abrams Press, ISBN: 9781419750304]/Kankee

But those consequences seem smaller when compared to the costs of the prolonged contact with the system while waiting for trial. The very act of being brought into the criminal justice system—even if you are never convicted—can also have severe consequences. Defendants have to miss school or work to attend court dates, and so the defendants may perform poorly in class or lose their jobs if they keep returning to court while waiting for a trial. And an arrest record—even if the arrest never turns into a conviction—is often used by landlords, employers, and immigration officials when they make important decisions about people’s lives. It doesn’t matter to these people outside of the criminal justice system that the defendant wasn’t convicted. As law professor Eisha Jain has explained, these people use arrest records because those records are relatively easy and inexpensive to find, and because they think arrests are good proxies for the potential for violence, unreliability, or instability. Because the difference is so small between the consequences of a trial and the consequences of a plea bargain, misdemeanor plea bargains might seem unimportant, especially when you compare their outcomes to the outcomes in felony cases. But it would be a mistake to ignore the problems that misdemeanor plea bargaining causes. And it would be an even bigger mistake to ignore misdemeanors when thinking about how to reform our system. Scott Hechinger sometimes makes a stink about the silly misdemeanor cases that he sees at arraignment. He’ll say, “Why is this case even in the system?” The assistant district attorneys get annoyed that he is objecting when they are giving his client a favorable deal. “The ADAs turn to me and say, ‘They are going home, Scott. Why are you making such a big deal?’ Then I’ll say, ‘If it’s not a big deal, then why are you prosecuting?’ They don’t have an answer.” Scott’s question is an important one. The 13 million misdemeanor cases filed each year clog up our criminal justice system. Especially in large urban areas, the people inside the system have made the decision that these cases aren’t really worth it: they think that a few hours in jail or a small fine are enough to “teach a lesson” to these defendants. The system doesn’t even care whether it has swept up an innocent or a guilty defendant; only the defendant who is willing to endure the costs of additional appearances has the opportunity to prove that he is innocent. So why do we have this bloated misdemeanor system? Sure, some misdemeanors are serious: domestic violence, for example, should be taken seriously by law enforcement. But many other crimes should not. In fact, it might be less efficient for us to treat certain behavior—especially behavior that is caused by poverty—as a crime rather than as a social problem to be solved. How much does it cost us to prosecute a person who jumps the turnstile in the subway rather than pay the $2.75 fare? How much does it cost us to jail the woman who can’t pay the surcharge from her previous misdemeanor case? If we put the resources that we currently use to arrest, prosecute, and jail these people into social service programs aimed at alleviating poverty, we would almost certainly save money. And those social services would help a lot of people who are hungry and who can’t afford public transportation but who haven’t stolen food, jumped a turnstile, or committed another crime. Unfortunately, the judges, prosecutors, and defense attorneys who work in the criminal justice system don’t get to make those decisions. Decisions about poverty prevention programs and the costs of public transportation are made by other public officials who set local budgets and decide on public priorities. And those officials are making those decisions—at least to some extent—based on what the public wants. Yet I can’t help but wonder whether the public would feel the same way if they sat in those courtrooms, saw the people shuffled through, and began to understand that we can’t arrest our way out of poverty and addiction. \* \* \* \* \* Months after I’d been to visit Scott Hechinger in Brooklyn, I was still bothered by the courtroom rules that he had told me about—especially the rule about no reading. I could understand why talking on the phone could disturb others in the courtroom, and I could understand why eating and drinking in the courtroom could cause a mess. But reading doesn’t bother anyone, so why should it be prohibited?

#### Court clog is a self-created problem justified via circular argument – there are too many cases because its too easy to settle a case via plea bargaining, justifying the creation of new crimes.

Schehr 24 [Robert Schehr, Professor at the Department of Criminology and Criminal Justice at Northern Arizona University and Co-Director of the Arizona Innocence Project at Northern Arizona University with a Ph.D. in Sociology from Purdue University West Lafayette, a M.S. in Sociology from Purdue University West Lafayette, an MLS Law from Yale University, and a B.A. in Labor Studies from the University of Illinois Springfield, 12-09-2024, "The Political Economy of Plea Bargaining", Taylor & Francis, https://www.taylorfrancis.com/books/mono/10.4324/9781003385103/political-economy-plea-bargaining-robert-schehr]/Kankee

The Hidden Role of the Legislature One of the persistent challenges confronted by legal scholars and practition- ers seeking to address the ubiquity and constitutionality of the plea appears in the following well-rehearsed claim: There are too many criminal cases being processed in the states. If every defendant chose to assert their constitutional right under Article III §2 to a trial by a jury of peers the system would collapse since there are far too few resources including courts, judges, prosecutors, defense attorneys, private investigators, and the fiscal wherewithal to effectively accommo- date them. This is a red herring. In fact, the argument made by those who, even reluc- tantly, support the preservation of the plea, when confronted with challenges that raise constitutional and justice-related concerns, shrug and contend that the system “is what it is,” and that we simply have to accept the plea as an efficient and pragmatic administration of justice. As this book will make clear, this is a circular argument. It is the legislatures of each state that construct criminal sentencing guidelines. To that end, states’ general assem- blies play a pivotal role in pushing defendants toward the plea. This is true because the states have created draconian sentencing guidelines constituted by severe mandatory minimum and maximum ranges for years to be spent in prison. Defendants confronting a mandatory maximum if convicted at trial will be induced to accept a plea bargain since the downward departure from the mandatory maximum will often be significant. It is in this way that the legislature creates a dynamic that predictably leads to the plea. In addition, legislatures are the political body that creates crimes. That is, until a behavior is officially designated as a violation of criminal law, that behav- ior is not criminal. However, once a legislature passes a statute designating a behavior a crime, hydraulic pressure is placed upon criminal legal sys- tem actors downstream, requiring police to arrest suspects for violations of criminal acts, investigate those cases, and share those cases with prosecutors for possible litigation. In short, it is the naming of behaviors as crimes that generates the flood of possible cases that must be managed by the criminal legal system. It is in at least these two ways – creation of draconian sentenc- ing ranges and the naming of behaviors as crimes now ensconced in state law – that locates the legislature of each state as a central agent generating the plea. So, to claim, as virtually every prosecutor and defense attorney whom I have queried about the plea has, that the criminal legal system is too unwieldy as it is deluged with too many cases, signifies a circular argument because the problem is created by the legislature itself. Circular arguments signify a fallacy of reasoning or argumentation.15 Circular reasoning is known as “question begging.” As is the case with system justifications for plea bargaining, self-dependent justifications lead to fallacious arguments where “the evidence [in this case, high caseloads] presupposes the truth of the claim it is trying to support [i.e., the system needs plea bargaining to manage high caseloads].”16 To summarize, the problem of plea bargaining manifests the pressure accruing from excessive caseloads, thereby requiring a legal technology capable of efficiently disposing of cases. As I have dem- onstrated, for system actors to justify the probity of the plea as a necessary palliative to heavy caseloads ignores the role played by the legislature in cre- ating the caseload dynamic in the first instance. It is in this way that prosecu- tors, defense attorneys, and judges each engage in circular reasoning since “the evidence presupposes the truth of the claim that it is trying to support.” More categories of crime are created that place downward hydraulic pres- sure upon the police, prosecutors, defense attorneys, and courts to adminis- ter them. Defendants, for their part, are confronted with a devil’s bargain. Either they take their chance at trial where, if convicted, they will spend significantly greater time in prison due to legislatively enacted sentencing ranges, or accept the downward departure from the maximum trial sen- tence, the plea. This is what is known as the “trial tax.” Defendants are “taxed,” i.e., punished, for asserting their right to trial by risking excessive punishment. Criminal legal system actors respond as if the caseload issue appeared from whole cloth. It didn’t. It was and continues to emanate from a state actor. The syllogism, then, is something like this: through its authority over criminalization of behavior and the setting of sentencing ranges, legis- latures create the dynamic leading to the proliferation of the plea. Hydraulic pressure is placed upon criminal legal system actors who contend that there are too many cases and far too limited resources for each defendant to assert their right to trial by jury. Therefore, we must adopt a more efficient and pragmatic technology to administer justice – the plea. Two immediate responses are possible. First, the legislature can decriminalize acts currently considered criminal. This is especially relevant to marijuana possession and distribution, which account for a significant proportion of state prison pop- ulations. Second, by significantly reducing mandatory sentencing regimes, the legislature can revisit sentencing ranges to encourage defendants to con- sider going to trial without fear of a trial tax. In sum, the problem of the plea has partly emerged from and been sustained by the legislative branch of state government. In the sections that follow, I will sketch out what I perceive to be the fun- damental historical, political, and economic frames used to justify the plea, followed by my own critique of the commodification of rights. Part II will provide an overview of the law pertaining to plea bargaining. Constitutional Confusion

#### All other common law countries don’t have a plea bargain problem – it’s a manufactured issue from overcharging

Schehr 15 [Robert Schehr, Professor at the Department of Criminology and Criminal Justice at Northern Arizona University and Co-Director of the Arizona Innocence Project at Northern Arizona University with a Ph.D. in Sociology from Purdue University West Lafayette, a M.S. in Sociology from Purdue University West Lafayette, an MLS Law from Yale University, and a B.A. in Labor Studies from the University of Illinois Springfield, 2015, “The Emperor’s New Clothes: Intellectual Dishonesty and the Unconstitutionality of Plea Bargaining,” Texas A&M Law Review, https://scholarship.law.tamu.edu/cgi/viewcontent.cgi?article=1055&context=lawreview]/Kankee

The Author initiated this Article with a reference to the well-worn fable made famous by Hans Christian Andersen. The Author sug- gested that it was absolutely crystalline that the system of plea-bar- gaining in the United States appears nakedly before us as an institutional mechanism for enhancing an out-of-control criminal-jus- tice system. In order to establish plea practice as constitutional, the Supreme Court was forced to employ a juridic discourse that shifted from the language of due process found in criminal law, especially the protections afforded by the Fifth and Sixth Amendments, and toward contract law where defendants were “free” to negotiate away their rights. This legal maneuver is akin to the Bush Administration’s use of the term “enemy combatants” rather than “prisoners of war” be- cause the latter would have invoked Geneva Convention protec- tions.281 The Supreme Court applied an entirely novel standard to the adjudication of criminal cases, and it rationalized its decision as being based on the need for efficiency. Post-1970 Supreme Court decisions, as the Author revealed in Section III, generated legitimacy for the plea system by referencing its 1970 precedent. Reasoning by circulus in propando, plea-bargaining was considered constitutional because it existed, and it existed because it was constitutional. Since the late 1960s, the Court has failed to address the constitutionality of pleas forthrightly without shifting the narrative away from due process and toward contract law. The reason for this, the Author contends, is be- cause the Court’s rationale would not bear the weight of 500 years of Common Law, U.S. constitutional mandates, and opinions of the Court extending to 1930. With the deftness of the magician’s slight of hand and the invocation of rhetorical deception, the Court disappears criminal procedure and due process afforded by the Constitution to all who are facing the loss of liberty and in its place returns an entirely new rhetorical device—the law of contracts. Those who participate in the proliferation of legal narrative justify- ing and rationalizing the plea system, the Author argues, are analo- gous to the vain king who, naked before all observers, continued despite what was obviously transparent to rationalize his conviction. The Supreme Court, prosecutors, judges, and even defense attorneys turn to rationalization from legitimate plea practices. They have to because, as demonstrated in this Article, neither our Common Law heritage, our founding documents, colonial and state constitutions, nor Supreme Court decisions until 1930 permitted plea waivers on constitutional grounds. Each of these federal and state institutions turned to our founding commitment to natural law and natural rights as constitutive of our philosophical understanding of personhood and liberty. As demonstrated, the Fifth and Sixth Amendment rights were considered by most to be natural rights and, as such, were inalienable. What explains this philosophical shift? It appears that it was the need for increased efficiency with regard to case litigation. But how did this happen? Do rights trump privileges with regard to the administration of pleas? Or put another way, Does our pre-political commitment to preservation of personhood under the law, with all its attendant quali- ties of liberty, freedom, and security, eclipse institutional demands for efficiency? Remember that until 1930 the Supreme Court issued opin- ions that emphatically ruled in the affirmative. Starting in 1930 with Patton v. United States, however, the Supreme Court did a dramatic about-face and shifted the course of plea jurisprudence. 282 Why? Be- cause the dramatic increases in criminal caseloads meant increasing demand for prosecutorial and judicial efficiency. But there remains a cart-and-horse problem. Why were there so many cases putting nearly insurmountable pressures on the legal system? Where did and do they come from? The problem of enhanced prosecution was and still is a direct by-product of legislative decision-making. The more legislators at the state and federal level define behaviors as criminal and in need of prosecution, the greater the resource pressures con- fronting law enforcement, prosecutors, defense attorneys, and the courts to investigate and adjudicate them. Is it really that simple? By saying so, the Author is at risk at being labeled incompetent and stu- pid. Clearly, by drawing attention to this simple fact, the Author pro- claims that the emperor stands naked before us. There really is not any need for plea-bargaining if there are fewer cases to litigate. How is it that all other Common Law countries manage to get by with a plea regimen that is the inverse of ours, and yet still manage to gener- ate quite orderly civil society? Finally, is the Author arguing for the elimination of plea-bargaining, or a kinder, gentler, more constitutionally viable version of it? Realis- tically, the Author joins Langer in calling for a directed-verdict stan- dard. 283 Increased discovery coupled with more nuanced acknowledgement of the ways in which human beings actually process and understand information, along with a modified adversarial due process may ameliorate some of the more pernicious aspects of plea- bargaining. These and a host of other questions remain to be ex- plored, but those will have to await another day. For now it is enough to say that, as presently implemented, the usurpation and direct in- ducement to gain convictions by encouraging defendants to abdicate their inalienable rights is a threat to personhood and liberty in the United States of America.

#### No court clog or crime links – Alaska proves screening out bad cases, no wasted bargaining time, and accountability for lazy law professionals solves

Canon 22 [Dan Canon, civil rights lawyer and a law professor at the University of Louisville in Kentucky, 2022, “Pleading Out: How Plea Bargaining Creates a Permanent Criminal Class,” Basic Books]

Still, even with widespread recognition of rot at the core of the system, Gross was taking a gamble. No one had tried banning plea bargains in a major city in more than a century, and no one had ever tried it statewide. Career public defender Geoffry Wildridge explains: “Alaska was uniquely situated to adopt such a policy. It had a small population base, lots of money (with the oil pipeline construction just getting rolling), and criminal prosecutions were subject to statewide supervision by the Alaska Department of Law. Av Gross and Governor Hammond saw a chance to create a ‘pure’ criminal justice system.”7 The major concern, of course, was that things would grind to a halt. But that didn’t happen. The trial rates shot up in some places, but the overall time it took to resolve cases actually went down for a while. In Anchorage, for example, the average time to resolve a felony case went from 192 days to fewer than 90, with similar drops in Fairbanks and Juneau. Why didn’t the system clog? For one thing, defendants didn’t stop pleading guilty; they just stopped making deals about what would happen if they did. Defendants could still take “open pleas,” meaning they would plead to what they were charged with and make a case as to why they should receive a lighter sentence. But this case was made to the judge, not the prosecutor, and in open court, not in some dimly lit conference room. In fact, under Gross’s order, prosecutors were to be “hands off” at the sentencing stage. One prosecutor reasoned that this made cases move faster: “Much less time is spent haggling with defense attorneys.… I was spending probably one-third of my time arguing with defense attorneys. Now we have a smarter use of our time. I’m a trial attorney, and that’s what I’m supposed to do.”8 Why would anyone take an “open plea” without knowing what they were stepping in? For one thing, the farce of a “contract,” under which the courts pretended a defendant had willingly bargained away their rights, was missing. If you got a bad judge who gave you a bad sentence, there was a record of it, and you hadn’t given up your right to appeal the judge’s decision. The authors of an early study sponsored by the US Department of Justice had another theory: The answer seems to be that some cases are “triable” while others simply are not; they are “naturals” for a guilty plea. One defense attorney put it this way: “Now if the guy is a ‘boy scout,’ I might advise him to enter a guilty plea. Keep the image consistent—he cooperated all the way.” On the other hand, some defendants, no matter how much they “go along with the program,” will never get any concessions by pleading guilty. For example, Alaskan judges are not moved to sympathy by cooperative rapists.9 And sure enough, during the period of time that the DOJ studied Alaska’s ban, no one convicted of rape received probation. The average sentence for rape was almost eight years—a far cry from the time-outs the affluent can bargain for, as we saw in Chapter 9. In other words, if your client is flaming- hot garbage, you have plenty to worry about in an open plea, and it’s probably stuff you should have to worry about—not stuff that you should be trying to bargain away without a judge ever looking at it. But this notion of “more effective time management” gives us only part of the picture. The bargaining ban did, in fact, fundamentally alter the dynamics of the Alaskan system. Prosecutors could no longer cram through as many prosecutions, and defense attorneys had to prepare every case as though it was going to be tried, which involved a lot of extra time. In Anchorage alone, trials increased by 97 percent right off the bat. No reduction in haggling time could have offset those major changes. Still, the courts continued to function. The most likely reason that the Alaskan system didn’t become the proverbial turtle swimming in peanut butter is that prosecutors got pickier. Before the plea bargaining ban, Alaskan district attorneys refused to prosecute only about 4 percent of the felony cases they received from law enforcement. After the ban, the refusal rate jumped to an astonishing 44 percent. This is exactly what Gross had intended. His first memo to state prosecutors stated, “An effective screening of cases filed, for example, will have to be instituted in order to avoid filing cases which might be ‘bargained’ under the existing system, but which could not be won at trial.” And that system of “effective screening” was in fact instituted, with the result that the state simply stopped wasting time on cases it couldn’t—or shouldn’t —win. Resources that might have been used on haggling for a few hours a day were diverted to reading case files, calling witnesses, and otherwise determining the soundness of cases. Then prosecutors would decide whether to push the case forward or drop it altogether. Career prosecutors seemed to like this arrangement much more than the old one. A chief prosecutor who handled cases both before and after the ban gushed: It is, in essence, a meaningless gesture to take in a whole lot of bad cases that can’t be proved and bargain them out for meaningless dispositions. It is no solution to crime in this country to run someone through the process to get some kind of conviction which, more often than not, is for something much less than they were accused of and which results in something which really doesn’t mean anything in terms of real punishment.10 And in 1976 a justice of the Alaska Supreme Court crowed to law professor Albert Alschuler: A no-plea-bargaining policy forces the police to investigate their cases more thoroughly. It forces prosecutors to screen their cases more rigorously and to prepare them more carefully. It forces the courts to face the problem of the lazy judge who comes to court late and leaves early, to search out a good presiding judge, and to adopt a sensible calendaring system. All of these things have in fact happened here.11 The arrangement left attorneys with some flexibility, just not enough to be too dangerous. For a bargain to happen, a local prosecutor had to get approval at the state level. That is, approval from Avrum Gross or his deputy. As one D.A. said, “It’s not that there isn’t any plea bargaining. It’s just that the power to negotiate is now localized in the chief prosecutor, and when that’s the case, there is much less bargaining.” The defense bar was slower to warm to the idea. Paul Canarsky, who was a public defender during the bargain-ban years, recalls, “We talked about the absurdity of the ban a lot at our office meetings/dart games/decompression sessions, and we effectively decided that we would wear the D.A.s into the ground. We knew we would either win the case at trial or, even if our client was guilty, the judge would see that the case had been overcharged and we would get a better sentence than we would have after a guilty plea.” This turned out to be a lot of work, but it wasn’t all bad: “The result, of course, was that we all did a lot of trials. I did 42 trials in 1981 and 36 in 1982. Our ‘go-to-trial-on-everything’ strategy worked because there were many months when the trial stats we sent to Anchorage showed that we got not-guilty verdicts on more than 50 percent of our cases!”12

#### Err neg – abolition costs are tiny

Ortman 23 [William Ortman, Associate Professor of Law at Wayne State University, 2023, “Plea Bargaining Abolitionism: A History,” Ohio State Journal Of Criminal Law, https://moritzlaw.osu.edu/sites/default/files/2024-08/20.2\_Ortman\_Final\_3.pdf]/Kankee

C. The “Inevitability” of Plea Bargaining Abolitionists resisted the claim that plea bargaining is inevitable. The point was developed towards the end of our period, in response to the arguments we have just seen from plea bargaining’s defenders. In 1983 and 1984, Alschuler and his soon- to-be University of Chicago colleague, Stephen Schulhofer, each published major articles on alternatives to the plea bargaining system.267 To the claim that abolishing plea bargaining would be too expensive, Alschuler argued that the costs had been grossly inflated,268 in large part because the actual budgetary footprint of criminal courts was tiny. Even if it had to be doubled or tri- pled, it would still be small in comparison to other social institutions. “This sort of investment,” Alschuler implored, “need not inspire panic.”269 To make things con- crete, Alschuler appraised the expense, as of 1983, of providing a three-day jury trial to every felony defendant who wanted one. Applying conservative estimates (i.e., erring on the side of higher rather than lower costs), he tagged it at $843 million.270 That would be a “3.2% increase in civil and criminal justice expenditures,” Alschuler noted, or about one-third of the “cost-overrun on [Lockheed’s] C-5A air- craft.”271 On the defenders’ sabotage point—i.e., that criminal justice insiders would in- evitably sabotage any effort to abolish plea bargaining—Alschuler accepted the premise. Some number of prosecutors, judges, and defense lawyers would violate a plea bargaining ban, just as some people violate the ban on murder and others violate the ban on robbery.272 Abolishing plea bargaining, Alschuler clarified, means abol- ishing lawful plea bargaining. He asked his readers not to be so cynical as to assume that “large numbers” of “America’s men and women of the law” would “not only would break the law to achieve their goals, but also that they would lie about this violation.”273

#### **No trial delays - Philadelphia proves**

Ortman 23 [William Ortman, Associate Professor of Law at Wayne State University, 2023, “Plea Bargaining Abolitionism: A History,” Ohio State Journal Of Criminal Law, https://moritzlaw.osu.edu/sites/default/files/2024-08/20.2\_Ortman\_Final\_3.pdf]/Kankee

Philadelphia’s criminal courts were also the subject of Schulhofer’s 1984 con- tribution to the cause.278 Though Philadelphia had not tried to abolish plea bargain- ing, Schulhofer argued that its jury-waiver system offered a blueprint for how to do it.279 He and his research assistants observed Philadelphia courtrooms in 1982, amassing data on 320 felony cases.280 In the sample, 44% of defendants pleaded guilty, but only a small fraction of the pleas represented negotiated dispositions.281 Schulhofer expected to find “tacit inducements” to plead guilty and searched for evidence of them, but located none.282 For defendants who pleaded not guilty, on the other hand, there were clear in- ducements to waive a jury, as post-jury trial sentences were much heavier than post- bench trial sentences.283 The bench trials were, as Alschuler had noted, quick. In the courtrooms that handled ordinary felonies, an outright majority of bench trials lasted between thirty minutes and an hour, while only 2% went more than three hours and **18%** were over in less than thirty minutes.284 Nonetheless it was clear to Schulhofer after watching the trials and speaking with the participants that all but a handful (seven, to be exact) were genuine adversarial processes and not, as some earlier ob- servers had suggested, “slow pleas of guilty.”285 Schulhofer summarized what he and his team found in **Philadelphia**: “In America’s fourth-largest city, there are rel- atively few inducements to plead guilty, most felony defendants do in fact claim a trial, and their cases are resolved in genuinely contested adversary proceedings.”286 “These findings,” he added, understating for effect, “cast some doubt on the wide- spread belief that case pressure or the behavioral dynamics of criminal litigation make plea bargaining inevitable.”287 To be clear, the notion that plea bargaining would help enable a massive and unprecedented expansion of the carceral state—as it did in the 1980s and 1990s— was not part of the academic argument for abolition in the 1970s. Scholars did not explicitly warn about the looming danger of mass incarceration, though Alschuler came close when cautioning against determinate sentencing reform proposals popu- lar in the late 1970s.288 But scholars did claim that America’s criminal justice appa- ratus had come unmoored from its foundations, with calamitous consequences for fundamental values of justice, freedom, and law itself. In the “move from adversari- ness [to cooperation],” Schulhofer observed, “only one thing is lost—the vigorous probing and questioning that, in their very unpleasantness, have been thought to serve a crucial function in the preservation of freedom.”289 Noting Daniel Webster’s pronouncement that “‘law’ would hear before it condemned, proceed upon inquiry, and render judgment only after trial,” Alschuler remarked that the legal profession had “lost sight of Webster’s kind of law.”290 While they may not have been able to predict the future, abolitionists warned us about plea bargaining.

#### New Orleans proves screening solves court clog by removing low evidence, non-violent cases from the docket

Canon 22 [Dan Canon, civil rights lawyer and a law professor at the University of Louisville in Kentucky, 2022, “Pleading Out: How Plea Bargaining Creates a Permanent Criminal Class,” Basic Books]

IN RESTRICTING PLEA BARGAINING IN ALASKA, AVRUM GROSS likely sought to emulate what New Orleans District Attorney Harry Connick Sr. had already been doing for a year. Connick made headline after headline when he promised to eliminate plea bargaining, and he generated even more news when he got elected and actually fulfilled that promise. Connick was a colorful character. Early in life, he traveled the world with the Army Corps of Engineers. He met his wife, Anita, in Morocco; they married in Tangier; and they eventually settled in New Orleans, where the two ran a record shop. He and Anita, both accomplished musicians themselves, put each other through law school on the proceeds they could scrape together from the shop and their other musical endeavors. Time published a piece on him called “The Singing D.A.”16 As one might expect, Connick’s approach to criminal law was as unorthodox as the rest of his life. In 1973 Connick beat out the incumbent D.A., former JFK murder investigator Jim Garrison. His first order of business was to knock Garrison’s modest plea bargaining rate of 60 percent down to 8 percent (or even less—the statistics are muddled).17 Assistant prosecutors were not allowed to plea bargain or dismiss without Connick’s express permission, which was not freely given. The effect on New Orleans legal system was, by most accounts, more dramatic and more immediate than in Alaska. Garrison’s prosecutors tried 190 cases in his last year in office. By Connick’s third year (of a twenty-eight year stint), his office was taking more than a thousand cases a year to trial. Still, the courts were able to function because of the system Connick implemented, which involved dedicated screening attorneys who thoroughly reviewed files to decide what charges could stick. His goal was to “weed out those cases really not worthy of being on the criminal docket, so more courtroom emphasis can be devoted to the violent offender.” He wouldn’t tolerate overcharging; if a screening prosecutor charged too many defendants with too much, he would be made to try one of his overcharged cases and, as one screener put it, “get his teeth kicked in.” Connick’s office rejected an average of 63 percent of all charges, a practice that, the public defender crisis notwithstanding, kept all the necessary balls in the air. Naturally, Connick was often at odds with New Orleans police throughout his tenure. He publicly derided their investigative techniques and rejected many cases—even serious felonies—for “poorly written or even illegible police reports.” But the no-deals policy was popular with the public and kept Connick in office, in no small part because he talked a lot about justice for victims of violent crime, without sweating the small stuff. Newspaper articles during his campaigns talked a lot about “murder, rape and robbery,” and not so much about marijuana possession, even while the drug wars were raging.18 In one letter to the editor, Connick explained: “I know how victims feel when their case is plea bargained away simply because some assistant and/or judge is too lazy to work. I resent that, and I know victims resent that. I don’t permit it.”19

#### Scotland proves plea bargaining is less efficient and causes court clog

Gormley 22 [Jay Gormley, researcher with a MA in Philosophy at the University of Strathclyde and a LL.B in Law at the University of Strathclyde, 5-22-2022, "The inefficiency of plea bargaining", Wiley Online Library, https://onlinelibrary.wiley.com/doi/10.1111/jols.12360]/Kankee

5.2 Is plea bargaining inherently problematic? The widespread belief among policymakers when producing reforms is that it is defendants who engage in gamesmanship. For example, it is commonplace for official policy documentation to propose ‘new procedures which get the case to trial quickly, with reduced chances of the accused “playing the system” and escaping justice’.61 In this context, defendants’ rational tactics are viewed negatively. Surely, it is argued, these people (who are presumed to be guilty) should accept the solemnity of the court and ‘the system should not become a game where delay and obstruction can be used as a tactic to avoid a rightful conviction’.62 However, there may be hypocrisy in condemning ‘games’. It might be noted that court professionals also utilize tactics and stratagems and that this is the norm of negotiations in Anglo-American adversarial systems. Indeed, Section 196 (the most overt form of plea bargaining) is itself a tactical attempt to create (dis)incentives to pleading guilty or not guilty. Moreover, as noted, defendants often feel that it is the legal professionals who are playing games and that they have minimal agency regarding their participation in plea bargaining – even if they wanted to plead guilty. The fact that plea bargaining itself prompts defendant practices (notably late guilty pleas) that policymakers bemoan has significant implications.63 However, perhaps this should not be surprising. Despite stereotypical perceptions, other research in courts has found that defendants are often more compliant than might be assumed. In court, defendants’ outward behaviour is characterized by a ‘passive acceptance’ of court norms.64 For example, in Jacobson and colleagues’ research (as in mine), defendants were docile in court, disruptions were rare, and the vast majority were inclined to follow the advice of their defence lawyers.65 In Auld Sheriff Court, the advice of defence lawyers, more often than in Braw Sheriff Court, leaned towards delaying a guilty plea in part because negotiations routinely took longer. In this way, defendants’ late guilty pleas were still passively accepting court norms and consistent with that system of plea bargaining. In other words, plea bargaining demands gamesmanship that requires extra time to play out. In sum, policy demands plea bargaining. However, in a significant number of cases, plea bargaining demands delaying a guilty plea. Defence lawyers and prosecutors in most courts66 struggle to negotiate guilty pleas early in court proceedings. Indeed, a case's trajectory seems to be largely determined by court norms for plea bargaining rather than defendants ‘playing games’ and attempting to evade justice. Instead, defendants can be, more or less, ‘dummy players’ and plea-bargaining norms the source of inefficiency.67 6 CONCLUSION By drawing on recent research in Scotland, this article has argued that we need to question plea bargaining's presumed efficiency in terms of cost effectiveness. First, plea bargaining's ability to induce guilty pleas is uncertain. We cannot know from existing data how many guilty pleas are attributable to it. In light of other factors that might lead to guilty pleas (such as process costs and procedural hassles), this lack of evidence is problematic. Second, the article has demonstrated that plea bargaining itself can entail key inefficiencies. In the Scottish research, it was found that expectations and perceptions of plea bargaining were commonly cited as a reason to delay a guilty plea. Thus, not only might plea bargaining fail to provide the expected degree of cost effectiveness, but it may actually reduce cost effectiveness in some situations. A key inefficiency of plea bargaining is that is it can hinder straightforward (early) guilty pleas. Even where a guilty plea would suit all concerned, negotiation norms and incumbent tactics can create impediments to simply admitting guilt. Prosecutors may expect the defence to demand concessions, and this may influence how they (over)charge. In turn, defence lawyers and defendants may perceive there to be overcharging and therefore delay pleading guilty until some concession is achieved. The result is that many guilty pleas take a long and inefficient path that leads to churn and cracked trials. Ironically, the inefficiencies identified above stem from the same norms encouraged by policymakers in the pursuit of efficiency via plea bargaining. While the prevailing belief of policymakers is that plea bargaining is and will be expedient, in practice it is mediated through defendant perceptions and the actions of legal practitioners with ethical obligations and other imperatives that exist in notionally adversarial systems.68 Indeed, it is perhaps to be expected that real-world plea bargaining is problematic: At an epistemological level, the adversary system encourages a strategic, rather than a moral or even instrumentalist approach … Two-party litigation and negotiation, when conducted strategically for individual client maximization, may prevent important and relevant information from being disclosed for fear the other side will use such disclosures ‘against’ the principal. In economic terms, this may leave ‘waste’.69

#### History proves plea bargaining abolition doesn’t cause court clog

Vogel 19 [Mary Vogel, Professor of Law and Chair in Criminal Law at the University of Manchester, 2019, “Plea Bargaining under the Common Law,” The Oxford Handbook of Criminal Process, https://academic.oup.com/edited-volume/28221/chapter-abstract/213316209?redirectedFrom=fulltext]/Kankee

In sum, several clear themes surface. Despite public concern that its leniency favors the guilty, plea bargaining also appears to assure that more guilty persons are convicted than at trial. Both acquittals and dismissals decline. Perhaps the greatest drawback of this practice is its propensity to convict the innocent, especially where bargaining is widespread and includes the weakest cases. As to whether leniency is actually received by those who negotiate, the evidence remains somewhat divided. The preponderance of findings suggests that bargaining usually does yield concessions. To the extent that defendants make decisions based on a calculation of costs and benefits, it is reasonable to think they are influenced by the leniency on offer.149 3. Administrative Efficiency Proponents of plea bargaining, including the U.S. Supreme Court, argue it promotes administrative efficiency and conserves court resources. Some argue this creates a “compelling” state interest in bargaining and that caseload pressure induces bargaining. Studies have produced mixed evidence for these claims. Berger studied effects of a 1971 prohibition on plea bargaining for three serious crimes in Maricopa County, **Arizona**. He saw no increase in trials, although his analysis was relatively casual. For example, he concluded that the bargaining ban “did not cause a rise in number of trials” and that guilty plea rates remained about 70 percent.150 But that does not tell us whether fewer cases were charged, more were dismissed, or tacit bar- gaining continued despite the formal ban. Another study examined effects (during two months) of eliminating plea bargaining for felonies in an **Iowa county**. Elimination of bargaining was, here, accompanied by four other supportive actions.151 In that case, abolishing plea bargaining “increased efficiency” when coupled with other reforms, such as new laws permitting immunity for witnesses who testify for the state and an alternative to prosecution through deferred judgments and supervised release.152 Cases filed declined 23 percent, dismissals decreased 50 percent, verdicts of guilty were reached in 50 percent more cases, and trials increased by only one single case. A third study that also looked at consequences on caseloads in one county of banning charge bargaining for drug-sale cases yielded markedly different findings. Based on interviews with twenty-three prosecutors, judges, and defense attorneys, Church con- cluded that after charge bargaining stopped, the trial rate “soared” and cases resolved by guilty pleas “fell considerably,” although guilty pleas still produced 75 percent of con- victions.153 From this Church inferred that implicit bargaining emerged (possibly tacit sentence bargains), prosecutors sought more dismissals, and trials increased for judges who were unlikely to engage in tacit sentence bargains. Church concluded that the elimination of all bargaining “would be accompanied by a . . . considerable increase in the number of trials.”154 Schulhofer argued that bargaining is driven neither by caseload pressure nor court- house workgroup cooperation. Based on observing the efficient operation of the bench trial system used to resolve 49 percent of cases at the Philadelphia courts, he made the case that plea bargaining is pervasive not because it is necessary but because it serves a popular but problematic conception of justice. Schulhofer insisted that “competitive norm[s] may strongly affect behavior” within organizations as in markets. He argued that expeditious trials, aggressive prosecutorial policies, a strong public defender’s office, and professional norms that disfavor quick compromises preserve the adversarial process and reduce bargaining.155 In sum, while evidence is mixed on bargaining’s administrative consequences, overall the work counsels skepticism about the assumption that bargaining fosters efficiency. Research suggests a more complex interplay among bargaining, caseloads, professional culture, and other factors. VII. Conclusion

### Contention 11: White Collar Crime and Pedophiles

#### White collar plea-bargain informants cause an underpunishment culture for business crimes – they exploit their advantages to get away with the theft of billions if they plead guilty or snitch

Natapoff 22 [Alexandra Natapoff, Lee S. Kreindler Professor of Law at Harvard Law School, member of the American Law Institute, and Guggenheim Fellow with a BA in philosophy from Yale University and a JD from Stanford Law School, 2022, “Snitching Criminal Informants and the Erosion of American Justice Second Edition,” NYU Press, https://arizona-ua.primo.exlibrisgroup.com/permalink/01UA\_INST/2eo519/alma991050104313703843]/Kankee

II. White Collar Crime and Cooperation So-called white collar or business crime has always been treated dif- ferently from street crime. Encompassing such offenses as fraud, embezzlement, money laundering, tax evasion, and other nonviolent economic offenses, the white collar category has its own culture and poses its own challenges. For one thing, the federal government is cen- tral to white collar enforcement. Although federal cases make up less than one-tenth of the entire American criminal system and, numeri- cally speaking, there are more state fraud prosecutions than federal ones, federal law enforcement dominates this arena, especially with respect to large companies and high-profile cases.26 Federal prosecutions tend to be complex and resource-intensive and often have national ramifica- tions, setting the tone in the business community for future practices. White collar criminal enforcement also takes place against a back- drop of extensive civil regulation and large administrative agencies that have their own enforcement mechanisms. Most wrongful business con- duct may be treated either civilly or criminally. As law professor Darryl Brown points out: “Parallel statutory regimes providing civil and crimi- nal sanctions for essentially the same conduct exist in virtually every area of white-collar wrongdoing, including health care fraud, environ- mental harms, workplace safety, and securities law.”27 Business organiza- tions thus typically spend more time negotiating compliance with civil regulatory agencies than they do confronting criminal prosecutors. As a result, business activities take place in a highly regulated atmosphere that is already heavily layered with expectations about civil compliance and cooperation and in which civil liability is often routinely substituted for criminal sanctions. The long-standing and persistent criticism of white collar criminal enforcement is that it is too lenient, that white collar offenses are not vigorously pursued, and that offenders receive punishments that are too light. In 2002, Forbes magazine ran a cover story titled “White Collar Criminals: They Lie, They Cheat, They Steal, and They’ve Been Getting Away With It for Too Long: Enough Is Enough.”28 The story revealed that, from 1992 to 2001, enforcement attorneys from the Securities and Exchange Commission referred 609 cases to the Justice Department for potential criminal charges. Of that number, only 187 cases were actu- ally prosecuted, 142 individuals were found guilty, and 87 went to jail. Even the highest- profile wrongdoers served relatively low sentences. In 1986, Michael Milken was sentenced to ten years for an illegal insider trading scheme worth upward of $100 million. He was released after serving just two years because he agreed to cooperate.29 Charles Keat- ing was convicted of fraud and racketeering for destroying the savings of 23,000 bank customers and fueling the $150 billion savings and loan crisis in the 1980s: he served four and a half years, approximately the same sentence he would have received for selling two tablespoons of crack cocaine.30 There was an uptick in corporate prosecutions during the so-called post–Enron era in response to the high-profile collapse of firms like Enron and WorldCom. The DOJ created the Corporate Fraud Task Force, while Congress and the U.S. Sentencing Commission increased penal- ties for white collar crimes.31 The new wave of high-profile prosecutions included the massive accounting firms KPMG and Arthur Andersen, while a few executives received record-setting sentences—Enron’s Jeffrey Skilling received twenty-four years, and WorldCom’s Bernard Ebbers re- ceived twenty-five.32 But that enforcement culture has ebbed and flowed. Most prominently, the 2008 collapse of the financial sector generated almost no individual prosecutions, and DOJ has been widely excoriated for treating powerful corporations and their CEOs as “too big to jail.” As federal Judge Jed Rakoff complained, the “‘too big to jail’ excuse . . . is disturbing, frankly, in what it says about the [DOJ’s] apparent disregard for equality under the law.”33 Critics have long argued that the differential treatment between white collar and street crime reflects social biases; because white collar defen- dants tend to be whiter, wealthier, better educated, and socially con- nected to other elites, they receive better treatment and more sympathy from the criminal system’s decision makers than do poorer, politically powerless defendants who are also more likely to be people of color.34 Recall the federal judge’s conclusion that inside trader David Slaine was still “a good person.” Even though business crime can impose substan- tial social harms, stripping innocent victims of their wealth and costing the nation literally billions of dollars, white collar offenders are often deemed less culpable than street crime offenders, even though the latter collectively steal less money and harm a fewer number of people.35 Or as Rhode Island justice Stephen J. Fortunato wrote more dramatically: “The gentle and genteel treatment by prosecutors (with occasional no- table exceptions) of corporate thieves, swindlers, polluters, tax evaders, and hustlers is proof positive that there are two separate and distinct criminal justice systems operating in this country.”36 To be sure, white collar defendants themselves may still experience race and wealth dis- crimination: one study found that, among federal white collar offenders, Black and Latinx defendants are incarcerated more often and for lon- ger than their white counterparts.37 But as compared to street and drug crime, the culture of white collar prosecution has tended to be more lenient and restrained.38 Cooperating informants are an important part of white collar inves- tigations and prosecutions. Because many financial or paper crimes are hard to detect, the industry is what the FBI calls “undercover resistant”: it often requires cooperation on the part of a knowledgeable insider to bring crimes to light. Conversely, the threat of cooperation can serve as an informal check on wrongdoing. After the prosecution of Rajaratnam and dozens of other Wall Street traders, the FBI asserted that its investi- gations had “sent a chill” through the hedge fund industry and that the agency “ha[d] enough informants lined up to keep its investigations of suspected illegal insider trading at hedge funds going for at least five more years.”39 White collar cooperation takes two main forms. One is the now- familiar individual cooperator who, in exchange for lenience for his or her own crimes, provides information about others’ wrongdoings. In addition, the white collar arena has produced a distinct phenomenon: cooperation by the corporation itself. When a corporate entity becomes a “snitch,” it raises unique issues for law enforcement and for the entity’s individual employees. Both forms of white collar cooperation (individ- ual and corporate) are discussed below. A. Individual White Collar Cooperators The typical white collar informant is a participant in a larger scheme to steal or defraud. For example, the government’s financial fraud cases against Enron’s chief officers Kenneth Lay and Jeffrey Skilling were built on the testimony of numerous informants, including accountants and managers in addition to CFO Andrew Fastow. Many of these witnesses were also guilty but received reduced sentences in exchange for their cooperation.40 When the government suspects a white collar offender, a number of things may happen that distinguish this arena from street and drug crime enforcement. First, the government may approach the suspect or their attorney, or send them a “target letter” revealing that they are under investigation, prior to any arrest or charges being filed. If the sus- pect does not already have counsel, this gives them the opportunity to get it.41 Some companies actually provide counsel for employees facing employment-related criminal charges. The fact that white collar defen- dants have better and earlier access to counsel than do street or drug crime suspects radically improves defendant options in this arena. Over three decades ago in his landmark book on white collar defense, Kenneth Mann described the pre-indictment process as the most im- portant service a defense attorney can provide her client. Counsel’s abil- ity to control information early on means that a defendant can shape the direction of a case and even potentially avoid indictment altogether.42 Cooperation makes this pre-indictment process a time of even greater opportunity and potential negotiation for represented defendants. White collar offenders depend heavily on their attorneys during the cooperation process. A good defense attorney can evaluate the strength of the government’s case, advise her client about the likelihood of suc- cess, and ensure that her client receives the greatest benefit from his cooperation. If the government eventually charges the defendant with a crime, the attorney remains the defendant’s most important guarantee that the government will keep its promises and that the defendant will get maximum credit for his cooperation.43 Professor Daniel Richman points out that law enforcement’s ability to obtain cooperation depends in part on its reputation for keeping its promises. If the government breaks its promise, the defense attorney may be the only witness who can publicize the breach. Richman tells the story of one attorney who took out a public advertisement in a national legal publication, castigating the U.S. Attorney’s Office for having bro- ken its promises to his cooperating client. The attorney wrote: During the sentence proceedings I stated that I was going to tell every defense lawyer in our nation not to enter any plea agreement with your office. Your office cannot be trusted. Your office cares nothing about promises and agreements. I am surprised that the eagle in the Great Seal of the United States didn’t fly from the wall in horror. . . . Like some sleazy insurance company who refuses to pay the widow because it wants the premiums but doesn’t want to honor its obligations, your office will go to any length to renege on its solemn promises.44 By way of contrast, when police break their promises to a street-corner snitch, no one is likely to find out. In such ways, the pervasive pres- ence of white collar defense counsel significantly levels the playing field between suspects and the government. Once a white collar defendant decides to become an informant, co- operation and benefits can take a number of forms. Typically the co- operation will involve proffer sessions with the government in which the defendant, with their attorney, will provide information about the scheme and others’ wrongdoings. They may also be required to testify before a grand jury or at the trial of others. In addition to providing in- formation about past wrongdoings, they may help investigate ongoing crimes by wearing a wire or otherwise engaging in proactive investiga- tion. For example, while investigating Richard Scrushy, former CEO of HealthSouth, investigators wired a financial officer’s necktie to covertly record conversations.45 Benefits may include avoiding indictment for some or all crimes that the informant has committed. The informant may also get immunity for crimes that they admit to but the government did not already know about and/or crimes that the government subsequently discovers as a re- sult of the cooperation. Finally, if they plead guilty, they typically receive sentence reductions.46 White collar cooperation agreements tend to be complex, formal, and written. They may involve careful descriptions of the kinds of immu- nity that a defendant is or is not entitled to, the kinds of work he or she is expected to do, and recommendations that the government may make at sentencing. Because these agreements are executed over time, sometimes long stretches of time, they must provide for the waiver or elimination of some bedrock rules of criminal procedure such as double jeopardy, speedy trial rights, self-incrimination rights, and others. As Professor Graham Hughes wrote in 1992, “deals involving promises to cooperate are sharply different from the general phenomenon of plea bargaining. They are exotic plants that can survive only in an environ- ment from which some of the familiar features of the criminal proce- dure landscape have been expunged.”47

#### Plea bargains let Epstein, Maxwell, and 100+ child rapists have immunity for human trafficking for decades.

Chapman 25 [Ronald Chapman, Federal Trial Lawyer with a L.L.M from the Loyola University Chicago logo J.D. from the Cooley Law School, and a B.A. in Philosophy from Oakland University, 7-28-2025, “"Pardon Moi?", Substack, https://ronaldwchapman.substack.com/p/pardon-moi?utm\_source=%2Finbox%2Fsaved&utm\_medium=reader2]/Kankee

100 Targets, That Have Immunity In a stunning turn of events, convicted sex-trafficker Ghislaine Maxwell has reportedly provided Justice Department officials with information on about 100 high-profile individuals connected to Jeffrey Epstein . Maxwell met with Deputy Attorney General Todd Blanche over multiple days in late July 2025 and, according to her attorney, “didn’t hold back” – answering every question about roughly 100 people who may have been involved with Epstein’s activities . This cooperative marathon is widely seen as Maxwell angling for a presidential pardon from Donald Trump . Her lawyer, David Markus, openly acknowledges that Maxwell “would welcome any relief” from Trump, even as he insists “no asks and no promises” were exchanged during the DOJ interview . This is a dramatic [read suspicious] shift in the Administration’s approach. During Maxwell’s prosecution in 2020-21, federal prosecutors never sought her cooperation. In fact, Trump’s Deputy AG Blanche noted that under prior administrations, nobody even asked Maxwell if she was willing to talk . Instead, the former DOJ pursued a straight conviction, sending her to prison for 20 years without striking any deals for information. The sudden decision by Trump’s Justice Department to entertain Maxwell’s information now – even hinting at clemency – is suspicious. It suggests a calculated gambit: Trump may use Maxwell’s intel as a weapon against a roster of powerful figures that until now have escaped accountability. Why Cut a Deal Now? Why didn’t prosecutors under previous leadership seek Maxwell’s help to reel in bigger fish? One theory is that prosecutors were reluctant to pursue Epstein’s well-connected friends – perhaps to avoid entangling political VIPs. Maxwell’s attorney now praises Trump for “his commitment to uncovering the truth”, implying the last DOJ lacked such commitment . Skeptics see something more cynical: Trump’s team might be seizing this opportunity not purely for justice, but to selectively target Trump’s political adversaries under the guise of law-and-order. Indeed, Trump himself has sent mixed messages about the Epstein saga. On one hand, his Attorney General Pam Bondi initially promised a full accounting of Epstein’s crimes, feeding supporters’ hopes of a grand expose. But just this month, the administration backtracked on releasing more Epstein files, provoking outrage among Trump’s own base. Some of Trump’s most ardent allies had long insisted a hidden “client list” of Epstein’s associates was being covered up by Democrats . Now, with Trump in charge, those allies are “skeptical” of the DOJ’s sudden claim that there’s “nothing left to disclose” . In response to backlash, Trump lashed out, dismissing the Epstein frenzy as “the Jeffrey Epstein hoax” and calling supporters who cling to it “weaklings” fooled by political opponents . He even complained the Epstein case was “pretty boring” and that all “credible information has been given”, urging people to move on . Yet behind the scenes, Trump’s Justice Department was quietly reaching out to Maxwell, possibly to placate those very supporters with real action. Blanche publicly declared that “no one is above the law – and no lead is off-limits,” saying he contacted Maxwell at the direction of AG Bondi to ask “what do you know?” . Within days, Maxwell was sitting down with DOJ interrogators. The timing suggests Trump’s team is performing a difficult balancing act: showing a willingness to pursue Epstein’s network (to satisfy political pressure) while controlling the narrative. By leveraging Maxwell’s secrets, Trump can claim to be delivering justice apolitically – even if the outcome conveniently singes his rivals. Epstein’s “Sweetheart” Deal Granted Maxwell Immunity To understand the stakes, one must revisit the extraordinary plea deal Epstein struck in 2008 – a deal so lenient and secretive that a federal judge later called it a brazen violation of the law . Back in the mid-2000s, local police in Palm Beach amassed evidence that Epstein was sexually abusing dozens of underage girls. But Epstein was a wealthy financier with powerful friends, and the justice system responded in unprecedented fashion. Instead of a federal sex-trafficking indictment, prosecutors quietly negotiated a non-prosecution agreement (NPA) that shut down the federal case entirely . Epstein pleaded guilty only to two minor state charges of prostitution (one involving a minor), for which he served 13 months in a county jail part-time (allowed to leave for work during the day) . Even more shocking was a clause buried in the deal: the NPA granted immunity to “any potential co-conspirators” who helped Epstein procure girls . This provision effectively shielded others in Epstein’s orbit – including Maxwell – from federal prosecution. And it was all done behind closed doors. The teenage victims were never informed of the plea arrangement at the time, a fact a judge later ruled was a blatant violation of the federal Crime Victims’ Rights Act. “I’m relieved that the court agrees it was wrong to hide this child rapist’s pathetically soft deal from his victims,” Senator Ben Sasse said when that ruling came down, blasting the “heartbreaking and infuriating” conduct of prosecutors . Why would the government agree to such a sweetheart deal? Critics have long suspected that Epstein’s influential connections and potential dirt on VIPs greased the skids. By 2006, media outlets in Florida were sniffing around the case, noting how Epstein initially got off with a mere solicitation charge. Facing mounting public scrutiny – and perhaps pressure from above– federal attorneys led by U.S. Attorney Alexander Acosta worked out the hush-hush plea. An internal DOJ review in 2020 found Acosta showed “poor judgment” in resolving the case through this non-prosecution pact and failing to ensure victims were told about Epstein’s state plea hearing . But the review stopped short of finding misconduct; it painted a picture of prosecutors who wanted the Epstein problem to go away quietly rather than risk a high-profile trial that could drag powerful people into the spotlight. Judge Kenneth Marra’s 2019 ruling showed how unusual the Epstein arrangement was. He flatly concluded that prosecutors “violated the rights of victims” by concealing the agreement . However, Marra did not invalidate the NPA, leaving it legally intact even as Epstein’s crimes — and the identities of any co-conspirators — remained shrouded in secrecy . Epstein’s “deal of a lifetime,” as it’s been called, held firm: he served brief jail time, then resumed his life (until a new wave of charges in 2019). Meanwhile, Maxwell and others in his circle enjoyed de facto immunity for years. It’s this “odd reality” – that Epstein’s deal arguably protected the very accomplices who enabled his abuse – that Maxwell is now trying to exploit in court. Maxwell’s Supreme Court Gamble: Can Epstein’s Deal Shield Her? Maxwell’s legal team is mounting a bold argument: they claim Epstein’s 2007 non-prosecution agreement also bars Maxwell’s own prosecution on sex-trafficking charges, even though her case was brought in a different state over a decade later . In a petition filed to the U.S. Supreme Court, Maxwell contends that the Epstein deal, by its plain language, immunized “any potential co-conspirator” – and thus should have prevented the Southern District of New York from ever indicting her in 2020 . It’s a novel question of law. Does a plea agreement with one U.S. Attorney’s office bind federal prosecutors elsewhere? Lower courts have mostly rejected Maxwell’s stance, but there is a split among federal appeals courts on this issue. Notably, some circuits have suggested that such agreements could have nationwide scope, while others disagree . Maxwell’s lawyer argues that this unsettled legal point warrants the Supreme Court’s attention. Even a former federal prosecutor, Mitchell Epner, observed that the circuit disagreement means “there is a chance” the high court will take it . The Trump Justice Department, for its part, is urging the Supreme Court not to intervene and to leave Maxwell’s conviction intact. In a July filing, Solicitor General D. John Sauer argued that whatever the circuit split, Maxwell’s case was a poor vehicle for review – because a plea deal’s scope is ultimately “under the control of the parties to the agreement.” In other words, Epstein’s deal was struck in Florida and bound that district’s prosecutors; it shouldn’t tie the hands of New York prosecutors who were not party to it. Trump’s DOJ thus finds itself in the somewhat awkward position of defending the validity of Maxwell’s conviction – even as Trump’s political allies suggest he might pardon her anyway for cooperating. The Supreme Court is expected to decide in the fall whether to hear Maxwell’s appeal. If they do take the case, it could result in a landmark decision by mid-2026 on whether Epstein’s old sweetheart deal truly gave lifelong immunity to his associates. Such a ruling would have enormous implications – potentially nullifying Maxwell’s conviction and others, or conversely affirming that no one can hide behind Epstein’s plea bargain except Epstein himself. Trump’s angle is clear: Pardon Maxwell to moot the appeal and pursue Epstein co-conspirators. High-Profile Names in the Crosshairs

#### Plea bargains allow child rapists to avoid registries and jail time, making punishments meaningless

Hessick 21 [Carissa Byrne Hessick, Ransdell Distinguished Professor of Law at the University of North Carolina School of Law, where she also serves as the director of the Prosecutors and Politics Project, 2021, “Punishment Without Trial: Why Plea Bargaining Is a Bad Deal,” Abrams Press, ISBN: 9781419750304]/Kankee

CHAPTER EIGHT THE COSTS: TRUTH AND JUSTICE Multimillionaire Jeffrey Epstein was accused of sexually exploiting dozens of underage girls, but he served only thirteen months in jail. His case largely escaped public notice until the Miami Herald published an exposé in the fall of 2018. The paper reported the sordid facts of sexual coercion as well as a secret plea deal in which Epstein pleaded guilty to two prostitution charges in state court. In return for that guilty plea, the federal government agreed to close its investigation into sex trafficking and other crimes. The public was outraged. The Herald identified approximately eighty women who claimed that they had been sexually abused by Epstein when they were teenagers. Epstein paid the girls not only to give him massages and engage in sex acts but also to bring more girls to him. With his victims acting as recruiters, Epstein was able to secure a steady stream of underage girls for his sexual gratification over the course of several years, sometimes molesting multiple girls in a single day. Many of the accusations involved sexual abuse by Epstein at his home in Florida. But there were also allegations that Epstein had supplied underage girls to other men at sex parties that he hosted. These sex party allegations were especially explosive because Epstein’s social circle at the time included former President Bill Clinton, England’s Prince Andrew, and Donald Trump, who was president when the story broke. After the Herald’s story was published, a 2002 quote from Trump surfaced in which he said that Epstein was “terrific” and that he “likes beautiful women as much as I do, and many of them are on the younger side.” Trump made that comment at the same time that accusers say Epstein was cycling dozens of underage girls through his Florida home. The sordid facts and the mere implication that powerful people may have attended Epstein’s sex parties would have been enough to ensure a media firestorm. But the Herald’s reporting also indicated that Epstein received unusually favorable treatment from law enforcement. Despite what seemed like significant evidence of sex trafficking, federal prosecutors decided not to pursue charges against Epstein. They entered into a deal with Epstein in which he could plead guilty to state prostitution charges and, in return, no federal charges would be brought against him or any of his accomplices. The deal was shrouded in secrecy. The meeting to arrange this deal was held at a hotel rather than at the prosecutor’s office. Federal prosecutors worked with Epstein’s defense lawyers to limit press coverage of the case. Prosecutors also failed to notify Epstein’s victims, who were entitled to know about the deal under federal law. The federal prosecutor who agreed to the extremely lenient plea deal, Alexander Acosta, quickly became the focus of intense public outrage. Acosta was serving as President Trump’s secretary of labor when the story broke. He gave an awkward press conference in which he tried to defend himself. But the press conference didn’t work. Acosta resigned two days later. As the furor over the story crested, federal law enforcement took action. Epstein was arrested on sex trafficking charges in New York. The FBI raided his Manhattan town house, where they found nude pictures of underage girls. Prosecutors claimed that Epstein and his employees brought underage girls to the town house so that Epstein could molest them. Epstein was denied bail and awaiting trial in federal custody when he committed suicide in August 2019. Epstein’s story captured the public’s imagination at least in part because of his wealth and personal connections. The media reporting on the case emphasized that Epstein was able to use his significant personal wealth and his relationships with powerful people to obtain favorable treatment. If not for Epstein’s money and connections, the stories suggested, his victims would have had their day in court and Epstein would have served the lengthy sentences that we impose on sex offenders. I’m not so sure. Don’t get me wrong: the criminal justice system treats wealthy people better than those without money. And I have no doubt that knowing powerful people can get you even more favorable treatment. But favorable plea deals that sidestep terrible facts—especially when it comes to crimes involving sexual abuse—are the rule, not the exception, in the criminal justice system. You don’t have to have millions of dollars or be friends with a president and a prince. You just have to convince a prosecutor that it isn’t worth the time or the effort to try and prove a particular set of facts. As long as you are willing to plead guilty to something, some prosecutors do not need a lot of convincing. Their goal is to ensure that the case is disposed of efficiently—that the defendant is convicted and receives at least some punishment. Getting at the truth would require a jury and a trial, neither of which is convenient or efficient, and so prosecutors want to avoid both. \* \* \* \* \* The envelope was so large, my assistant took it out of my faculty mailbox and kept it at her desk for me to pick up. I was in the middle of a big research project collecting records from district attorney elections, and so she was used to taking giant envelopes out of my mailbox. But this envelope didn’t contain copies of the dusty, somewhat boring election records that I was collecting. It contained evidence that would rattle most Americans, shaking their faith in the criminal justice system—provided they had the ability to understand it. When I first opened the envelope, I didn’t appreciate what I saw. It contained a document that was more than 130 pages long. The document listed hundreds of cases from Cuyahoga County, the second-largest county in Ohio, which includes the city of Cleveland. The cases were sex crimes that had been pleaded down to far less serious charges, oftentimes having nothing to do with sex. And there were a lot of them. As I read through the descriptions, I was astounded by what I saw. One defendant had been charged with raping a child, but he had pleaded guilty to “interference of custody” and served only six months in jail. Another defendant was charged with kidnapping and anal rape but pleaded guilty to aggravated assault and attempted abduction. His sentence was three years of probation. A third defendant engaged in a sexual relationship with a girl who was only twelve years old. They had sex multiple times a week for years. He pleaded guilty to one count of aggravated assault and was sentenced to five years of probation. The list of cases went on and on. A small handful of cases involved child pornography or soliciting a minor to engage in sexual activity. But the overwhelming majority were cases of child molestation, rape, or sexual assaults against adults and children—literally hundreds of very lenient plea deals for very serious crimes. I was surprised by how little punishment these defendants received. Legislatures routinely pass laws that increase punishments for sex crimes. There are so many laws because sex offenders are some of the most reviled people in the criminal justice system. At the beginning of the twenty-first century, several states started to adopt laws that imposed the death penalty on defendants who raped children. But the U.S. Supreme Court struck those laws down, saying that it was unconstitutional to execute people who hadn’t killed anyone. While they couldn’t execute sex offenders, state legislatures did what they could to eliminate them from society. They passed laws that not only kept sex offenders in prison for long periods of time but also restricted where they could live, work, and even walk once they were released. Ohio is no exception when it comes to these laws. It imposes long mandatory minimum sentences on people convicted of rape. Rape carries a mandatory sentence of three years in prison. And other sex offenses carry mandatory minimum penalties of five, ten, or fifteen years. Ohio also requires sex offenders to register with the state and imposes residency restrictions on them. Based on these laws, the people of Ohio probably think that anyone who commits a rape or molests a child will spend a long time in jail and will be monitored after release. But that isn’t what happens. The list of cases that I read showed that these harsh laws are routinely circumvented. The list spanned a little over a decade, from 2005 to 2017. Of the hundreds of cases included, fewer than 60 resulted in prison sentences longer than a year. And nearly 250 cases resulted in no jail time whatsoever for defendants: they were sentenced to probation or a fine, or their jail sentences were suspended by the judge at the time of sentencing. In other words, because of plea bargaining, these defendants spent much less time in jail than the mandatory minimum sentences required—and many didn’t have to go to jail at all. And for the many defendants who weren’t pleading guilty to sex crimes, they were not subject to sex offender registration requirements or residency restrictions. Of course, as I read through the case descriptions, I didn’t know whether the defendants actually committed the crimes that they were charged with. The mandatory minimum sentences, the sex offender registry, and the other restrictions on convicted sex offenders no doubt placed a lot of pressure on all of those defendants to plead guilty. So it was possible that I was looking at a list of innocent people who had been forced to plead guilty. Or I might have been looking at a list of people who committed heinous crimes and suffered very few consequences. I couldn’t tell. But either way the list was deeply troubling: if these people hadn’t committed crimes, then they shouldn’t be convicted; if they had committed these crimes, then their punishments seemed much too lenient. Even more troubling was that people in Ohio almost certainly didn’t know that this was happening. Unless they or someone they knew was involved in one of these cases, they don’t know that prosecutors are willing to bargain serious sex crime charges down to less serious convictions. And because the public doesn’t know, they can’t make their public officials tell them why little or no jail time seemed like a good resolution in these cases. To put it simply, since the plea bargaining process wasn’t transparent, voters couldn’t hold their officials accountable. One man in Ohio wanted to change that. \* \* \* \* \* Judge Michael Donnelly has deep concerns about plea bargaining. As a former prosecutor, Donnelly was both familiar and comfortable with plea bargaining in 2005, when he was elected to serve as a trial court judge in Cuyahoga County, Ohio. At first he thought of plea bargaining the same way that he did when he was a prosecutor: that is to say, he thought that plea bargaining was a good way for the two sides in a criminal case to negotiate a resolution. Just as two lawyers in a real estate transaction might haggle over the sale price or the closing date, plea bargaining allowed the prosecutor and the defense attorney to haggle over what the right punishment would be for a defendant. Or so Judge Donnelly had been taught as a prosecutor. Once he was on the other side of the bench, Judge Donnelly started to look at plea bargaining differently. He was no longer one of the lawyers engaged in a negotiation. Instead he was the judge, and so he was supposed to be a neutral party in the process. Soon that process began to concern him. Initially, Judge Donnelly was concerned only about the judge’s role in the off-the-record hearings that occurred in Cuyahoga County before guilty pleas. In those hearings, the prosecutor and the defense attorney would tell the judge about the case and then would ask whether he would be willing to accept the plea that they had negotiated. Sometimes the judge would say no, but more often than not the judge would say yes. If the judge decided to accept the plea bargain, then he had to decide what sentence to impose on the defendant. Unlike in the federal system and some other states, judges in Ohio have a lot of flexibility in deciding what sentence to impose. Judge Donnelly noticed that the lawyers were saying things in the off-the-record conference that they wouldn’t say in open court—things that could make a serious difference in a judge’s sentencing decision. This made him uncomfortable. For example, a former trial court judge told Judge Donnelly about a prosecutor who would appear in her courtroom. The former judge had thought very highly of this prosecutor, but she knew that he was often in trouble with his supervisor for not being aggressive enough. The supervisor wanted the prosecutor to demand higher sentences, but the prosecutor didn’t agree. The prosecutor told the judge about the problem with his supervisor. And sometimes, in off-the-record hearings, the prosecutor would give a sentencing recommendation and then warn the judge that he was going to argue for a harsh sentence later, in open court. As he told the judge, he would argue for the harsh sentence in open court in order to satisfy his supervisor, even though he personally didn’t think that such a severe sentence was necessary. This was a clear signal to the judge that she should impose a lower sentence than what the prosecutor would argue for in open court. The judge who told Judge Donnelly this story thought it showed the benefits of off-the-record hearings and why they should continue. Those hearings allowed her to get a candid sentencing recommendation from the prosecutor without getting him in trouble with his supervisor. But Judge Donnelly didn’t see it that way. He saw the story as an illustration of why these hearings should be stopped. “What good did that do to anybody?” he asked me. “Was there a victim in that case who didn’t know that the prosecutor was being disingenuous?” Judge Donnelly began to realize that prosecutors and defense attorneys were striking deals that left victims and the public in the dark about what actually happened. And he worried about the role that judges played in all of it. He noticed that the on-the-record proceedings in which the defendant pleads guilty sometimes made reference to facts that were completely different from those in the off-the-record conference. He realized that some defendants were pleading guilty to entirely different sets of facts or even crimes than what had been discussed beforehand. Judge Donnelly was especially concerned about this practice in cases involving rape and sexual assault. Based on the difference between what was discussed in the off-the-record conferences and then what was said in the courtroom, he realized that prosecutors were repeatedly letting defendants accused of serious sex crimes plead guilty to charges that had nothing to do with sexual assault even though the prosecutors appeared to think that the defendants actually had committed sex crimes. The more of these cases Judge Donnelly saw, the more concerned he became. How many sexual assaults were being treated like other, less serious types of crimes? He looked into it, and the result was a long list of cases—the large document that showed up in my mailbox. Judge Donnelly was horrified when he found all of these cases. As a judge, he was especially worried that those plea bargains obscured whether the defendants were repeat offenders. If one of these same defendants committed another rape in the future, the next judge would not know that the defendant had committed sex offenses in the past. As a result, the defendant would probably get a lesser sentence than if he were a repeat offender. Or he might be permitted, once again, to plead guilty to a lesser, nonsexual offense. Judge Donnelly also worried about the victims in these cases. Some cases had been pleaded down to a particular type of low-level assault that was available only for defendants whose victims were partially at fault for the crime. Those were the sorts of charges that prosecutors might bring against a defendant who was in a bar fight if the victim had started the fight. “Could you imagine being the victim in that sort of case?” Judge Donnelly asked me when we spoke on the phone. “The defendant sexually assaulted you. And the public record in that case says you were partially to blame.” As his uneasiness grew, Judge Donnelly changed plea bargaining practices in his own courtroom. He ended all off-the-record conferences for plea bargaining, and he informed lawyers that he wasn’t going to accept pleas for charges that weren’t supported by the facts. Not content to allow these plea bargaining practices to continue in other courtrooms, Judge Donnelly also tried to change the court rules that allowed them. He drafted a new state rule that would bring more transparency to plea bargaining by requiring that plea-bargained convictions be based on the facts of the defendants’ crimes. He brought the rule to the Ohio Supreme Court— which is responsible for writing the court rules in the state—but the justices there rejected it. Undeterred, Judge Donnelly took his fight to voters. Ohio, like many states, elects its judges. And so Judge Donnelly ran for a seat on the Supreme Court of Ohio. As part of his campaign, he talked about the need to change plea bargaining in the state. And he won. Judge Donnelly is now Justice Donnelly. As of January 2019, he sits on the Ohio Supreme Court. And he is now one of the people who will make decisions about court rules. \* \* \* \* \* You might think that the problem of overly lenient plea bargains is limited to sexual assault cases because those cases often get treated differently. Sexual assaults are rarely reported. Police are less likely to believe victims of sexual assault than victims in other types of cases. And prosecutors will often refuse to bring charges even when police have arrested a suspect. As a result, even when they are reported, sexual assault cases rarely result in convictions. So it shouldn’t be surprising that prosecutors are more likely to offer overly lenient plea deals in sexual assault cases; after all, they are less likely to pursue those cases in the first place. But sexual assault is hardly the only area of the law where plea bargains routinely and systematically obscure the facts. Take, for example, cases involving guns. Many places have passed laws that impose harsh punishments on people who possess or use guns illegally. But prosecutors routinely use those laws only as a way to pressure defendants into taking a plea to a lesser crime rather than to actually make defendants serve long prison sentences. This practice is so common in federal court that it has a name: “swallowing the gun.”

#### Plea bargains allow secret coverups that hide info about sex offenders like that would be found out at trial – this allows follow-on crimes given that the public doesn’t know

Hessick 21 [Carissa Byrne Hessick, Ransdell Distinguished Professor of Law at the University of North Carolina School of Law, where she also serves as the director of the Prosecutors and Politics Project, 2021, “Punishment Without Trial: Why Plea Bargaining Is a Bad Deal,” Abrams Press, ISBN: 9781419750304]/Kankee

But she never heard that message. She didn’t even know whether the prosecutor understood why she had been arrested. Because the defendant thought that the resolution of her case might have been a big mistake, it is hard to believe that she heard any message at all. \* \* \* \* \* Defendants aren’t the only group of people who have lost rights and opportunities; victims also suffer in a system of plea bargains. Trials of guilty defendants allow victims an opportunity to participate in the criminal justice system and have their voices heard. A system of plea bargains not only eliminates that participation but also shrouds the resolution of cases in secrecy, sometimes leaving victims unable to understand what happened or why. This lack of understanding can be incredibly difficult for victims to deal with. When I first started teaching, I had a student whose father had been killed several years before. The student had gone to law school, in part, because of her father’s death. The prosecutor gave the defendant who had caused her father’s death a plea bargain under which he pleaded guilty to something other than murder and served a few years in jail. Years later, the student and her family were still devastated: not only was her father dead, but they never understood why the man who killed him got that deal. They didn’t think the sentence was long enough, and they didn’t understand why the prosecutor didn’t insist on the defendant pleading guilty to murder. The student said that they had asked the prosecutor these questions but he didn’t really answer them. Instead, he made some vague statements about the strength of the evidence in the case—at least, the statements were vague to my student and her family. During the years that she was in law school, the woman came to my office several times to give me more details about her father’s case. She wanted me to help her understand the decision the prosecutor made. But I couldn’t help her. I could explain how plea bargaining works generally, but I didn’t have access to information about her father’s case. This is the other side of the morality play that Bibas describes. Trials don’t just send messages to defendants; they also send messages to victims. Trials tell the story of what the defendants did and how that behavior affected the victims. Sometimes the victims themselves get to testify, allowing them to tell their own stories. Having the opportunity to tell his story in open court and hear a jury say that the defendant is guilty can give a victim a sense of closure. Guilty verdicts don’t undo the harm that a victim suffered, but the verdict lets the victim know that his community agrees with him that what the defendant did was wrong. Not everyone agrees that trials are better for victims. Sometimes crime victims don’t want to testify at trial—maybe because they are afraid of the defendants or maybe because they don’t want to relive the terrible experiences of the crimes themselves. And those who see the victims’ rights movement as just another way to push for harsh law-and-order policies might worry that having victims testify at trial could lead to more convictions or harsher sentences. Those victims who don’t want to testify shouldn’t be forced to do so. But some crime victims do want to testify at trial; they want to be a part of the process that decides guilt and punishment for the people who harmed them. This was one of the complaints that Jeffrey Epstein’s victims raised. They were outraged not only by the lenient way he was treated but also by the denial of an opportunity to speak out about what happened to them and to have that pain and violence acknowledged. A system without trials deprives victims of the ability to participate and the ability to feel heard. As for whether victim participation might result in more convictions or harsher punishment, that’s far from clear: juries might be skeptical of victim testimony, and a clearer picture of the harm victims suffered might actually result in less punishment for those defendants who cause less harm. But even if it did result in more convictions and more punishments, those convictions would be the result of more and better information about what the defendants actually did. Trials allow us to draw more accurate conclusions about what defendants did and the effects of their actions. That accuracy is important, even if it makes us think some punishments are too lenient. \* \* \* \* A system without trials doesn’t just affect victims and defendants; it also deprives the general public of the opportunity to participate in the criminal justice system by serving on a jury. It might seem strange to argue that people should have the opportunity to sit on a jury, since most people probably think of jury duty more as a chore than as an opportunity. Jury duty can involve long waits on uncomfortable chairs, and the whole exercise may seem somewhat pointless

#### Plea bargains hide virtually all info from the public

Turner 21 [Jenia I. Turner, Amy Abboud Ware Centennial Professor in Criminal Law, SMU Dedman School of Law, 1-28-2021, “Transparency in Plea Bargaining,” Notre Dam Law Review, https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=4947&context=ndlr]/Kankee

I. LACK OF T RANSPARENCY IN P LEA B ARGAINING Although plea bargaining is the standard method by which criminal cases are resolved today, its operation remains informal and obscure. Any negotiations between the parties remain off the record and closed to the public.19 Neither the victim nor the defendant is typically present during the negotiations,20 and the judge is usually not privy to them either. 21 In most jurisdictions, judges are expressly prohibited from participating in negotia- tions out of concern that their involvement might be too coercive and might prejudice them in the event the negotiations fall apart and the case proceeds to trial. 22 Typically, plea offers are not publicly announced or placed on the record. They are often not even reduced to writing, but are instead conveyed informally—over the phone, in the courtroom corridor, or in the prosecu- tor’s office. 23 Even when written down, they are rarely entered into a database that could be searched to compare results. 24 Instead, any records of plea offers typically remain in the prosecutor’s paper file (which is closed to outsiders), or in an email shared only with the defense attorney working on the case. 25 Recording remains haphazard and highly variable from prosecu- tor to prosecutor and from office to office. 26 If an offer is accepted, the resulting plea agreement is more likely to be written down and filed with the court. Yet even this custom is not uniform across jurisdictions. Only about half of the states require that the agreement be disclosed on the record, and an even smaller group mandate that the agreement be placed in writing. 27 Both caselaw and anecdotal accounts con- firm that oral plea agreements are not uncommon, 28 even in jurisdictions that require the agreement to be in writing. 29 It is only when a plea agree- ment is filed with the court or disclosed on the record that it becomes acces- sible to the public. 30 Even when a plea agreement is disclosed on the record, it does not always provide adequate transparency, for several reasons. First, it may not contain the full terms of the bargain. 31 Omissions are especially likely if the parties are attempting to conceal a fact bargain from the court. 32 Even when a plea agreement is in writing and lays out all the applicable terms, it usually does not provide a justification for the terms negotiated. 33 Nor does it dis- close the steps that led to the final agreement, including terms rejected or modified. The failure to record plea offers and plea agreements is part of a broader problem of lack of transparency in the criminal justice system, par- ticularly with respect to prosecutorial decisionmaking. Prosecutors are not required to provide reasons for their charging or plea-bargaining decisions, nor are they required to publicize any policies that they may follow in reach- ing those decisions. 34 Even when prosecutors do record the charging and plea decisions, these data often remain “buried” in paper files. 35 And while criminal case data are becoming increasingly digitized, information about different steps in the process often remains spread across multiple systems and databases. As a result, tracking how a plea offer fits with other decisions made in the course of a case, from pretrial to sentencing, and comparing cases based on their characteristics remains a daunting task. 36 Detecting and analyzing patterns in prosecutorial charging and plea decisions is likewise a continuing challenge. 37 The stage at which the defendant formally tenders a guilty plea before the court—known as a plea hearing or plea colloquy—occurs in public and can provide some transparency. 38 At this hearing, the court must ask ques- tions to determine whether the guilty plea is voluntary, knowing, and factu- ally based. 39 If sufficiently probing, these questions could reveal the full terms of the underlying bargain. But in practice, the public plea hearing fails to compensate for the many unknowns earlier in the bargaining process. Plea hearings tend to be brief affairs and usually do not unearth less visible charge and fact bargains or the reasons behind any plea concessions. 40 Furthermore, because plea hearings occur only after the parties have agreed on a disposition, the parties have every incentive to keep from the court facts that may disturb the agree- ment.41 Defendants thus give “scripted responses” to the judge’s formulaic questions and read statements prepared by their lawyers ahead of time. 42 Sentencing hearings provide another opportunity for the public to learn the factors that shaped the outcome of a negotiated case. But sentencing hearings are also frequently brief and uninformative—particularly when the parties have agreed upon a sentence. These hearings often fail to clarify whether and in what way the negotiations influenced the ultimate sentence. They rarely reveal whether or what charges were dropped, reduced, or declined.43 In a negotiated case, the parties have agreed on a sentence or sentence recommendation, so they often have no incentive to argue about the sentence at the hearing. Furthermore, if the defendant rejects a plea offer and is convicted after a trial, the sentencing hearing does not disclose the differential between the rejected plea offer and the posttrial sentence. In brief, much plea-related information is absent from the sentencing hearing, so its publicity does not make up for the opacity of the process that precedes it in negotiated cases. II. CONSTITUTIONAL C OMMITMENT TO P UBLIC C RIMINAL P ROCEEDINGS The lack of transparency in plea bargaining contrasts sharply with our longstanding legal commitment to public criminal proceedings. This com- mitment is rooted in the English common law 44 and enshrined in the Sixth Amendment, which provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . public trial.” 45 State constitutions, statutes, and judicial decisions have long affirmed the same principle. 46 Open criminal proceedings were conceived as a fundamental right for criminal defendants because of the recognition that transparency helps ensure fair treatment: “The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.” 47 The publicity of criminal proceedings is further safeguarded by the First Amendment.48 As the Supreme Court has explained, the rights to free speech and free press presuppose the right to receive information about the workings of the government—including how criminal proceedings are han- dled.49 The First Amendment thus “goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.” 50 Today, courts frequently view the Sixth and First Amendment rights to a public crim- inal proceeding as coextensive. In deciding how broadly to apply the constitutional provisions on public- ity, courts examine the functions and purposes of these provisions. Accord- ing to the Supreme Court, the right to a public trial helps ensure fair treatment of the defendant and advances the truth-seeking goal of the justice system.51 Public proceedings can enhance the accuracy of the outcome by encouraging witnesses to come forward. 52 The possibility of public scrutiny also encourages participants to follow the rules, remain impartial, and stay “keenly alive to a sense of their responsibility” in dispensing justice. 53 As Jus- tice Harlan remarked, “the public-trial guarantee embodies a view of human nature, true as a general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings.” 54 By promoting the fairness and integrity of the pro- ceedings, public access benefits not only the defendant, but also “society as a whole.”55 Openness is also critical to ensuring that the proceedings are perceived as fair and legitimate. As the Supreme Court has explained, “public access to the criminal trial fosters an appearance of fairness, thereby heightening pub lic respect for the judicial process.” 56 Writing for a plurality in Richmond Newspapers v. Virginia, Chief Justice Burger noted the longstanding common- law position that openness of criminal proceedings has a “therapeutic value” for the community and enhances “public acceptance of both the process and its results.” 57 As he elaborated, “[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.” 58 Critically, publicity allows citizens to monitor judicial proceedings for unfairness and injustice and to hold governmental officials accountable for such abuses. The Supreme Court has repeatedly called attention to this long- standing function of publicity, noting that the public trial “guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.” 59 Public criminal pro- ceedings allow the community to hear and evaluate the reasons given for acquitting or convicting a defendant of particular charges and, in the event of a conviction, the reasons for a particular punishment. Such transparency of reasoning is important to ensuring that a verdict is based on the facts and the law and not on partiality or incompetence. As legal philosopher Jeremy Bentham declared, “Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account.” 60 Finally, public proceedings inform citizens about the functioning of the criminal justice system. This knowledge allows them to “effectively partici- pate in and contribute to our republican system of self-government.” 61 Citi- zens who have seen firsthand the imperfections and injustices of the criminal process are better able to advocate for reforming it. 62 Public access not only ensures a fair proceeding for the defendant, but also guarantees to the public a right to witness how criminal justice in its name is dispensed. For that rea- son, the right to a public trial does not belong merely to the accused, but is rather “a shared right of the accused and the public, the common concern being the assurance of fairness.” 63 While the text of the Sixth Amendment speaks of the defendant’s right to a public trial, courts have extended both the Sixth Amendment and the First Amendment rights of public access to a range of nontrial proceedings, including some relating to plea bargaining. In determining whether public access applies to a nontrial judicial proceeding, courts have applied the “experience and logic” test. Under it, they examine “whether the place and process have historically been open to the press and general public” and “whether public access plays a significant positive role in the functioning of the particular process in question.” 64 Public access is more likely to be granted if it “would serve as a curb on prosecutorial or judicial misconduct or would further the public’s interest in understanding the criminal justice system.”65 Courts have generally “protect[ed] access unless its denial is longstand- ing and functionally necessary.” 66 Grand jury proceedings, for example, remain secret because they have historically been exempt from public access and secrecy is necessary for their proper functioning. 67 By contrast, under the logic and experience test, courts have extended the right of access to other nontrial criminal proceedings, including jury selection 68 and prelimi- nary,69 suppression, 70 and sentencing hearings. 71 Courts have also applied the right of public access to plea hearings. 72 Accordingly, governments must take all reasonably available measures to accommodate such access. 73 The extension of publicity rights to plea hear- ings makes sense in a world where jury trials are the exception and guilty pleas are the norm. 74 In fact, the bypass of the jury, which during trial serves as “an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge,” makes public access to plea-related proceedings “even more significant.” 75 The presence of the public at plea hearings can help ensure fairness by “monitoring the adminis- tration of justice by plea.” 76 It helps “discourag[e] either the prosecutor or the court from engaging in arbitrary or wrongful conduct.” 77 Public access to plea hearings and sentencing hearings also “reveals the basis on which society imposes punishment.” 78 It informs the community about the opera- tion of the criminal justice system and enables more effective public partici- pation in democratic government. 79 A number of courts have also confirmed a Sixth Amendment and First Amendment right of public access to plea agreements and plea hearing tran- scripts.80 This result flows out of caselaw affirming that the right of public access to criminal proceedings “extends to the documents filed in connec- tion with those proceedings.” 81 Besides the Constitution, the common law further protects access to judicial documents. 82 The right of access to public plea agreements hinges on the agreements being judicial records—that is, being filed with the court or disclosed on the record at the plea hearing. 83 Accordingly, in jurisdictions where plea agree- ments are not placed on record with the court, the doctrine of public access does little to ensure transparency in plea bargaining. Likewise, the right of public access does not extend to plea offers—at least not to those offers that, as is the custom, have not been placed on the record. 84 The few courts that have considered the question have also refused to extend the First and Sixth Amendment rights of public access to plea negoti- ations.85 As one court explained, such negotiations are “private matters between the parties,” they have not “historically been open to the press and general public,” and “public access to such negotiations could obviously play a significantly harmful role, rather than ‘a significantly positive role[,] in the functioning of the [negotiation] process.’” 86 The court never elaborated why public access would “obviously” harm plea negotiations, leaving the func- tion and desirability of secrecy in such negotiations unexamined. In brief, while constitutional rights of access extend to proceedings and records that document the final outcome of plea negotiations, the negotia- tions themselves remain shielded from access under the assumption that neither experience nor logic calls for greater disclosure. The next two Parts critically examine the reasons for and against transparency in plea bargain- ing, showing the limits to the assumption that secrecy in plea negotiations is functionally necessary. III. REASONS FOR N ONTRANSPARENCY

### Contention 12: Innocents

#### Plea bargains cause a vicious cycle, making it both easier to convict innocents with larger caseloads and less screening, and undermining the guilt/innocence distinction,

Gilchrist 11 [Gregory M. Gilchrist, Assistant Professor of Law at the University of Toledo College of Law with an A.B. from Stanford and a J.D. from Columbia, 2011, “Plea Bargains, Convictions And Legitimacy,” American Criminal Law Review, https://heinonline.org/HOL/P?h=hein.journals/amcrimlr48&i=145]/Kankee

II. PLEA BARGAINING UNDERMINES THE LEGITIMACY OF THE LEGAL SYSTEM A. Is ConvictingMore Innocent People Necessarily a Bad Thing? "One should recoil at the thought of convicting of innocent defendants." 95 Convicting the innocent is wrong. Does it follow that the system which convicts fewer innocent defendants is to be preferred to one that convicts more? Some would argue that this is not necessarily true; it is not problematic that more innocent persons are convicted in a system that permits plea bargaining. Frank Easterbrook took this position, noting that the source of the injustice is not the plea bargain, but "rather, that innocent people may be found guilty at trial." 96 This is correct. The calculus by which innocent persons accept reduced sentences is predicated on there being a chance that the innocent person will be convicted at trial, notwithstanding his innocence. If innocent defendants could be assured of acquittal at trial, then no offer of a lesser sentence would induce a guilty plea.97 Bibas responds that "even if it is sometimes rational for an innocent defendant to plead guilty, the criminal justice system is wrong to encourage it."98 However, this does not quite respond to Easterbrook's point. Positing a class of cases in which an innocent person stands a one-in-twenty chance of conviction at trial, Easterbrook concludes that "given the regrettable fact that courts make mistakes, no principle of justice calls for executing that unlucky [innocent person convicted after trial] rather than allowing all twenty to plead and receive low sentences." 99 Easterbrook is not contending that what is rational in an instance is systemically good. He is suggesting that what is systemically necessary- that some innocent persons will be convicted even at trial-renders otherwise unappealing options potentially appealing. Were no innocent persons convicted at trial, there would be no basis to support a system that caused innocent persons to plead guilty. Where trial cannot prevent wrongful convictions, Easterbrook sug- gests there is no basis to require minimizing the wrongful convictions if doing so undermines the ex ante welfare of innocent persons charged with a crime. If you knew you were innocent and knew that you would be charged with a crime, would you prefer to be charged in a system that permits plea bargaining, or one that does not? From the perspective of the individual affected, there is no basis not to prefer plea bargaining. There is no cost (to that person); if the offer is not preferable to trial (which the defendant would assess according to how he perceived the chance of acquittal), trial remains an option. The calculus shifts if considered across a different population or at a different time. For example, Easterbrook is considering the value to the set of twenty innocent persons who have been charged and who face a one-in-twenty chance of conviction post-trial. For these twenty persons, the risk of the severe post-trial penalty may make the option of a lesser pre-trial remedy appealing. This conclu- sion is inherent in what was illustrated by the hypothetical in Part I: there are plea offers that, analyzed rationally, are better than trial even for innocent defendants. However, the question remains: what percentage of the population do those twenty persons represent? Where convictions are too easy to secure because of lax plea bargaining rules, the number of innocent persons charged could rise. This is the point made by Gazal-Ayal. 100 Gazal-Ayal argues that the primary problem stem- ming from plea bargaining is not that innocent defendants are induced to plead guilty through the practice of plea bargaining; rather, it is that by diminishing the cost to the prosecutor of bringing weak cases, plea bargaining decreases the incentive to properly screen out weak cases through prosecutorial discretion at the outset.101 This important consideration seems to be unaccounted for in Easterbrook's analysis. Any remedy that renders convictions of the innocent too easy introduces the risk of a vicious cycle: easy convictions limit prosecutorial incentives to rigorously screen cases. And charging too many innocent persons undermines the correlation between guilt and conviction. As described above,10 2 where that correlation is too attenuated, the criminal justice system will cease to deter crime. Often, the attack on plea bargaining concentrates on the harm it causes to the defendants wrongfully convicted. That harm is significant and deserves attention. Less plain, but of equal or greater concern, is the harm that systematic wrongful convictions can cause to the perceived legitimacy of the legal system as a whole. B. The Importance of the PerceivedLegitimacy of the Legal System

#### Plea bargains are coercive and convict innocents – stats and experiments prove

Dervan et al. 23 [Lucian E. Dervan, professor of Law and Director of Criminal Justice Studies at the Belmont University College of Law, Vanessa A. Edkins, Psychology Professor Emerita at the Florida Institute of Technology, and Thea Johnson, Professor of Law at Rutgers Law School 2023, “Victims of Coercive Plea Bargaining: Defendants Who Give False Testimony for False Pleas,” American University Law Review, https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=2361&context=aulr]/Kankee

Similar language appeared five years later in Menna v. New York,51 where the Court wrote, “a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case.”52 In the 1985 case of Hill v. Lockhart,53 the Court, quoting language from the United States Court of Appeals for the Seventh Circuit, said, “‘the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea.’”54 But, as the David Vasquez case illustrates, defendants since the Brady decision have often been confronted with bargains so coercive that even the innocent will sometimes falsely confess in return for the benefits of the bargain. As evidenced by data from several exoneration and innocence databases, the decision by Mr. Vasquez to falsely plead guilty is not an anomaly.55 Consider, for example, a 2015 report from the National Registry of Exonerations on the issue of Innocents Who Plead Guilty.56 Of the first 1,700 exonerees in the database, fifteen percent pleaded guilty to an offense they did not commit.57 In some types of cases, the rates of false pleas are astonishingly high.58 For example, drug crimes comprised forty percent of all guilty plea exonerations, with sixty-six percent of exonerations involving a false guilty plea.59 In Harris County, Texas, the report noted that there were seventy-one drug exonerations since 2014, and the defendants in every one of those cases falsely pleaded guilty.60 According to the National Registry of Exonerations, “most of these defendants accepted plea bargains to possession of illegal ‘drugs’ because they faced months in jail before trial, and years more if convicted.”61 The general percentage of exoneration database cases involving false pleas of guilt has also risen over time.62 In 2021, for example, the National Registry of Exonerations added 161 new cases.63 Of that number, forty-eight, or almost thirty percent, involved false pleas of guilty.64 While statistical analysis of exonerations indicates that false guilty pleas, such as Mr. Vasquez’s, are not anomalies, laboratory evidence has also established this fact over the last decade. In an article published in 2013, Dervan and Edkins conducted a psychological deception study considering the likelihood that a defendant would falsely plead guilty in return for the benefits of a bargain.65 As noted above, many have assumed over the years that plea bargains are inherently reliable, in part because innocent defendants will inevitably proceed to trial in hopes of vindication.66 This study sought to consider the accuracy of these assumptions through laboratory testing of decision-making and human behavior.67 The study involved students participating in what they believed to be a test designed to understand individual work versus group work through a series of LSAT-style questions.68 In reality, the inquiry was interested in how students would respond to accusations of cheating where a plea bargain was offered.69 To examine how people respond in the face of actual accusations of wrongdoing where offers of leniency are proposed, all of the students participating in the test as study participants were accused of cheating.70 In reality, the paradigm was structured so that only about half of the students actually engaged in this misconduct.71 The other students completed the test on their own without offering improper assistance to the confederate who was in the room with them.72 Regardless of factual guilt or innocence, and without yet knowing which of the participants had actually cheated, all of the participants were offered a bargain in return for confessing to the alleged offense. If the student admitted to cheating, they would lose their compensation for participating in the study. This was viewed as akin to probation or time served. The participant was also informed that if they refused the deal, the matter would be referred to an “Academic Review Board.” This board was described to the participants in a manner that made it sound very similar to a criminal jury trial, including the right to present evidence and testify. If convicted before the board, the participants were told that they would lose their compensation, their faculty adviser would be notified, and they would be required to attend an ethics course. This ethics course was viewed as a loss of time, akin to a period of incarceration. While this scenario did not perfectly recreate the actual criminal justice system, the anxieties experienced by participants were similar to, though presumably not as intense as, those experienced by people facing criminal charges. Further, this research advanced our understanding of defendant decisionmaking in ways that earlier studies utilizing only hypothetical scenarios could not. In response to [the] cheating paradigm, [eighty-nine] percent of the guilty participants took the plea offer. With regard to the innocent students, 56 percent of the participants were willing to falsely confess to an offense they had not committed in return for the benefits of the bargain. For the majority of innocent students who knew definitively that they had not violated the rules, it appears that accepting the deal simply made more sense.73 The results of the psychological deception study supported the proposition that cases like Mr. Vasquez’s and those identified by the National Registry of Exonerations were not anomalies.74 Further, the results indicated that the assumptions of courts and others regarding how innocent defendants behave when given the choice between proceeding to trial or accepting the benefits of a bargain are wrong.75 Subsequent studies by other laboratories have validated these results and found similar rates of false pleas in modified plea bargaining scenarios.76 According to Wilford and Wells, there are now several “real-stakes“ (i.e., non-hypothetical) studies recording false plea rates near or exceeding fifty percent.77 In considering false guilty pleas, their impact on victims, and how their prevalence might be reduced, one must examine the forces that lead to such acts by the accused. Research during the last decade has revealed defendants plead guilty for a variety of reasons and that a host of factors influence these decisions. Often, the reasons for pleading guilty relate to guilt in the matter, but there are other considerations.

#### Plea bargains’ mass coercion and innocent convictions harms justice system credibility – it makes convictions seem arbitrary and unrelated to guilt

Gilchrist 11 [Gregory M. Gilchrist, Assistant Professor of Law at the University of Toledo College of Law with an A.B. from Stanford and a J.D. from Columbia, 2011, “Plea Bargains, Convictions And Legitimacy,” American Criminal Law Review, https://heinonline.org/HOL/P?h=hein.journals/amcrimlr48&i=145]/Kankee

INTRODUCTION Guilty pleas routinely are secured by something akin to coercion. Although courts require defendants to affirm that pleas are given freely and voluntarily, many pleas are entered under the threat of severe penalties for the defendant or her loved ones should she not plead guilty. And, the law-as a matter of law-largely ignores this pressure.' Plea bargaining does enhance efficiency. The legal system, as presently struc- tured and funded, could not generate the number of convictions it does by trial alone. 2 However, efficiency comes at a significant cost: innocent defendants are induced to plead guilty. More innocent defendants are convicted by plea bargains than would be by trials alone. These wrongful convictions not only harm the innocent persons who plead guilty; they undermine the reliability of all convic- tions. Plea bargaining has often been understood to replicate or approximate likely trial results through freedom of contract. "[T]he classic shadow-of-trial model predicts that the likelihood of conviction at trial and the likely post-trial sentence largely determine plea bargains."3 Lately, this view is increasingly subject to challenge. In his influential article, Plea Bargaining Outside the Shadow of Trial, Stephanos Bibas challenged the classic model by identifying inefficiencies in the contracting process that limit the influence of the likely outcome at trial.4 William Stuntz-who co-authored one of the most influential articles on plea bargaining as contracts-largely agrees that the inefficiencies undermine the ability of plea bargaining to generate results aligned with likely trial outcomes.6 Just as it fails to track the likely consequences of trial, plea bargaining may also do a poor job of aligning criminal consequences with actual guilt. Consider the recent, high-profile prosecution of Broadcom executives over backdated options. In that case, a federal court rejected the previously-entered guilty plea and dismissed the indictment against Dr. Henry Samueli. Dr. Samueli "pleaded guilty in June 2008 to one count of making a false statement to the Securities and Exchange Commission and agreed to pay $12 million to the Treasury." 7 After Samueli completed two days of testimony as a defense witness in a co-defendant's trial, the judge asked him to step off the witness stand and face the bench.8 When Samueli did so, the judge told him that, on the basis of his testimony, there was insufficient evidence to support the plea of guilty.9 The court rejected the plea and dismissed the indictment. 10 Not only was Samueli innocent, there was insufficient evidence to support even a guilty plea: so why would he have pled guilty in the first place? [Samueli] said he had agreed to plead guilty and pay the penalty because he didn't want to put his family through the ordeal of a public trial-or risk a prison sentence. "It was a personal decision, based on what I would have had to put my family through," Samueli said under questioning from [his co- defendant's attorney].11 Sometimes innocent people plead guilty because they do not believe they can prevail at trial. Sometimes they do so because they do not wish to risk the more severe sentence that will result if they lose at trial. Sometimes they do so for personal reasons. The practice of plea bargaining-granting a benefit to the defendant in exchange for the waiver of certain trial and appellate rights- provides an incentive to plead guilty. Plea bargaining generates outcomes that may have less to do with the weight of the evidence than they do with the psychological temperament of the defendant and the charging options available to the prosecutor. Put simply, plea bargaining has little to do with actual guilt or innocence. And yet, it is the method by which almost all criminal convictions are obtained.12 Criticism of the practice of plea bargaining is extensive and well developed.1 3 Generally, these criticisms have concentrated on the fact that bargaining fails to get the "right" results: "[Plea] bargains reflect much more than just the merits.... [S]tructural distortions pro- duce inequities, overpunishing some defendants and underpunishing others based on wealth and other legally irrelevant characteristics."' 4 There is, however, another problem with plea bargaining. By failing to generate results correlated with the likely outcome at trial, plea bargaining undermines the legitimacy of the criminal justice system. As courts have long noted and empirical research has confirmed, the perception of legitimacy is a crucial aspect of a legal system's efficacy.15 The perception of integrity is predicated in significant part on whether and how well the system functions in accord with basic rules of procedural fairness. Whether these rules are approached empirically or normatively, there is significant overlap in the factors that generate. procedural fairness; common examples include neutrality, lack of bias, treating like cases alike, accounting for relevant differences, and providing parties an opportunity to be heard. 16 Systems that fail to operate in accord with such principles lose some legitimacy. And plea bargaining-at least as currently practiced-is at odds with many of these principles. This Article considers those aspects of plea bargaining that cause the most harm to the legitimacy of the criminal justice system. It proceeds in three parts. In Part I, I argue that, under the current system, probable cause is the only effective standard of proof applied to bargained-for guilty pleas. Working within the framework of recent literature that exposes the disconnect between plea bargaining and the likely results of trial, I illustrate that the results of plea bargaining will have little to do with actual guilt or even the weight of the evidence. Trials, on the other hand, are centered around evidence. Adversaries are permitted to present evidence, in accord with well-established rules, to impartial finders of fact, who then weigh the evidence. The presumption of innocence and the government's burden of proof beyond a reasonable doubt cause the evidence to be weighed in a manner that favors, by design, wrongful acquittals over wrongful convictions. The distinction between the processes that lead to bargained-for convictions and those resulting from a trial are significant; the former is less reliably linked to evidence and actual guilt than the latter. In Part II, I explore the impact of plea bargaining on the legitimacy of the criminal justice system. By generating less reliable results than trial, plea bargaining harms those wrongfully convicted.1 7 However, there is a systemic harm as well. Notwithstanding the lesser reliability of bargained-for guilty pleas, the legal system treats such convictions as formally identical to convictions after trial. Symmetrical treatment of asymmetrical convictions generates a discord that threatens the perceived legitimacy of the criminal justice system. The legal system's failure to account for the difference in reliability between bargained-for convictions and convictions by trial repre- sents a failure to abide by the axiom that like cases should be treated alike (and its corollary: cases that are relevantly and materially different should be treated differently).1 8 Moreover, the legal system compounds this harm by generally requiring defendants who wish to benefit from a plea bargain to confess factual guilt (as opposed to merely entering a formal plea of guilt).' 9 The innocent defendant who wishes to secure leniency is given an incentive to lie. This impugns the character of the legal system and can deny defendants a meaning- ful opportunity to be heard or to participate in the process. In Part III, I propose that the legal system openly acknowledge the compromise between efficiency and reliability inherent in plea bargaining through a few simple rules. First, where a guilty plea is obtained through promised leniency, the result of the plea should be formally distinct from the conviction secured by trial. Second, the defendant should never be compelled to admit factual guilt to secure the benefit of a bargain. The proposed rules give rise to valid concerns, each of which are addressed. Implementing these two modest rules would limit the harm that plea bargaining presently causes to the perceived legitimacy of the legal system. Additionally, it might generate the political will to reform the practice of plea bargaining more completely. I. PLEA BARGAINING CAUSES MORE INNOCENT DEFENDANTS TO BE CONvICTED That plea bargaining represents something of an affront to the rule against coerced confessions has been oft-noted20 and more often ignored.2 1 The objections that have been leveled against plea bargaining are numerous and diverse,22 but most stem from a common problem: plea bargaining reduces the ability of the criminal justice system to avoid convicting the innocent A. Legal Mechanismsfor Preventing Conviction of the Innocent Ideally, our system of criminal justice sacrifices a degree of accuracy in favor of avoiding conviction of the innocent. Implicit in the generally accepted requirement of proof of guilt beyond a reasonable doubt is agreement that accuracy in the simple sense is not the sole or even the paramount objective of the criminal justice system. This standard of proof, like other procedural requirements, is intended to prevent inaccurate convictions even at the expense of inaccurate acquittals.2 3 Historically, the law has valued avoiding convictions of the innocent more highly than maximizing convictions of the guilty. Rules and procedures aim to align the results of criminal cases accordingly, most notably by presuming defendants innocent and requiring proof beyond a reasonable doubt for convic- tion. "The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation."2 5 Although the Constitution does not refer to either the presumption of innocence or the require- ment of proof beyond a reasonable doubt, courts have long assumed both have constitutional standing.26 These concepts have generally 2 7 -though not always28\_ been recognized as components of the requirement that "[n]o person shall be. . . deprived of life, liberty, or property, without due process of law." 2 9 Demanding proof beyond a reasonable doubt for a conviction skews the error rate between wrongful convictions and wrongful acquittals, decreasing the former at the expense of increasing the latter.30 As Justice Harlan wrote, "the trier of fact will sometimes, despite his best efforts, be wrong in his factual conclusions.,31 Requiring proof beyond a reasonable doubt for criminal convictions influences the relative frequency of these two types of erroneous out- comes ... [and therefore] should, in a rational world, reflect an assessment of the comparative social disutility of each.... In a criminal case . .. we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty.3 2 Blackstone is often quoted: "the law holds, that it is better that ten guilty persons escape, than that one innocent suffer." 3 3 But is that really the ratio? In the Supreme Court's earliest exploration of the substance and interrelation of the presumption of innocence and the reasonable doubt standard, the Court identified three distinct ratios of error presented by three sources in the span of three paragraphs: twenty to one; five to one; and ten to one.34 This may seem a matter of how each author chose to express himself, rather than a meaningful meditation on the correct balance. But the correct balance is important. As Scott Sundby has written, "[f]ew would advocate, for instance, that the government's burden of proof should be beyond all possible doubt or, more vividly, that 'it is better to let one million guilty people go free than to convict one innocent person."' 35 Sundby observes that "a tension exists between 'elevating the impulse of compassion' and acknowledging 'the unlovely necessity of self-protection."'36 Whether we are willing to let five, ten, twenty, or a million guilty people go free before convicting one innocent person does matter. Although there is broad and deep disagreement as to the function of punishment, "[m]ost observers-of the criminal law agree that the ultimate aim of the law itself, and of punishment in particular, is the control of crime."3 7 And as Sundby notes, criminal law's ability to control crime depends to some degree on obtaining the correct ratio between wrongful acquittals and convictions: [I]t is obvious that if our ratio [of guilty persons acquitted per innocent persons convicted] is extended indefinitely, there comes a point when the whole system of justice has broken down and society is in a state of chaos. In short, it is only when there is a reasonable and uniform probability of guilty persons being detected and convicted that we can allow humane doubt to prevail over security.38 The statement is correct, but incomplete. There are actually two points on the spectrum where order will give way to chaos. The first is that described by Sundby, where the number of guilty persons acquitted is so high as to undermine the authority of law. The other is where the number of innocent persons convicted undermines the perceived merit of a conviction altogether-that is, where too many innocent persons are convicted for the public to recognize a meaningful correlation between guilt and punishment. 39 In either case, the power of law as a tool. of social control is undermined. Allowing "humane doubt to prevail over security" is a sort of luxury affordable only where there is reasonable and uniform probability of convicting the guilty; however, the caveat is that reasonable and uniform conviction of the guilty serves the interest of the system only where it can be achieved without too many wrongful convictions. Requiring a heighted stan- dard of proof for a criminal conviction stems from a recognition that a wrongful conviction is worse than a wrongful acquittal.40 Wrongful acquittals are preferable to wrongful convictions because the conse- quences of criminal conviction are especially severe. Whereas the consequences of civil litigation are financial in nature, the consequences of criminal litigation can be death, 4 1 prison,4 2 probation, 4 3 fines,44 loss of status, moral condemnation, and social stigma.45 Throughout the history of common and civil law, severe and sometimes draconian penalties have been imposed on those found guilty.46 Courts have recognized that criminal convictions entail especially serious consequences. As Justice Brennan wrote, "[t]he accused during a criminal prosecu- tion has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction." 47 In his concurrence in the same case Justice Harlan reiterated the severe consequences in terms of loss of liberty and stigmatism associated with a criminal conviction. 48 Because the consequences are so severe, wrongful convictions must be limited even if they cannot be eliminated. "Given the limits of investigatory techniques and human knowledge, a system that convicts only the guilty is generally acknowledged to be impossible." 49 No system is perfect, and that includes the system that provides trials to criminal defendants in the United States. Aside from the challenges inherent in developing a uniform definition of "reasonable doubt," police officers, prosecutors, judges, witnesses, defense lawyers, and jurors make mistakes. The innocent will sometimes be convicted.50 The presumption of innocence and the requirement of proof beyond a reasonable doubt both serve to maintain a balance that favors wrongful acquittals over wrongful convictions. James Whitman argues that the real purpose of the proof-beyond-a-reasonable- doubt requirement is otherwise. He suggests the standard was developed to protect the conscience and souls of those called upon to judge the defendant.5 1 The book marshals historical support for the conclusion that the reasonable doubt standard "was not originally designed to make it more difficult for jurors to convict. It was designed to make conviction easier, by assuring jurors that their souls were safe if they voted to condemn the accused." 5 2 Putting aside the question of original intent behind the development of the standard, however, it remains the case that a reasonable doubt standard (along with a presumption of innocence) has the effect of protecting against wrongful convic- tions at the expense of foregoing some number of rightful convictions.5 3 This is the dominant view espoused by courts, and Whitman agrees, noting that the mecha- nisms for providing moral comfort to finders of fact will often coincide with those for raising the bar against conviction.54 Whether one is concerned about the direct consequences for the defendant or the spiritual or emotional consequences for the juror or judge, the severity of the consequence for the defendant is a sufficient reason to avoid wrongful convictions. B. Plea Bargaining Undermines the PrimaryLegal Mechanisms for Preventing Conviction of the Innocent Where trials are avoided, the standard of proof required for a conviction can be reduced to mere probable cause. Probable cause is the standard required to initiate charges.55 Where the government has: (a) probable cause to bring a series of charges with significantly disparate penalties, and (b) discretion to select among those charges, 56 then the effective burden of proof to secure a conviction can be reduced to as little as probable cause. This problem is best illustrated without accounting for the very real complexi- ties introduced by cognitive bias and lack of information. Such complexities are the basis for Bibas' assertion that plea bargaining does not really happen "in the shadow of trial."5 7 A simplified example-presented very much in the shadow of trial-demonstrates that even a purely rational innocent defendant may elect to plead guilty, and that the effective standard of proof for securing this plea will be mere probable cause. Introducing real-world biases (such as over-discounting future utility) and real-world limitations (such as lack of information or resources) would significantly complicate the example. As a result of such complexities, some defendants would be more likely than the rational defendant to accept a deal; others would be less likely to do so. 58 The point remains, however, that plea bargaining asks defendants to decide whether to plead guilty based on factors largely unrelated to actual guilt.59 Consider a hypothetical in which the quantum of evidence against the defendant is such that the innocent defendant assesses the risk of conviction as twenty percent.60 The defendant faces thirty years in prison if convicted after trial and has an offer of four years if she pleads guilty. Discounting the thirty-year sentence by the anticipated eighty-percent chance that it would not result if the defendant opted for trial (30\*0.2) nets a pre-trial estimate of the value of trial to be a six-year sentence. 61 Even assuming-in another simplification 62-that the defendant val- ues her liberty consistently over time (i.e., without a value-reduction for liberty benefits accruing further in the future), a rational defendant would accept this offer without regard for her guilt or innocence. Anytime the calculus generates a result where a rational defendant will plead guilty, the effective burden of proof to achieve that result is probable cause (assuming the defendant is rational). To be clear, this is not an abstract concern. A four-year offer on charges that could net thirty years after trial may seem unrealistic. It is not. Such a skew is dramatic, but in federal criminal practice it is neither unusual nor new. 63 For example, in a case involving illegal possession of a firearm and possession with intent to distribute a controlled substance, a federal prosecutor might offer a plea to the status offense of being a felon-in-possession of a firearm,64 while threatening to charge carrying a firearm in furtherance of a drug trafficking crime65 if the defendant seeks a trial. 66

#### Plea bargaining’s legal silencing causes wrongful convictions with a culture of complacency and pre-determined outcomes.

Natapoff 5 [Alexandra Natapoff, Lee S. Kreindler Professor of Law at Harvard Law School, member of the American Law Institute, and Guggenheim Fellow with a BA in philosophy from Yale University and a JD from Stanford Law School, 2005, “Speechless: The Silencing Of Criminal Defendants,” NYU Law Review, https://nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-80-5-Natapoff.pdf]/Kankee

A. Defendant Losses 1. Understanding How much do defendants who do not speak for themselves understand the legal process? 175 The legal system has long grappled with the concern that defendants, particularly those with educational or cognitive deficits, may not understand what is happening to them. 17 6 As studies of medical consent demonstrate, even when tech- nical concepts are explained to them, laypeople often do not under- stand the language being used or remember what they are told. 1 77 Silent defendants are even more prone to misunderstandings because their ignorance is rarely revealed, either to the court or often even to their own lawyer. For the under-educated, often functionally illiterate defendant population, silence may thus both mask and contribute to incomprehension. Silence can also cause cognitive disengagement: Defendants who are not expected to speak or testify during motions, hearings, or trials may stop listening, especially when the language used is legalistic or technical.1 78 Silent defendants are also less likely to grasp the con- cepts that govern their case because they never have to reproduce them out loud. 179 Counsel likewise are under little pressure to ensure that their clients understand anything more than the basic precepts because defendants (and therefore counsel) are never tested. While defense counsel will usually ask questions to determine whether their clients understand key concepts, much of what goes on in a case or in court will never be explicitly discussed. 180 Silence also reinforces defendants' psychological distance from court proceedings. Silence is a form of acquiescence to authority, a way of admitting incomprehension and the inability to contest what is being said. In her study of Baltimore rent court, Barbara Bezdek con- cluded that tenants' in-court silence both reflected and reinforced their perception that they were powerless and that their legal fate was predetermined.1 8 ' Psychologists have noted that silent litigants who do not participate in their own cases "due to issues of acculturation, linguistic background, and/or mental health difficulties," are more likely to experience discrimination from judges and jurors, and that the inability to participate verbally in their own legal proceedings is itself a species of discrimination. 182 While the incomprehension that accompanies forced silence is a well-recognized phenomenon for non- English-speaking litigants,18 3 it is a danger for all defendants in light of the system's bias against silence. 2. Remorse and Rehabilitation

#### Bad standards unquestioned by plea bargaining being dominant practice cause false convictions

Schehr 18 [Robert Schehr, Professor at the Department of Criminology and Criminal Justice at Northern Arizona University and Co-Director of the Arizona Innocence Project at Northern Arizona University with a Ph.D. in Sociology from Purdue University West Lafayette, a M.S. in Sociology from Purdue University West Lafayette, an MLS Law from Yale University, and a B.A. in Labor Studies from the University of Illinois Springfield, 7-1-2018, “Standard Of Proof, Presumption Of Innocence, And Plea Bargaining: How Wrongful Conviction Data Exposes Inadequate Pre-trial Criminal Procedure,” California Western Law Review, https://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=1646&context=cwlr]/Kankee

III. PLEA BARGAINS , WRONGFUL CONVICTIONS , AND THE PROBABLE C AUSE S TANDARD At the time of this writing there are 1886 exonerees listed in the National Registry of Exoneration database, spanning from 1989 to 2016.53 Of particular interest to this article is the number of wrongful convictions generated as a result of the guilty plea. From 1989 to 2016 there have been a total of 276 identified cases of wrongful conviction where the accused accepted a guilty plea but was later determined to be innocent.54 That amounts to a little more than fifteen-percent of the total number of identified wrongful convictions. Among those states that make use of grand jury indictments as their principal charging instrument, there are 180 exonerees who originally entered guilty pleas.55 Table 2,56 provided below, culls data from the National Registry to illustrate the following three data points: (1) states that make use of grand jury indictments as their principal charging instrument, (2) the number of exonerees who entered into guilty pleas, and (3) the total number of exonerations from each of the grand jury states. Since 1989, twenty-six grand jury states collectively convicted 180 innocent people via the plea, about twenty percent of the total 895 wrongful convictions.57 I present this particular plea exoneration data to emphasize one significant point: in 180 cases (twenty percent of the total), innocent people were presented with an indictment following presentment before a grand jury where the standard of proof was probable cause. All of these 180 people accepted the terms of a guilty plea.58 I have argued elsewhere that guilty pleas give rise to a significant number of wrongful convictions.59 Legal and social science scholars simply do not have access to the kind of data necessary to determine which among the felony plea convictions, comprising of 95 to 97 percent of all felony convictions, are cases where the defendant is innocent. The National Registry data presents us only with cases that have been identified as wrongful convictions, but surely there are more. A host of legal fictions have been constructed to rationalize the constitutionality of conviction by way of plea bargain. Surely, some reading this article will object to my juxtaposition of trial with plea convictions as being a comparison of apples to oranges. In fact, those critics would be correct. In the United States, we have established two distinct mechanisms for criminal conviction: a trial that affords the accused their constitutionally mandated due process protections, and plea bargaining which occurs in the privacy of the prosecutor’s office.60 It is important to note the temporal aspect of the plea process. Legal scholars will often contend that pleas are constitutional, and that the accused relinquishes her right to the presumption of innocence upon admission or confession to the charges.61 However, my concern, and the substance of this article, is temporally sensitive. What I am addressing is the legal process that unfolds for an accused between the time of the defendant’s arrest and her grand jury indictment. Once the indictment is procured, the prosecutor may advance toward negotiation of a plea. This article contends that the unconstitutionality of the plea process commences prior to the admission or confession where guilt is affirmed at the plea colloquy. It seems clear that it is the confluence of police investigation activities, pre-sentencing reports, case law, courtroom working groups, and neurophenomenological characteristics62 of the accused (occurring upon arrest and ending with grand jury indictment), that directly implicate police officers, prosecutors, and defense attorneys in an unconstitutional but immanently efficient practice of moving cases toward rapid conviction It is my contention that the confluence of the following factors all but assure innocent men and women will be wrongfully convicted via the plea: (1) The low standard of proof necessary to indict (probable cause); (2) The absence of a pre-trial presumption of innocence; (3) The fact that prosecutors are not bound by the Federal Rules of Evidence—there is no evidentiary requirement that the state presents exculpatory evidence; (4) The absence of adversarial due process; (5) The fact that a prosecutor may convene as many grand juries as is necessary to procure an indictment; (6) The fact that neurophenomenological factors heavily influence the plea bargaining process;63 and (7) The prevalence of Draconian state and federal sentencing statutes that are used by prosecutors and defense attorneys to encourage resolution of cases via the plea Equally important to the legitimacy of a democracy, as the Supreme Court recognized in Winship, is the “moral force of the criminal law” that must not be “diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.”64 In Table 2, data is culled from the National Registry of Exonerations pertaining to exonerations occurring since 1989 in grand jury states There are countless activities that people and institutions engage in because it is what they have always done. In fact, in many ways what constitutes being human is our frequently inconsiderate return to habitual pathways regardless of whether they pertain to a morning commute to work, conversations with family, friends, and colleagues, or conventions relating to the way we eat and dress. When those habits rise to the level of bureaucratic procedure, as in criminal due process, they may take on superstructural hegemonic significance, ultimately manifesting as legal-rational mechanisms for the reproduction of state power. Such is the case with our contemporary reliance upon the probable cause standard of proof as it applies to the presentation of charges, at information hearings, or before a grand jury. It is doubtful that prosecutors, defense attorneys, or judges stop to question the bureaucratic significance of the probable cause standard, especially as it applies to the standard necessary for obtaining an indictment at information or grand jury proceedings. Indeed, the standard is so ubiquitous and steeped in over fifty years of practice applied to plea bargaining, that it has attained hegemonic status. The probable cause standard for indictment is taken for granted by everyone who occupies the courtroom working group. Like the presumption of innocence, the probable cause standard is so ubiquitous that merely questioning the prudence of the standard of proof as it pertains to criminal charges before a grand jury, for instance, generates a quizzical look akin to questioning whether the sun rises in the east. The practical application of the probable cause standard of proof required for indictment, a standard that has existed for over one-hundred years,67 has taken on an essentialist quality that through its proliferation over time, has developed a deeply worn channel. The question then becomes: Is it true that just because we have been operating on the premise that the probable cause standard is hegemonic, must it necessarily be so? In an article published in March of 2016 by the Stanford Law Review, Professor William Ortman provides a thorough historical assessment of the origins and applications of probable cause both in England and the United States.68 Professor Ortman’s article provides a thorough account of the origin and evolution of probable cause, something that this article will not entirely repeat here. However, it will reveal some prescient insights as they may prove to be important in assisting my claims. As already considered, the standard of proof is an important procedural mechanism to ensure fairness. If there were no charging standards, a prosecutor could bring a case before a grand jury with illegitimate evidence, or even no evidence whatsoever. Ortman contends that, “charging standards act as a constraint on prosecutors.”69 Accordingly, “[t]he more one ratchets up a charging standard. . . the more confident one can be that prosecutors are constrained and that convicted defendants are actually guilty.”70 The probable cause standard was known to American judges and attorneys at the time of our nation’s founding primarily through English “Whig tracts, legal treatises, and justice of the peace manuals.”71 It appears that disputes arising between Whigs and Tories are what generated intense focus on whether one could be charged and indicted before a grand jury based upon “probabilities.”72 The grand jury in England originated with the creation of the Assize of Clarendon in 1166 by Henry II,73 but little attention is given to charging standards until Edward Coke and Matthew Hale comment on them in the mid- seventeenth century.

#### The trial penalty is coercive and causes innocent convictions. Lawyer polls and studies prove

Dervan et al. 23 [Lucian E. Dervan, professor of Law and Director of Criminal Justice Studies at the Belmont University College of Law, Vanessa A. Edkins, Psychology Professor Emerita at the Florida Institute of Technology, and Thea Johnson, Professor of Law at Rutgers Law School 2023, “Victims of Coercive Plea Bargaining: Defendants Who Give False Testimony for False Pleas,” American University Law Review, https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=2361&context=aulr]/Kankee

As Chief Justice John Roberts acknowledged in Lee v. United States,78 defendants are motivated by different “determinative issue[s],” such as immigration consequences, when making plea decisions.79 The legal community knows from both individual examples and laboratory evidence that these motivations can compel even an innocent person to plead guilty, which accounts for the criminal justice system’s high rate of pleas. One of the most significant factors leading to a guilty plea is the sentencing benefit offered in return for giving up the right to trial by jury. In a study where adult and juvenile offenders in New York were interviewed, researchers discovered that adult defendants received an eighty percent average reduction of the anticipated sentence that would result from trial.80 The discount for pleading guilty for juveniles was even larger, at ninety-five percent.81 In another study examining plea discounts in Pennsylvania, researchers found that sentences were fifty-seven percent longer for those convicted at trial.82 And yet another study, focusing on all federal criminal cases from 2006 to 2008, found that those who exercised their right to trial received sentences that were sixty-four percent longer than similarly situated individuals who pleaded guilty prior to trial.83 Other research indicates that conviction by a jury not only increases the length of sentences, conviction at trial also increases the likelihood of being sentenced to incarceration. One analysis by the Vera Institute of Justice in 2020 found that the odds of incarceration were 2.7 times higher for those who exercised their right to trial and that the sentences of these individuals were fifty-seven percent longer than the sentences of those accepted guilty pleas.84 Another study of federal sentencing practices released in 2019 demonstrated that defendants convicted at trial faced a two to six times greater likelihood of being incarcerated.85 Given these discount rates for pleading guilty, it is little wonder why defendants, including innocent defendants, often plead guilty. In one study that examined adults and juveniles, a belief that one was receiving a “deal” was one of the most often cited reasons for accepting a plea bargain.86 Data also indicates that the better the “deal,” and the higher the benefit from accepting the plea offer, the more likely a defendant is to accept.87 When prosecutors charge defendants with statutes carrying mandatory minimum sentences, they can leverage these extreme potential penalties to encourage defendants to take a favorable deal on the table.88 Mary Price, General Counsel of FAMM, said in a 2019 piece, “[m]andatory minimums are essential to the trial penalty.”89 The certainty of mandatory minimums means that defendants are not forced to guess at the benefits of pleading guilty. Another example of the power of sentencing differentials and the gap between the pre-trial offer and potential post-trial sentence in leading a defendant to plead guilty is the case of Chris Ochoa, who falsely pleaded guilty to rape and murder in Texas in 1989.90 After his plea, Mr. Ochoa was sentenced to life in prison.91 Thirteen years later, in 2002, DNA evidence exonerated him.92 In Mr. Ochoa’s case, he was threatened with the death penalty if he did not plead guilty.93 His attorney had encouraged him to accept the plea offer, but he maintained his innocence and refused.94 It was only after his mother became ill from the stress of the case and asked him to accept the offer that he relented.95 Mr. Ochoa’s case not only reflects the significance of sentencing differentials in leading defendants to plead guilty, but the matter illustrates the important role that counsel may play in encouraging this behavior. And yet, the Supreme Court has made clear that it believes that the presence of counsel is the very thing that will prevent an innocent person from falsely pleading guilty.96 Research from the last decade, however, indicates that this assumption regarding the protections afforded by counsel in plea decision-making was also in error. In a 2020 article by Diamond and Salerno, the researchers, in collaboration with the American Bar Association Commission on the American Jury, examined reasons for the disappearing trial.97 The study conducted interviews with judges, prosecutors, and defense counsel and concluded that defense counsel played a significant role in encouraging defendants to take pleas.98 The report noted that counsel were recommending pleas, in part, because of overwhelming caseloads and limited resources.99 Diamond and Salerno also found that other factors that lawyers consider when encouraging their clients to take pleas are the imposition of mandatory minimum statutes and increased sentences after conviction at trial.100 Contrary to the Supreme Court’s assumption that the role of counsel safeguards against false pleas, research also indicates that counsel can have a significant role in increasing, not decreasing, the likelihood of false guilty pleas by the innocent. In a study from 2018 regarding attorney perceptions of guilty pleas, the authors interviewed counsel in nine U.S. states (New York, Tennessee, Wisconsin, Wyoming, Vermont, Idaho, Iowa, Arizona, and Rhode Island).101 Roughly seventy-eight percent of those asked indicated that there were definitely cases in the current system where an innocent individual should plead guilty.102 “When asked whether they had ever been involved in a case where a client chose to plead guilty despite maintaining their innocence,” almost ninety percent said yes.103 Not only were the attorneys aware of this occurring, almost forty-five percent admitted to having advised clients they believed were innocent to accept a favorable plea agreement.104 In fact, even in cases where the defense attorney felt there was less than a fifty percent chance of conviction, a significant proportion stated they would recommend to an innocent client to plead guilty.105 Again, as identified by Diamond and Salerno, several factors lead to this behavior, including severe sentences after trial and plea offers being beneficial.106 Henderson and Levett published a study using the cheating paradigm applied to students by Dervan and Edkins in their 2013 study.107 This time, however, the study protocol was modified to include testing the influence of advocate participation during the decision-making process.108 Where no advocate participated, the study participants falsely pleaded guilty thirty-five percent of the time.109 Where an advocate participated and recommended proceeding to trial, the false plea rate dropped to four percent.110 But where an advocate participated and provided only educational information regarding the available options, forty-seven percent of the study participants went on to falsely plead guilty.111 This represented a twelve percent increase in the false plea rate compared to scenarios in which there was no advocate present.112 More strikingly, where an advocate participated and recommended pleading guilty, fifty-eight percent of the study participants went on to falsely plead guilty.113 This plea rate is sixty-six percent higher than that found when there was no advisor at all.114 Other studies have identified the likelihood of an even more pronounced impact of counsel recommendations on juveniles, where they are particularly susceptible to influence.115 Contrary to earlier assumptions regarding the beneficial role of counsel in preventing false guilty pleas, these findings demonstrate that the presence of counsel likely exacerbates the false plea phenomenon. Finally, not all defendants receive the same advice from counsel, creating a situation in which the potential negative impacts of plea advice from counsel are exacerbated for some and not others. First, studies indicate that wealth impacts the representation and advice that defendants receive.116 Defendants with public defenders, for example, have been found to plead guilty at higher rates.117 The limited resources available to underfunded public defense offices and, by extension, the need to recommend guilty pleas more often to manage burdensome dockets, may be contributing to this increased rate of pleas.118 Second, the defendant’s race influences the plea recommendations of defense lawyers.119 In a 2011 study by Edkins, defense counsel from multiple jurisdictions were asked to make recommendations for defendants considering mock plea offers.120 The study found that when the defendant was depicted as Black in the hypothetical, defense counsel was more likely to recommend the defendant take a plea and more likely to recommend a plea that included a custodial sentence.121 Sentencing differentials and attorney advice to clients are not the only significant influences for defendant-decision making. Pretrial detention is another significant driver of pleas, including false pleas.122 A 2018 study considered plea rates, innocence, and pretrial detention through the use of various hypothetical scenarios.123 Participants in the study were asked to review scenarios involving a student charged with a drug offense, a nurse charged with assault, and an unemployed individual living with two children in public housing and charged with breaking and entering.124 Participants were then asked to decide whether to accept a plea agreement or proceed to trial.125 The results confirmed the validity of the legal community’s concerns regarding the impact of plea offers on both the accuracy of the system and the free exercise of individuals’ constitutional right to trial.126 First, the study found participants assigned to both the factually guilty and factually innocent conditions electing to plead guilty, thus once again confirming the innocence phenomenon. . . . [Further], the study found that pretrial detention significantly influenced plea decisions. Of particular importance here, the rate of innocent individuals who pleaded guilty tripled in the pretrial scenarios.127 Other studies have found similar impacts from pre-trial detention.128 In a Vera Institute report on plea bargaining, one study cited in the report examined 76,000 arrests in Delaware.129 The study determined that pretrial detention increased a person’s likelihood of pleading guilty by forty-six percent.130 Similarly, in a recent article examining the results of five hundred interviews with public defenders, the authors noted that extra-legal factors such as pre-trial detention influenced counsel’s recommendations regarding plea offers.131 Finally, Leslie and Pope examined almost one million arraignments for felonies and misdemeanors in New York City from 2009–2013.132 They found a link between pretrial detention and increased plea rates.133 But the authors also found that defendants detained pretrial were willing to plead to worse offers.134 Further, the study demonstrated that many of the individuals who pleaded guilty would have proceeded to trial had they not been detained pretrial.135 Importantly, other research has shown that people of color are more likely to receive larger bail amounts and longer pretrial detention periods.136 Once again, therefore, the influence of pre-trial detention is not just contributing to false guilty pleas, but is likely leading to a disproportionate impact on marginalized communities.137 Many factors may impact a defendant’s decision to plead guilty: assessments the likelihood of success at trial,138 a desire for finality,139 the impact of collateral consequences,140 risk aversion,141 temporal discounting,142 and familial considerations,143 among others. However, as discussed above, the three factors that appear most influential are sentencing differentials, the advice of counsel, and pretrial detention.144 Certainly for Mr. Vasquez, these influences contributed to his decision to falsely plead guilty, a decision that had significant consequences not only for himself, but for the others who became victims as a result. II. FALSE TESTIMONY IN RETURN FOR FALSE BARGAINS

### Contention 13: Silence is Compliance

#### Compelled speech via induced lies in plea bargains undermines justice credibility and violates speech rights

Gilchrist 11 [Gregory M. Gilchrist, Assistant Professor of Law at the University of Toledo College of Law with an A.B. from Stanford and a J.D. from Columbia, 2011, “Plea Bargains, Convictions And Legitimacy,” American Criminal Law Review, https://heinonline.org/HOL/P?h=hein.journals/amcrimlr48&i=145]/Kankee

2. Plea Bargaining Creates an Incentive for Dishonesty When a defendant seeks the benefit of a plea agreement, she generally must admit her guilt in court. This is a peculiar harm visited upon the actually innocent defendant who seeks leniency through a plea; she is compelled to lie to get it. Although the Constitution permits Alford 12 5 and nolo contendere 126 pleas, prosecutors rarely permit them when offering the defendant a benefit in exchange for a plea. A defendant has no right to get the benefit of a plea agreement with the government and to enter an Alford or nolo contendere plea.'2 7 Plea agreements routinely require that the defendant both advise the court that she is in fact guilty of the charges to which she is pleading and affirm the truth of the government's statement of facts. Even where there is no plea agreement, the Department of Justice strongly opposes Alford pleas 2 8 and nolo contendere pleas.I2 9 In federal court, it is a rare case in which a defendant can earn the benefit of a plea agreement while refusing to acknowledge factual guilt fully and completely. 3 0 Confessing is only a problem where the confession is dishonest. Thus, when the innocent confess to secure the benefit of a plea bargain, there is a clear problem. However, a confession can be dishonest even where it is accurate. For example, a defendant might have a good faith but erroneous belief in her innocence. Such a belief could be the result of mistake, denial, diminished capacity at the time of offense or the time of plea, or possibly even uncertainty or indeterminacy of the fact of guilt. Bibas suggests that "even a true but insincere confession is better than no confession at all." 13 But what should be made of the untrue and insincere confession? One might argue that such confessions also serve a purpose: a system that compels all who plead guilty to acknowledge their guilt might protect itself to some degree from the perception that it convicts innocent persons. This even could be seen as a helpful step in avoiding the harm to the legitimacy of the system that is inherent in treating all convictions alike132 ; by demanding that all defendants confirm their guilt, the legal system can pretend the innocence problem does not exist (i.e., the system would simply deny the possibility that innocent defendants ever plead guilty). Unfortunately, this suggestion is contrary to what we know. We know that innocent persons are convicted, and we know that the number of innocent persons convicted by a system with plea bargaining is higher than that by a system without the practice. While the compelled statement of guilt may help prevent the identification of individuals who believe in their innocence (to some degree), it cannot alter the fact that we know some higher number of innocent individuals are convicted systemically as a result of plea bargaining. Requiring that a defendant with a good-faith belief in her innocence confess in order to secure leniency is at odds with three of the factors Tyler identified as serving to promote the procedural justice of a legal system: (1) it prevents the defendant from stating his case; (2) it fails to treat the defendant with dignity; and (3) from the defendant's perspective, it reflects poorly on the character of the legal authorities.1 3 3 First, being compelled to state something that the defendant be- lieves to be untrue is much worse than merely not being able to tell one's story. That is, to the defendant, the system is preventing her from telling her story and forcing her to tell a lie in its place. Second, few subjected to such coercion would feel that the compulsion to lie about one's own guilt is consistent with being treated with dignity. And third, the person subject to this treatment is unlikely to feel that it reflects positively on the character of the legal authorities. Not all agree. Bibas has condoned the use of "external pressures, such as the threat of imprisonment, [to] induce offenders to overcome their denial,"1 3 4 suggesting that "[a]dmitting one's wrongdoing is the first step toward moving beyond it."' 3 5 But there are serious problems with this position. First, it seems to ignore the fact that defendants believe in their own innocence for reasons other than denial.' 36 Some defendants are actually innocent. It is difficult to see what good could possibly come of asking the actually innocent defendant to lie in order to secure a lesser sentence. Others may be mistaken or perceive uncertainty as to the key issues. For example, a defendant charged with possession of a controlled substance may erroneously believe he is innocent because he knows that the narcotics did not belong to him and he fails to understand the legal concept of joint, constructive possession. Or, the defendant may have been intoxicated at the time of the offense or suffering from some other form of diminished capacity, such that he erroneously believes in his innocence. In a case in which the defendant maintains a good-faith belief in his innocence, a confession induced by the promise of leniency is unlikely to benefit the defendant or the legal system. . Even in the case of denial, it is by no means clear that a coerced confession would have any positive influence in overcoming the denial. Indeed, query whether a system that compels a choice between lying (for, even the defendant in denial, at the time she made the statement of guilt, would be lying)13 7 and accepting additional punishment for a crime of which the defendant believes herself innocent carries sufficient moral authority with that defendant to overcome her denial. It seems at least equally likely that the defendant compelled to lie about her guilt in order to receive a lesser punishment for a crime she believes she did not commit would be pressed further into cynicism and denial. As Bibas writes, "[p]ublic confidence and faith in the justice system are essential to the law's democratic legitimacy, moral force, and popular obedience." 138 That confidence cannot be bolstered by compelled confessions in cases of wrongful convictions. Still, eliminating admissions during guilty pleas represents a cost to those who place a normative or instrumental value on confessions. However, the value of admissions during guilty pleas can be vastly overstated. "A rapist's denial means that the victim was making up her accusation, or that she consented to sex, or that she enjoyed being raped. The justice system must not put its stamp of approval on these denials, because they victimize victims all over again."' 3 9 A rapist's denial means nothing of the sort. A rapist's denial means that the rapist is denying the truth. On the other hand, a defendant's denial means that the defendant is taking a different position than the complaining witness. The difference turns on whether we know the truth of the matter. My point should not be mistaken for some sort of epistemological skepticism (e.g., can we ever really know what happened?). My point is that we do know when we accept a bargained-for guilty plea that we have applied a far less rigorous method of factual proof than trial beyond a reasonable doubt; we do know that by doing so we have increased the likelihood that conviction will result without regard for actual innocence; we do know that we cannot be as confident in the outcome as we would had we not employed the shortcut of a bargained-for plea. We have taken a shortcut as a matter of practical necessity. The shortcut comes at a cost in terms of the certainty of result. No system demands or provides absolute certainty of result; however, the practice of compensating pleas produces more wrongful convictions than the practice of jury trials at a reasonable-doubt standard. Compelling those defendants who seek the benefit of the bargain to declare their factual guilt may cause some defendants to balk at the deal. It will compel others to lie. As hurtful as the defendant's denial may be to the alleged victim, the solution is not to force a confession that purports more certainty than merited by the circumstances giving rise to the conviction. The harms inherent in admissions required as a condition of leniency are well illustrated by cases of compelled public apologies. In recent years, the Department of Justice has turned to public apologies in environmental cases as a means of both educating the public and punishing the offender. Though creative and possibly effective, such public confessions carry costs similar to those associated with the required admissions. Consider the case of Thomas Lukegord, owner of a charter boat service operating out of Gloucester, Massachusetts.140 On May 6, 2005, Lukegord towed the Nicole Renee, a nineteen-year-old, sixty-two-foot wooden boat, to sea, intending to sink it on Jeffrey's Ledge-thirty- three miles of rock ledge running offshore from Massachusetts to Maine.' 4' He did this because on numerous occasions the Nicole Renee sank at her mooring.142 The boat was no longer sea-worthy. Lukegord estimated that paying for disposal of the wrecked boat would cost over $10,000.143 Disposing of the boat himself would cost fuel for towing, in addition to his time. Prior to towing the boat to sea, Lukegord emptied the Nicole Renee of fuel and oil. The weather worsened as Lukegord left the harbor, and the Nicole Renee was more difficult to tow than he anticipated.'4 Unable to reach Jeffrey's Ledge, he stopped in one hundred feet of water off Plum Island.1 4 5 There, he engaged the bilge pump to flood the vessel, causing it to sink stern-first. 14 6 According to the Government, the sunken vessel posed a navigational hazard to commercial fishing vessels that pulled nets through the area.1 47 Lukegord pled guilty pursuant to an agreement under which the government would recommend a sentence of one year probation, a $2,000 fine, $1,928.96 in restitution, and publication of a public apology at his own expense in the Gloucester Daily Times, the New Bedford Standard-Times, and the National Fisherman.14"The apologies were to be printed on a full page in the New Bedford paper, and a half page in the other two, with the total cost capped at $6,000.149 The apology was to read: [i]t's not worth it. I towed my fishing boat, the Nicole Renee, offshore and I sank it. I didn't get the required permit from EPA and I didn't tell the Coast Guard. I never meant to harm anyone, but I now realize that my actions could have endangered other fishermen. I agreed to pay for this notice so that other boat owners might learn from my mistake. Unpermitted vessel sinking is a crime. It can harm the environment and interfere with safe navigation. Don't do it. It's not worth it. 15 0 While this public apology likely served to educate the public about the state of the law, Mr. Lukegord no longer stands by the statement. He recently told a newspaper reporter that the prosecutor wrote the apology himself.15 ' He added his belief that the prosecutor "uses the practice to advance his own career and show off that 'he's got another notch on his gun.""5 2 Lukegord's comments highlight challenges inherent in coerced statements. People don't like being compelled to say something they believe to be untrue. It is one thing to be punished for a crime; it is quite another to be forced to trumpet the righteousness of the government that is punishing you. The newspaper article suggested that Lukegord was "bitter" about the ad.153 His attorney commented on defendants from whom apologies are compelled generally: "'These people have families. They have kids who are in school ... ."'154 In Lukegord's case, the government got the publicity it sought. And, hopefully, others were educated as to the risks of unpermitted vessel sinking. However, one could fairly question whether compelling a public apology from the defendant was the best way to achieve these ends, especially if the apology was not sincere. If the report is correct, Lukegord's perception of the procedural justice of the legal system was undermined by the compelled speech-that is, the case in which the defendant was actually guilty.15 5 In a case in which the defendant believes herself innocent-for whatever reason-the compelled admission is an additional harm to the integrity of the legal system. Nor is this harm limited to incidences of actual or perceived innocence. A defendant generally must accept and affirm the prosecutor's version of events in order to secure the benefit of the plea agreement; guilty defendants may be induced to lie about specific aspects of the offense in order to appease the prosecution. For example, a defendant might recognize her own guilt for having dealt drugs or disagree with the government's assessment as to the quantity of drugs she sold, yet nonetheless wish to accept a plea offer. To do so, she would likely be required to make a statement about the quantity of drugs she sold that she believes to be incorrect. Whether the induced statement is about actual guilt or some specific aspect of the offense, the harm caused by inducing a participant in the legal system to make a statement that she believes to be false is real. III. LIMITING THE HARM TO THE LEGITIMACY OF THE SYSTEM CAUSED BY PLEA BARGAINING

#### Plea bargaining’s legal silencing of minority voices undermines dignity, legitimacy, and free speech rights, resulting in mass incarceration

Natapoff 5 [Alexandra Natapoff, Lee S. Kreindler Professor of Law at Harvard Law School, member of the American Law Institute, and Guggenheim Fellow with a BA in philosophy from Yale University and a JD from Stanford Law School, 2005, “Speechless: The Silencing Of Criminal Defendants,” NYU Law Review, https://nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-80-5-Natapoff.pdf]/Kankee

Over one million defendants pass through the criminal justice system every year, yet we almost never hear from them. From the first Miranda warnings, through trial or guilty plea, and finally at sentencing, most defendants remain silent. They are spoken for by their lawyers or not at all. The criminal system treats this perva- sive silencing as protective, a victory for defendants. This Article argues that this silencing is also a massive democratic and human failure. Our democracy prizes individual speech as the main antidote to governmental tyranny, yet it silences the millions of poor, socially disadvantaged individuals who directly face the coercive power of the state. Speech also has important cognitive and dignitary functions: It is through speech that defendants engage with the law, understand it, and express anger, remorse, and their acceptance or rejection of the criminal justice process. Since defendants speak so rarely, however, these speech functions too often go unfulfilled. Finally, silencing excludes defendants from the social narratives that shape the criminal justice system itself, in which society ultimately decides which collective decisions are fair and who should be punished. This Article describes the silencing phenomenon in practice and in doctrine, and identifies the many unrecog- nized harms that silence causes to individual defendants, to the effectiveness of the criminal justice system, and to the democratic values that underlie the process. It concludes that defendant silencing should be understood and addressed in the con- text of broader inquiries into the (non)adversarialand (un)democraticfeatures of our criminal justice system. The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discus- sion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our polit- ical system rests. -Justice Harlan, Cohen v. California1 The United States's criminal justice system is shaped by a funda- mental absence: Criminal defendants rarely speak. From the first Miranda warnings through trial until sentencing, defendants are con- stantly encouraged to be quiet and to let their lawyers do the talking. And most do. Over ninety-five percent never go to trial, 2 only half of those who do testify, 3 and some defendants do not even speak at their own sentencings. As a result, in millions of criminal cases often involving hours of verbal negotiations and dozens of pages of tran- scripts, the typical defendant may say almost nothing to anyone but his or her own attorney. Courts and scholars typically treat this silencing as a victory for defendants. In our adversarial system, the right to remain silent and its Siamese twin, the right to have counsel speak on one's behalf, are necessary to permit the defendant to challenge the government's case, primarily because the government has the burden of proof and defen- dant speech is potentially incriminating. Silence is also one of the principal protective devices standing between defendants and an increasingly unsympathetic criminal justice system in which high con- viction rates and heavy punishments make defendant speech risky. 4 The right to remain silent is thus "the essential mainstay of our adver- sary system."'5 It also reflects the overwhelmingly instrumental out- look of modern criminal practice in which defendant entitlements are evaluated almost exclusively in terms of their ability to help defen- dants evade punishment. 6 Defendant speech, however, has personal, dignitary, and demo- cratic import beyond its instrumental role within the criminal case. From an individual perspective, silent defendants are denied many of the cognitive and participatory benefits of expressive engagement in their own cases. After all, it is through speech that defendants enter into a relationship with the law. Through speech they attain and express their understanding or misunderstanding of legal dictates, their views on the fairness or unfairness of the procedures by which they are adjudicated, and, ultimately, their acceptance or rejection of the process and its outcome. Defendants who remain silent throughout the legal process are less likely to understand their own cases, engage the dictates of the law intellectually, accept the legiti- macy of the outcomes, feel remorse, or change as a result of the experience. 7 Defendant silence also has systemic implications for the integrity of the justice process. In our democracy, individual speech has histori- cally been seen as an antidote to governmental overreaching. 8 Crim- inal defendant speech is perhaps the quintessential example of the individual defending his or her life and liberty against the state. 9 Yet silent defendants rarely express themselves directly to the government official deciding their fate, be it judge or prosecutor, and are often punished more harshly when they do. The justice system assumes that conversations between counsel and clients, and counsel's own speech on behalf of clients, fulfill the personal needs of defendants as well as systemic requirements that defendants be "heard." Yet most defense counsel are overworked, appointed counsel with insufficient time to spend communicating with their clients or fully exploring their clients' personal stories. 10 More generally, speech is the constitutionally celebrated vehicle by which defendants have their "day in court," enforce or waive their constitutional rights, tell their stories to the jury, persuade the judge of proper punishment, and communicate with their constitutionally guar- anteed counsel. The fact that defendants speak rarely or not at all means that these democratic speech functions often go unfulfilled. Silenced defendants are also excluded from the larger institu- tional and social discourses that control their fates within the justice system. 1 Since defendants speak for themselves so infrequently, judges, prosecutors, and lawmakers almost never hear from them, and the democratic processes that generate our justice system proceed without those voices. This process failure reinforces the social and psychological gaps between defendants and those who adjudicate them. Above and beyond the discourses that take place within legal institutions, defendants are excluded from broader social narratives that give meaning to systemic precepts such as fairness, deterrence, and punishment. Because they do not speak for themselves in court, and, as "criminals," are disfavored speakers outside the legal process, defendant voices are by and large missing from the criminal justice discourse. Defendant silence thus extends beyond the courtroom. It is part of a larger phenomenon of expressive disempowerment of those dis- advantaged groups who tend to become defendants: racial minorities, the poor, the undereducated or illiterate, juveniles, the unemployed, or people with criminal histories, mental health or substance abuse problems. 12 A now-familiar literature explicates the legal silencing of subordinated groups: poor people, women, people of color, non- English-speakers, juveniles, and others. 13 At the center of this litera- ture lies the recognition that legal structures and norms contribute to such groups being silenced, and that being heard within the legal pro- cess can be an important part of a larger power struggle over social meaning. 14 Criminal defendants belong in this silencing literature. Not only are they silenced by their typical status as impoverished, young, undereducated people of color, 15 but they are additionally silenced by constitutional doctrines, criminal rules, and their attor- neys. Although the plight of criminal defendants as legal speakers has generally evaded this type of analysis16-and the adversarial system creates unique demands discussed below-defendant silencing should nevertheless be understood as part of a larger, well-documented struggle over narrative social power. This Article focuses primarily on the plight of this most disadvan- taged class of defendants. In addition to their socioeconomic and edu- cational disadvantages, these defendants suffer an additional silencing set back: They are represented by public defenders or low-paid attor- neys who lack resources to investigate and litigate each case to its ful- lest, or sometimes at all. 17 Some of this Article's conclusions therefore may not apply with equal force to those represented by well- resourced private or other counsel who have the time to develop a robust communicative relationship with defendants. Wealthy defen- dants also have greater speech opportunities outside the courtroom and therefore their silence within the legal system may not resonate with other silencing experiences in the same ways.18 I thus focus on disadvantaged defendants both because they constitute approximately eighty percent of the defendant population, 19 and because they are most likely to suffer the sorts of socioeconomic and personal handi- caps that make expression and representation difficult. Accordingly, their expressive experiences are both typical and tell us the most about the flaws in the system. Not only does defendant silence raise troubling issues of social exclusion and dignitary harm, but the phenomenon itself largely escapes notice. Defendant self-expression receives practically no legal attention: The most highly developed area of law and scholarship in this regard takes the negative form of a jurisprudence of silence which asks only when defendants may not be forced to speak. 20 But the right to remain silent implicates at best a small subset of expressive issues. It cannot fully account for the expressive experiences and needs of society's most disadvantaged speakers as they are investi- gated, prosecuted, and brought before our nation's official tribunals. This Article is first and foremost a diagnostic project. It describes the phenomenon of defendant silence, identifies its sources in practice and doctrine, and explores its symptoms, including its negative impact on principles of expressive dignity, democratic responsiveness, and social empowerment. This Article is also prescriptive in that it argues that we should attribute more positive value to defendant speech, even as it acknowledges the tension between the normative assertion that defendant speech is valuable, and the reality that criminal defen- dants can be significantly harmed by their own words. The "cure" for defendant silencing therefore cannot lie simply in more speech, or giving defendants further opportunities to incriminate themselves. Because defendant silence is integral to the criminal justice system, any attempt to "turn up the volume" must contend with the system's larger commitment to an adversarial, representative process in which defendants who speak are severely punished and have their stories demeaned. In effect, the phenomenon of defendant silence represents the clash of two sets of values. The first set is instrumental: those values that protect defendants against incriminating evidence in litigation. The second set of values is both personal and social, centering on defendants' expressive, dignitary, and participatory needs. The argu- ment here is not that the latter trumps the former. Rather, it is two- fold. First, this Article argues that notwithstanding the obvious instrumental value of silence, the criminal justice discourse has ignored the latter set of dignitary values, an omission this Article tries to remedy. Second, it argues that any balancing decisions between the two sets of values must take place within the larger conversation about the criminal justice system in which traditional models and assumptions are being challenged and rethought. With the demise of the adversarial model, 2 1 the dominance of plea bargaining, 22 the explosion in the criminal justice population 23 and its prevalence in poor communities of color, and greater attention being paid to the role of the criminal industrial complex within the body politic and the economy, 24 our understanding of our justice system is changing. This Article thus offers a richer description of defendant silence in order to situate it within these broader debates over the true nature of the criminal system. Ultimately, evaluating defendant silence-and making decisions about which procedural protections are appro- priate-must take place within this larger effort to discern the extent to which our massive modern criminal justice system is fair and democratic. Part I describes the twin engines of defendant silence: the prac- tical mechanics of criminal cases, and the rules governing speech and silence. First, this Part describes the pervasive fact of silence in the criminal justice system and how the everyday procedures and prac- tices of litigation consistently ensure that defendants say little or nothing. The Part then discusses at some length the silencing role of counsel and the constraints on the attorney-client conversation. I argue that counsel is best understood as a functionary of the adver- sarial system and its institutional predilection for silence. This system thus limits the ability of individual attorneys to overcome the silencing pressures stemming from their own roles. Part II constructs a jurisprudence of defendant speech as a way of understanding how existing constitutional rights and criminal rules, taken together, define, restrain, and undervalue criminal defendant speech. This jurisprudence is conflicted: It contains robust theoretical commitments to defendant expressive freedom that are constantly subsumed by instrumental demands for defendant silence. Notwith- standing the fact that First Amendment doctrines rarely apply to crim- inal adjudication, this Part also explores the relevance of free speech values and principles to the criminal process. With its attentiveness to the role of speech in democratic governance and institutional integ- rity, free speech scholarship offers new ways to appreciate the value of defendant speech. Part III hypothesizes some of the non-jurisprudential effects and costs of the silencing phenomenon. These include cognitive costs to defendants who do not participate expressively in their own cases, the institutional loss of information about defendant perceptions and experiences that might enable the judicial and political spheres to respond better to those who populate the criminal justice system, the erosion of normative principles of human dignity and participation, and, finally, the near total exclusion of defendants from the national dialogue on criminal justice. The criminal system is undergoing reevaluation on several fronts: the erosion of adversarial ideals, the dominance of plea bargaining, the unprecedented level of incarceration and harshness of punish- ment, and the recognition that crime control is becoming a dominant governance mechanism. The Article concludes that, for this reevalua- tion to be complete, it needs to engage the phenomenon of defendant silence. I THE PERVASIVENESS OF DEFENDANT SILENCE

#### Defendant free speech is key to democracy and dignity

Natapoff 5 [Alexandra Natapoff, Lee S. Kreindler Professor of Law at Harvard Law School, member of the American Law Institute, and Guggenheim Fellow with a BA in philosophy from Yale University and a JD from Stanford Law School, 2005, “Speechless: The Silencing Of Criminal Defendants,” NYU Law Review, https://nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-80-5-Natapoff.pdf]/Kankee

II SILENCE Is GOLDEN: THE JURISPRUDENCE OF DEFENDANT SPEECH Analyzing legal practices and participation as forms of speech has become a fertile scholarly field. 84 The legal system is a creature of language, and participation in that system necessarily takes place through verbal and written speech, rendering all litigants in some essential sense "speakers." Conceptualizing legal actors as speakers highlights the idea that speaking can have value in and of itself-in terms of self-expression, recognition, and participation-above and beyond the content or instrumental effect of the words themselves. This framework also reveals the ways in which "speakerhood" plays an important role in the law. For criminal defendants, this speakerhood framework is espe- cially fertile. Defendants' speech has unique constitutional signifi- cance: They have the right to remain silent, to testify at trial, and to represent themselves. As part of their right to counsel, they also have the right actually to communicate with that lawyer. 85 Defendant speech also has democratic significance: It is the weapon with which defendants protect themselves against the executive branch and sup- plicate the judiciary. Defendant speech thus plays a central role in many foundational aspects of the criminal justice system itself. Although neither criminal procedure nor First Amendment doc- trine expressly conceptualizes criminal defendants as speakers, taken together these doctrines constitute a de facto jurisprudence that cele- brates defendant speech and personal expression in theory, but serves in practice as a powerful engine of silence. Fifth and Sixth Amend- ment doctrines contain significant theoretical commitments to defen- dant expressive choice and dignity, but in operation they inevitably succumb to the instrumental pressure in favor of silence. While First Amendment jurisprudence and scholarship offer little direct protec- tion to defendants, free speech discourse concerns itself with many values and questions centrally implicated by defendant speech, the main one being the question of whether a criminal justice system that never hears from its subjects is democratically legitimate. 6 Reconceptualizing defendants as speakers is not just a way of reorganizing existing doctrine; it offers an alternative to the dominant instrumental model that treats defendant speech, indeed all defendant rights, as valuable primarily insofar as it reduces the likelihood of pun- ishment. 87 The speakerhood model recognizes additional values such as the defendant's personal dignity and choice, democratic participa- tion, expressive freedom, and the ability to be heard-values that are sacrificed when defendants remain silent. The speakerhood model thus permits a more accurate evaluation of the true costs of silence, an evaluation of particular importance in a system in which ninety-five percent of defendants will never go to trial or actually exercise many of their constitutional rights. The speakerhood model also brackets questions of individual guilt or innocence. 88 The question of whether defendants' speech is exculpatory or factually true does not answer the broader question of whether they are worth hearing from. 89 The speakerhood framework thus gives weight to all defendant speech, perhaps especially that of those who plead guilty since they constitute the bulk of the criminal defendant population 90 and also represent that class of defendants least likely to be listened to. A. Defendant Expressive Rights The Fifth Amendment privilege against self-incrimination, often referred to as "the right to remain silent," is a vast doctrinal creature generating volumes of analysis and dispute. It is not my purpose to try to reduce it to a unitary theory. Rather, the contention here is that we can fairly read the privilege as conferring value on defendant expressive freedom. It gives independent, dignitary value both to speech and to the very act of choosing whether or not to speak at all. In particular, it recognizes the central role of speech within the crim- inal case and the defendant's right to shape his legal destiny with his own words. This recognition is reflected in those doctrinal areas pro- tecting a defendant's right to testify at trial, and to proceed without counsel, in which the Fifth and Sixth Amendments together directly protect the defendant's right to speak. In these senses, the "right to remain silent" is a misnomer: The privilege protects, not the right to remain silent, but rather the right to make autonomous expressive decisions about whether or not to speak. 91 1. Miranda: The Suspect as Subjugated Storyteller In establishing the classic contours of the right to remain silent, the Miranda Court was centrally concerned with defendant expressive liberty. The protections of counsel and warnings, explained the Court, "enable the defendant under otherwise compelling circumstances to tell his story without fear .... "92 The evil of interrogation is that it "subjugate[s] the individual to the will of his examiner, '9 3 "is... destructive of human dignity,"'94 and prevents defendant speech that is "truly ... the product of his free choice." 95 The privilege also reflects the proper relationship between the state and individual expression: "[T]he privilege against self-incrimination-the essential mainstay of our adversary system-is founded on a complex of values. All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government ... must accord to the dignity and integrity of its citizens. '96 At bottom the privilege is not about silence but expressive choice: "[T]he privi- lege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.' 97 "Our aim," concluded the Court, "is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. '98 Some scholars have also placed expressive choice at the heart of the privilege. In his historical analysis, William Stuntz described the definitional Fifth Amendment cases of Miranda and Massiah as pro- tecting defendant choice: The privilege protected the defendant's pri- vate information "unless the defendant chose-really chose-to give it up." 99 Christopher Slobogin has likewise described the array of due process, Fifth and Sixth Amendment privileges as reflecting a "deep and universal commitment to voice,"' 10 0 focusing on the notion that the privileges value speech and expression and not merely silence.' 0 ' The testimonial component of the privilege reflects even more specific expressive concerns. It protects a suspect's "communica- tions," even where the information contained in those communica- tions is not itself protected and may be obtained by other means. 102 "It is the extortion of information from the accused,... the attempt to force him 'to disclose the contents of his own mind,' ... involving [the accused's] consciousness . . .and the operations of his mind" that trigger the privilege. 10 3 It is precisely its ability to reveal thought- processes that makes testimonial speech expressive and makes its pro- tection integral to defendants' dignity and autonomy as free, willing speakers. 2. The Defendant's Right to Speak The Constitution also confers upon defendants affirmative rights to speak: the right to testify, to allocute at sentencing, and the right to represent oneself. These expressive privileges flow from a combina- tion of principles: the Fifth Amendment right to remain silent and various aspects of the Sixth Amendment including the right to put on witnesses in defense. The right to testify is perhaps the defendant's most obviously expressive entitlement. The Court has repeatedly affirmed that every defendant has the right to tell his story in his own way. 10 4 The right flows from three constitutional provisions: due process, the Sixth Amendment's Compulsory Process Clause, and the Fifth Amendment right to remain silent. Each of these constitutional components con- tains an expressive element. "[D]ue process of law include[s] a right to be heard" and the defendant's right to "choose between silence and testifying in his own behalf. ' 10 5 The Sixth Amendment's right to call witnesses includes "an accused's right to present his own version of events in his own words." 10 6 Finally, the right to remain silent implies a correlative right to speak. 10 7 Defendants also have the right to speak at sentencing, although this expressive entitlement appears to rest more on the rules of crim- inal procedure than the Constitution. Rule 32 of the Federal Rules of Criminal Procedure provides that the defendant has the right to allocute,10 8 and numerous courts have remanded for resentencing when it appears that defendants were not given the opportunity to speak. 10 9 As a constitutional matter, the Supreme Court has held that the Fifth Amendment applies at sentencing and that therefore a defendant's silence at sentencing cannot be held against him. 110 Like- wise, the Court has implied that, under the Fifth Amendment, a defendant cannot be precluded from allocuting."' Finally, the Court has held that the Sixth Amendment right to assistance of counsel includes the correlative right to self-representa- tion, which the Court has specifically recognized as an expressive enti- tlement to individual voice: "A defendant's right to self- representation plainly encompasses certain specific rights to have his voice heard."' 2 It is a right to a strong, individuated voice: "[T]he right to speak for oneself entails more than the opportunity to add one's voice to a cacophony of others ... a defendant may legitimately be concerned that multiple voices for the defense will confuse the message the defendant wishes to convey .... ,,113 This right to voice, moreover, has an illustrious pedigree. In tracing the history of self- representation, the Court noted the longstanding common law pre- sumption that a fair trial included the defendant's right to "conduct his own cause in his own words. 1" 4 Even after the emergence of the right to counsel, "the accused retained his established right 'to make what statements he liked.""' 5 In these senses, the right to self-repre- sentation is the quintessential, non-instrumental expressive right. The defendant has the right to control both the speech that constitutes his own case and the voice in which it takes place, even to the detriment of his legal success. In sum, the right to remain silent, the right to testify, the right to self-representation, and their rationales add up to a broad expressive commitment. Defendants have the constitutional right to choose whether to speak or to remain silent, and ultimately to control the messages sent by their own criminal defenses. This expressive privi- lege recognizes the inherent value in speakerhood and its intimate connection to personal autonomy, dignity, and democratic par- ticipatory values. B.Doctrinal Silencing

#### Plea bargaining’s unique coercion causes duress to abdicate their speech rights, destroying First Amendment protections.

Natapoff 5 [Alexandra Natapoff, Lee S. Kreindler Professor of Law at Harvard Law School, member of the American Law Institute, and Guggenheim Fellow with a BA in philosophy from Yale University and a JD from Stanford Law School, 2005, “Speechless: The Silencing Of Criminal Defendants,” NYU Law Review, https://nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-80-5-Natapoff.pdf]/Kankee

The historical shift away from expressive concerns also manifests itself in the operation of the privileges themselves. The pivotal point at which the right to remain silent transitions into a silencing mecha- nism is when the right to counsel attaches, after a defendant is for- mally charged. 1 19 At that point, the privilege against self- incrimination shifts from the protection of the defendant's autonomy against government coercion (a scenario in which a defendant might choose to speak) to a strong bias against uncounseled speech. A defendant's invocation of his right to counsel receives more solicitous treatment than his invocation of his right to remain silent. 120 After the right to counsel has attached, even voluntary speech by defendants made without counsel's sanction is inadmissible, if "deliberately elic- ited" by the government. 121 A charged defendant's waiver of the right to remain silent is presumed invalid absent strong evidence that the defendant does not wish counsel to be present. 122 In this scheme, it is counsel, not the defendant's personal right to remain silent, which is treated as protecting defendants most vigorously. Plea doctrine likewise reflects the devaluation of defendant expression by tolerating coerced speech as long as it is counseled. Threats of death, prison, prosecution of family members, promises of leniency, and even cash 123 are all permissible bargaining tools for the prosecution in its effort to induce the defendant to say what the state wishes him to say and to waive his constitutional rights, including the right to speak at trial. In its leading case on the topic, the Court rejected the notion that such inducements are coercive, relying on the presence and advice of counsel to ensure that a defendant's decision to plead guilty is rational and voluntary. 124 In other words, a defen- dant can agree to plead guilty out of fear for his life or his family as long as he has a lawyer, and his decision to do so will be deemed voluntary even if the defendant's subjective feeling is that he has no choice at all. This impoverished notion of voluntariness contrasts with the more robust and nuanced expressive concerns of Miranda and Faretta discussed above.125 Or, as Albert Alschuler put it over twenty years ago, "[t]he practice of plea bargaining is inconsistent with the principle that a decent society should want to hear what an accused person might say in his defense.' 12 6 This jurisprudential shift is part of a larger analytic transition in the criminal process in which representation by counsel becomes a proxy for defendant autonomy. After counsel is appointed, the avail- ability of the privilege no longer turns on Miranda-type concerns: whether the defendant actually feels coerced or free. Instead, the assumption is that as a represented litigant, a defendant's expressive and autonomy needs are fulfilled by having a lawyer present and it is counseled speech, not voluntary speech, which the constitutional rules aim to produce. Counseled speech is actually presumed to be volun- tary and informed, even absent evidence that the defendant in fact understood or was specifically told of all his rights by counsel. 127 The role of defendant speech in the law shifts accordingly: Instead of speech being the vehicle by which a defendant expresses himself, it becomes the thing that the lawyer does for him. The onset of repre- sentation is actually a moment of silencing, all the more so because, as described above, the attorney-client conversation often cannot do the expressive, communicative work assigned it by the Court. 128 1. Erosions of Specific Speech Rights As noted above, the Supreme Court has held that the necessary corollary of the right to remain silent is the right to speak. But the Court's protection of the defendant's right to speak is markedly weaker than its protection of the right to remain silent. A defendant may never even be informed by the court of his right to testify at his own trial: The "silent record rule" holds that a defendant's failure to testify or object to the lack of opportunity will be deemed a waiver of the right. 129 By contrast, Miranda requires that defendants be warned even before they are charged with a crime of their right to remain silent, and the court will inform them on the record of this right.1 30 Similarly, the failure to allow a defendant to allocute at his own sen- tencing is not per se constitutional error,' 3 ' while his right to remain silent at sentencing is constitutionally protected. The Court's treatment of the right to self-representation reflects a similarly weakened commitment to defendant's expressive rights, flowing again from the Court's heavy reliance on defense counsel. Soon after Faretta132 declared the defendant's right to proceed pro se in order to tell his own story, the Court modified its approach to the right to self-representation in McKaskle,133 affirming the court's authority to appoint stand-by counsel and stand-by counsel's authority to speak for the defendant to the court and the jury, notwithstanding the defendant's opposition to counsel's participation. 1 34 The McKaskle Court held that as long as the defendant retained "actual control over the case,"' 135 presenting the essence of the case to the jury the way he wanted, stand-by counsel's speech did not infringe the defendant's right to control his own case. In particular, the Court was concerned about the lower court's ability to use stand-by counsel for its own convenience, to create a mouthpiece for the defendant, against his wishes, who could better address the rules and procedures to ease the process of trial. 136 In that sense, the defendant's expressive rights were trumped by the court's desire to hear the case in a convenient and familiar manner, and stand-by counsel's need to usurp the defen- dant's speech when necessary to do her job. In sum, despite significant expressive underpinnings, defendant's speech rights do not function in practice as expressive entitlements but primarily as silencing ones, limitations on the speech that the gov- ernment can extract rather than an affirmation of the dignitary rights of defendants. The Court has given shorter shrift to the right to speak-making it easy to waive and hard to enforce-than its rhetoric about the importance of speech would seem to predict. This de- emphasis of defendant speech flows from the Court's reliance on counsel: Once represented, the defendant's personal expressive needs disappear, jurisprudentially speaking. The Court's jurisprudence thus contributes to a criminal justice process that devalues defendant speech rights and is in tension with the Court's broader commitments to expressive autonomy and dignity. C. First Amendment Values in the Criminal Context Nearly all the ways that defendants speak in court are heavily regulated and potential ly punishable without raising First Amend- ment claims. The rules of evidence and procedure strictly limit court- room speech. 137 Defendants who speak disrespectfully to the court or address the jury directly may be held in contempt. 138 The government can burden the defendant's right to go to trial and testify by threat- ening him with additional counts and longer sentences. 139 A defen- dant who speaks angrily or without remorse at a sentencing hearing may be put in prison for additional years. Even the rare defendant who openly criticizes the nature of the proceeding-thus engaging in classic political speech-has limited protection.1 40 In any event, polit- ical protest-type "high speech" is not directly implicated by the vast majority of routine expressive activity that occurs in court during testi- mony, plea colloquies, and sentencing.141 The bulk of criminal defen- dant speech thus takes place in ways that do not trigger First Amendment protections at all. Likewise, courts and scholars do not assess defendant speech through the broader political or expressive prism of First Amendment values. 142 This inattention can be seen as a species of what Frederick Schauer calls the "invisible," "camouflaged" boundaries of First Amendment doctrine-the fact that during the criminal process "the First Amendment just does not show up."'1 4 3 More concretely, there is heavy pressure to treat defendant speech instrumentally as part of the criminal process, relevant only to its impact on defendant liability and punishment, and not to external non-adjudicative values. The fact that his "free speech" can cost a defendant years in prison tends to push non-instrumental dignitary concerns about speakerhood into obscurity.1 4 4 This section maintains that defendant speech has non-instru- mental, democratic, expressive value of the sort commonly associated with the First Amendment. This is not a positive law claim about the contours of actual First Amendment doctrine, but rather a more gen- eral exploration of how we value speech and expression in other gov- ernmental and social arenas, and how those values and concerns are triggered when defendants are silenced. Free speech concerns are triggered in the courtroom because that is where defendants directly address the government and the public, where the public and media have the right to hear them, 145 and where the official process of adju- dication takes place. Free speech concerns are also implicated more broadly by defendant silence because the criminal justice system-its value judgments and its place within the political economy-is deprived of the challenges that defendant voices might pose. This latter concern is of particular significance because defendants' silence is exacerbated by their social status: Defendants constitute a signifi- cant segment of poor communities of color 14 6 for whom the criminal justice system is a dominant governmental presence and for whom the lack of speech opportunities represents an additional democratic and dignitary loss. 1. First Amendment Values

#### Legal silencing means that minority communities lose key means of in-system critique and key to ensure government accountability and rights protections

Natapoff 5 [Alexandra Natapoff, Lee S. Kreindler Professor of Law at Harvard Law School, member of the American Law Institute, and Guggenheim Fellow with a BA in philosophy from Yale University and a JD from Stanford Law School, 2005, “Speechless: The Silencing Of Criminal Defendants,” NYU Law Review, https://nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-80-5-Natapoff.pdf]/Kankee

1. First Amendment Values The First Amendment triggers deep inquiries about the value of speech in our constitutional democracy. It has become an umbrella for wide-ranging debates over the meaning of truth and democracy, equality and tolerance, as well as the proper relationship between gov- ernment and individual. The two classic themes discussed below-the marketplace of ideas and the role of free speech in self-governance- illustrate how criminal defendants' speech implicates some of the values typically associated with free speech ideals. 147 a. The Marketplace of Ideas Justice Holmes famously wrote of the First Amendment that "the ultimate good desired is better reached by free trade in ideas-that the best test of truth is the power of the thought to get itself accepted in the competition of the market. ' 148 These words have generally been interpreted to mean that free speech plays an important role in permitting social truths to emerge, and that silencing voices within that "marketplace" impedes rigorous inquiry into truth. 14 9 By exten- sion, when viewpoints are excluded from the public debate, it under- mines confidence in the conclusions. Criminal defendants are excluded from the "marketplace of ideas" that shapes the criminal justice system. Spoken for and about by lawyers, criminologists, legislators, and law enforcement, defen- dants rarely share their own views on the criminal process: Is it fair? Does it deter? Does it seem cruel or lenient? Legitimate or over- bearing? Rational or random? At no point during the criminal pro- cess itself can defendants safely share their thoughts on these matters, and afterwards, in prison or on release, the opportunities to speak are even more scarce. 150 From a market viewpoint, this loss of voice is significant. There is increasing evidence that innocent defendants are not heard in their own cases, resulting in wrongful convictions.15 1 From a more systemic perspective, defendants are experts in the system, with unique exper- iences that could cast light on the central efficiencies and inefficiencies of the criminal process, as well as its various claims to fairness. Indeed, defendants are the subjects of the system itself: Laws and punishments are aimed centrally at their minds and behaviors. If defendants are ignorant of the law and their obligations, it may mean that the system does not convey its message well. 152 If defendants experience the legal process as unfair, overbearing, and unresponsive, it suggests that some of the promises of due process and the Bill of Rights have gone unfulfilled. 153 If defendants feel guilty and remorseful about their criminal behavior, perhaps the criminal law reflects generally shared norms and values. 154 Without hearing from defendants in their own voices, however, it's hard to say whether any of these things are true. For these reasons, a marketplace of ideas that does not include defendant voices is an impoverished one whose out- comes and conclusions are suspect. b. Democratic Self-Governance Another classic theme paints free speech as a prerequisite for participatory democracy and self-governance, necessary to any system that rests on the "consent of the governed." 155 The Court has held variously that democratic self-governance requires "free political dis- cussion to the end that government may be responsive to the will of the people,"1156 that free speech is the "guardian of our democracy,"1 15 7 and that the First Amendment was designed to "ensure that the indi- vidual citizen can effectively participate in and contribute to our republican system of self-government.' ' 158 Scholars have likewise described the First Amendment as intended "to make the public debate sufficiently rich to permit true collective self-determina- tion, ' 159 to preserve responsible and regulated discussion, 160 and as necessary to "best promote democratic deliberation. ' 161 Others adopt a more individualistic and participatory focus, treating free speech as a way of preserving the individual right to participate in and shape the public debate. 162 In each version, free speech's crucial function is to legitimate the political process and thereby its outcomes. Defendant silence engages the question central to these approaches to free speech: whether the democratic debate over the state's power to punish can proceed without hearing from those who are punished. Or, put another way, is our criminal justice apparatus legitimate from a participatory, political responsiveness perspective? The democratic decisional process that creates criminal laws, mandatory minimum sentences, sentencing guidelines, felon disen- franchisement laws, and registration requirements-in other words, all the punishments and burdens imposed on criminal defendants- takes place without hearing from defendants who are in the process of being subjected to those very laws. Once convicted and incarcerated, defendants continue their exclusion from the public debate. Their silence begins in prison, 163 and continues upon release, not least because of felony disenfranchisement laws and defendants' inability to hold public office. Defendants do not even have good proxy speakers: Their actual representatives-their attorneys-are constrained by the exigencies of litigation and sworn to secrecy. Moreover, there are very few interest groups who speak for defendants within the political process. 164 Since First Amendment self-governance theory holds that the political process derives its legitimacy from the opportunity for expressive participation, defendants' lack of parliamentary floor time 165 renders their treatment by the criminal system deeply suspect. This problem becomes more poignant when defendants comprise a large percentage of poor communities of color. What Jonathan Simon refers to as "governing through crime" 166 and David Garland describes more generally as a "culture of control,' 67 points to the fact that the criminal system is a dominant form of governance in poor black neighborhoods. In communities where fifty percent or more of the men are under criminal justice supervision at any given time, where the odds that a black man will be arrested in his lifetime are one in three, and where thirteen percent of the men are disen- franchised, the criminal system is the government. 168 The central fact about this government, of course, is that it is coercive and punitive. However, its failings are exacerbated by the fact that it actively silences its constituents, cutting off traditional avenues for democratic change and practically ensuring official unresponsiveness. c. Subordinated Speakers The silencing of criminal defendants is an example of the phe- nomenon that seemingly neutral principles of free speech can actually silence disempowered speakers. 169 Discourse-the way things are talked about-is an exercise in power. In this case, criminal justice discourse shapes the identity and fate of defendants. 170 Defendants are thus silenced twice, first by the adversarial process, but also by their status as overwhelmingly low income, predominantly minority, undereducated "criminals." Defendants as a class are among those least likely to be heard by judges, legislators, and the public. In other words, they are the least likely to have authentic "free speech" oppor- tunities. Moreover, the "speech" doctrines of criminal procedure are specifically designed to ensure their silence and to empower others to speak for them. The fact that criminal procedure doctrine and scholarship ignore the harm of silencing-even treat it as a favor to defendants-only exacerbates the problem. Or, as Catharine MacKinnon put it elsewhere: Both [First Amendment and Equal Protection law] show virtually total insensitivity to the damage done to social equality by expres- sive means and a substantial lack of recognition that some people get a lot more speech than others. In the absence of these recogni- tions, the power of those who have speech has become more and more exclusive, coercive, and violent as it has become more and more legally protected. Understanding that there is a relationship between these two issues-the less speech you have, the more the speech of those who have it keeps you unequal; the more the speech of the dominant is protected, the more dominant they become and the less the subordinated are heard from-is virtually nonexistent. 171 Defendant silence thus skews the scholarly debate. First Amend- ment discourse does not grapple with the special problems posed by criminal defendant speech, and criminal procedure's jurisprudence of silence is barren of the sorts of concerns and pressures that First Amendment questions exert in other arenas. As a result, we lack even the vocabulary to describe the "free speech" concerns that arise when a defendant feels official pressure to keep silent about his own fate in the face of government prosecution. 172 2. Reevaluating Defendant Speech Ultimately, the problem revealed here is that defendant speech is undervalued, treated narrowly as a Fifth Amendment problem instead of broadly as a First Amendment opportunity. The cure is not to extend First Amendment protection to everything a defendant says. Rather, it is to start valuing defendant speech.' 7 3 This brief discussion suggests new ways to attribute familiar, positive values to defendant speech. Likewise, the previous discussion of the Fifth and Sixth Amendments reveals existing doctrinal foundations that place high importance on defendant expression and choice, the very same "pre- mise of individual dignity and choice upon which our political system rests" and which the First Amendment also protects. 174 These existing tools offer ways both to appreciate defendant speech for its potential democratic and social contributions, and to identify the significant losses that accompany defendant silence. III FURTHER IMPLICATIONS OF DEFENDANT SILENCE To this point, this Article has examined defendant silence prima- rily by reference to existing jurisprudential norms, as a way of high- lighting the costs of defendant silence for which we already have legal labels and frameworks. Widespread defendant silence implicates core concerns of First, Fifth, and Sixth Amendment jurisprudence and scholarship, undermining personal expressive freedom within the legal system, reducing democratic participation, and impeding responsive government. But defendant silence involves additional costs beyond these jurisprudential harms. This Part inquires into these costs, which emerge from a richer inquiry into the role that speech plays in indi- vidual consciousness, legal practices and institutions, and, more broadly, in constituting the discourses that shape the legal system and our understanding of it.

#### Plea bargaining undermines minority speech opportunities to challenge dominant narratives, perpetuating institutional ignorance in law and the public sphere that causes domestic violence, mass incarceration, and racialized criminal justice

Natapoff 5 [Alexandra Natapoff, Lee S. Kreindler Professor of Law at Harvard Law School, member of the American Law Institute, and Guggenheim Fellow with a BA in philosophy from Yale University and a JD from Stanford Law School, 2005, “Speechless: The Silencing Of Criminal Defendants,” NYU Law Review, https://nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-80-5-Natapoff.pdf]/Kankee

3. Perceptions of Legitimacy When the law does not hear or recognize individuals' speech, it undermines the legitimacy of the legal process for those silenced indi- viduals. People who are not heard, who feel unrecognized and unac- knowledged during the legal process, are less likely to accept its outcomes or consider them to be fair. For example, as Bezdek described Baltimore's silent rent-court litigants, their decision not to speak in court reflected in part their belief "that the outcome was pre- determined, i.e., that rent collection through rent court was another set of rules in which others have all the say-so."'1 96 Similarly, William O'Barr and John Conley concluded that liti- gants who are silenced by formal legal procedures experience less per- sonal satisfaction with the legal process than small-claims participants who are permitted to speak in their own voices. 197 Formal constraints led to "frustration and dissatisfaction," and some litigants reported that "they never would have taken their cases to court or agreed to testify if they had realized ahead of time how little opportunity they would have to tell their stories. ' 198 While criminal defendants are in a significantly different posture than civil litigants, presumably they experience similar distrust of a legal process that does not hear their voices.199 By contrast, studies of litigant satisfaction with restorative justice programs suggest higher offender satisfaction with the expressive opportunities in these programs than with those afforded by tradi- tional adversarial court sentencing proceedings. 20 0 The example should not be strained. Restorative justice programs, such as victim- offender mediations in which victims and offenders negotiate a resolu- tion through a mediation process, involve a great deal more than mere defendant/offender speech, and they typically address punishment alone: Liability is usually already determined.2 0 ' Nevertheless, it is worth noting that offenders who participated in the studies were explicitly asked whether they "had an opportunity to tell their story" 20 2 and whether "their opinion was adequately considered. 20 3 For both questions, the restorative justice programs scored signifi- cantly better than the court proceedings. 20 4 None of these examples contradicts the bedrock importance of the right to remain silent in protecting the typical defendant from self- incrimination. In the United States, restorative justice programs are still "embryonic ' 20 5 and complementary to the adversarial process: They typically do not adjudicate contested issues of liability, and are often limited to juvenile offenders. 20 6 The open nature of restorative proceedings, moreover, permits different sorts of inquiries: For obvious reasons we lack data on defendant satisfaction with the ability to withhold inculpatory evidence from the police and the court. But these examples nevertheless indicate that, at the very least, in our system where the vast majority of defendants admit guilt, more atten- tion needs to be paid to defendant perceptions of the legitimacy of the process by which their stories are heard and their punishments determined. B. Systemic Harms 1. Institutional Ignorance If defendants could speak more freely, what might we learn? First, we might learn what defendants know about their obligations under the law and potential punishments. While ignorance is no excuse under the law, we could better determine what deters and what does not, and under what circumstances legal rules function well. Judges and prosecutors would learn about the social circum- stances that breed crime and violence from the perspectives of those who must survive under them. They might also learn some of the rea- sons why people commit crimes in high-crime neighborhoods, why heroin addicts rob banks, or why juveniles steal cars. 20 7 Legislators could better probe the elusive relationships between poverty, dignity, and criminality. The system would also obtain more information about law enforcement and how police behave, in ways that suppres- sion hearings rarely permit because defendants face incrimination if they take the stand. 20 8 Every aspect of criminal justice, in other words, could be evaluated in light of its actual effects on its intended targets. Instead, the adversarial system makes silence the safest, most protective option for a defendant. As a result, the criminal system never gets to know defendants-their voices, identities, motivations, or experiences. The only institutional actors who do-defense counsel-are overworked and sworn to secrecy. If the system was intended to keep society substantially clueless about the people it incarcerates, it could not have been better designed. Defendant silence thus maintains the ignorance of institutional players such as judges and prosecutors who never hear the full story about the individuals before them, or indeed about the functioning of the justice system itself.20 9 There are remarkably few alternative sources of information. For judges, defense counsel are expected to fill in the narrative gaps about their clients, although, as described above, this is a highly artificial, constrained account. Judges are also expected to have some institutional memory about the conditions that affect defendants, but since they rarely hear from a defendant in his own voice, their worldview is necessarily limited. This information deficit often occurs, moreover, in the context of existing judicial bias and hostility. Recent studies indicate pervasive racial and economic discrimination in sentencing, particularly at the federal level, in which unemployed black and Hispanic youth receive heavier sentences than other defendants with similar criminal histo- ries. 210 The ABA Report on indigent counsel similarly documents judicial collusion with prosecutors in which some judges help to ensure that defendants plead guilty, sometimes without appointing counsel at all. 211 For prosecutors, the problem of defendant silence likewise ensures institutional ignorance. Prosecutors are charged with ensuring fairness and balance,2 12 even though they will never obtain full or balanced information about the circumstances that generate the cases they prosecute.2 1 3 Prosecutors are thus deprived of the worldview that might inform their charging decisions and sentencing recommendations, even as those decisions strongly predetermine the ability of the court to make judgments about lenience.2 14 Whether defendant silence leads to harsher charging and sen- tencing decisions is admittedly speculative. After all, the presumption behind the privilege is precisely that defendants will harm themselves by talking freely to prosecutors and judges. On the other hand, the system is already remarkably harsh, 215 and widespread defendant silence means that there is little empathetic or educational impetus for change in the perceptions and predispositions of these institutional decisionmakers. Prosecutors and judges rarely contend with the human voice of the person they punish, learn his story, or hear his perspective. What is true of psychologists and defense counsel is equally true for prosecutors and judges: Learning to hear defendants despite their differences takes education and dialogue.21 6 While there may be good legal reasons for individual defendants to remain silent, in the long run, silence is a recipe for continued institutional hostility. 2. Social and Discursive Exclusion The institutional silencing of defendants ensures that courts, leg- islatures, and the public rarely hear the viewpoints, experiences, and stories of the people at the center of the criminal justice system. Insofar as we understand criminal law as narrative or rhetoric-even as "the central art by which community and culture are established, maintained, and transformed" 2 17-defendants do not directly partici- pate in it, at least not while they are defendants. Defendant silence is thus a species of the more general phenomenon that the law silences the disadvantaged. Not only does silence render defendants invisible, it affirmatively shapes the law in ways that further disadvantage them. As Charles Lawrence put it with respect to African Americans generally, [o]ur stories have, for the most part, not been told or recorded in the literature that is the law .... We remain invisible and unheard in the literature that is the evidentiary database for legal discourse, and when we are seen, in stories told by others, our images are severely distorted by the lenses of fear, bias, and misunderstanding. 218 Feminist scholars have shown the symbiotic relationship between women's silence under the law and the dominance of male-centric legal norms such as the "reasonable man," the devaluation of domestic violence, and the acceptance of pornography. 2 19 Defendant silence likewise reinforces legal norms of punitiveness, hostility, and incomprehension. Beyond the legal arena, the media and political spheres are satu- rated with overblown, racially charged images of criminals and crimi- nality, images which in turn stir up fear and are used to support harsher punitive measures. 220 Silent defendants cannot compete with these voices. Because it eliminates the primary voices that might be raised against harsh practices including long sentences, inhumane prison conditions, and deprivations of rights upon conviction, defen- dant silence helps to validate such practices. The criminal system is not, of course, the only place where defen- dants can speak or be spoken for. Politics, literature, music, and other parts of the public discourse remain. 22 1 For example, Paul Butler argues that more attention should be paid to hip-hop because it has become a vehicle for the voices of men of color who are familiar with the criminal justice system. Says Butler: At the same time that an art form created by African American and Latino men dominates popular culture, African American and Latino men dominate American prisons. Unsurprisingly then, jus- tice-especially criminal justice-has been a preoccupation of the hip-hop nation. The culture contains a strong descriptive and nor- mative analysis of punishment by the people who know it best.222 At the same time, hip-hop may be the exception that proves the rule: Originally shunned by record labels, mainstream media, political discourse, and other conventional speech arenas, the creative denizens of the world dominated by the criminal justice system managed to create a new cultural speech medium in which they could authenti- cally speak and be heard. As Butler recognizes, hip-hop's political power remains weak and should not be treated as a substitute for dis- course in other social arenas.2 2 3 In other words, the existence of the multi-million dollar hip-hop industry, or other limited public outlets for defendant voice, does not excuse or cure the deafening silence that characterizes the justice system and public discourse more generally. The silence of criminal defendants thus demands recognition as a socio-political phenomenon that harms individuals within the criminal justice system and skews public perceptions of criminal justice. The fact that silence is good litigation strategy, and that it has constitu- tional support, does not alter the fact that it is yet another disability imposed on the already overpunished defendant population, as well as a systemic dysfunction that impedes progress within the criminal system. CONCLUSION The picture offered above is one of a fundamentally flawed system. On the one hand, defendant silence is an inevitable by- product of the adversarial system necessary to protect defendants. At the same time, widespread silencing devalues defendant dignity, con- tradicts the expressive impulses within the law, and systemically excludes disadvantaged groups from the criminal justice discourse. As a result, in a democracy that prides itself on its devotion to expressive rights and individual voice, millions of disadvantaged citizens are thrust into the court system, found guilty, and sent off to prison, while uttering nary a word in public. This bodes ill for individual defendants as well as for the democratic vitality of the system. It is also a most suspect species of public policy, for it ensures that the very individuals who have fallen through society's cracks will never be heard. Defendant silencing thus poses a fundamental challenge to the criminal justice system. That challenge is to reconceptualize defen- dants as speakers rather than objects of litigation, to turn them from abstract "juridical subject[s]" 224 into thinking, feeling human beings from whom, as a society, we need to hear. Recognizing defendants as speakers and valuing their speech is a form of empathy, inclusion, and empowerment. 225 It also resonates with fundamental values of our legal system such as the importance of individual speech, personal autonomy, and democratic participation. Reconceptualizing defendant speech in these ways dovetails with the ongoing scholarly debate over the nature and role of the adver- sarial criminal process. Despite its illustrious pedigree, there is an increasing consensus that we have an adversarial system in name only. In reality, the majority of criminal cases are handled administratively, their outcomes are determined by police and prosecutorial discre- tionary decisions, and only a few cases at the margins are actually liti- gated and shaped meaningfully by defense counsel and judges. 22 6 There is also growing recognition that the few cases that make it to rial, thus implicating the full panoply of defendant constitutional rights, play a reduced role in shaping criminal justice norms and prac- tices. Plea bargaining takes place not merely in the "shadow" of trial but subject to its own internal pressures and dynamics that have little to do with constitutional criminal procedure but turn rather on institu- tional pressures on prosecutors and defense counsel.2 27 More globally, increasing attention is being paid to the ways that the criminal system functions as a form of government: criminalizing a wide range of behavior in disadvantaged communities, and repre- senting a model of punitive social control rather than a more coopera- tive form of consensual governance. 22 8 In this vein, Jonathan Simon argues that "advanced industrial societies (particularly the United States) are experiencing not a crisis of crime and punishment but a crisis of governance that has led them to prioritize crime and punish- ment as the preferred contexts for governance. '229 This general description resonates with the contention above-that defendant silence is an anti-democratic phenomenon that reflects a public policy choice to limit the socio-political voices of defendants in exchange for instrumental litigation advantages. By challenging the purely instrumental, case-oriented approach to the "right to remain silent," this Article implicitly questions whether the privilege is justifiable from a personal, dignitary, and democratic perspective. This question cannot be answered without reference to larger unsettled concerns about the demise of the adver- sarial model and the extent to which the criminal system is part of a larger governance crisis. On the other hand, I submit that these larger questions cannot be answered in full without reference to the deaf- ening silence of defendants themselves. Acknowledging the losses experienced by silent defendants, and the social deformations silence creates, is thus a first step toward breaking the silencing itself.

#### Coerced guilt admissions are compelled speech, using the defendant as a means to an end and denying their dignity via public humiliation

HLR 15 [Harvard Law Review, 12-2015, "State v. KH-H", Harvard Law Review, https://harvardlawreview.org/print/vol-129/state-v-kh-h/]/Kankee

The Washington Court of Appeals, Division II, affirmed.20 Writing for the panel, Judge Worswick21 observed that the unchallenged findings of fact were sufficient to support a finding of guilt.22 The trial court found that K.H.-H. touched C.R. without her consent and that the kisses, bites, and gropes were “harmful and offensive contacts” that satisfied the requirements of an assault with sexual motivation.23 The court dismissed K.H.-H.’s “mixed messages” defense,24 whereby he argued that the trial court omitted facts tending to show that C.R. did not verbally protest and “liked [K.H.-H.], felt attracted to him, and had previously . . . h[eld] hands and hugg[ed him].”25 Judge Worswick declared that the evaluation of facts was the province of the factfinder, and that the appellate court would not “reevaluate the persuasiveness of the evidence and the credibility of . . . testimony.”26 Turning to the compelled speech claim, Judge Worswick rested the majority’s analysis on the Ninth Circuit’s reasoning in United States v. Clark.27 The Clark court held that a forced public apology was constitutional if imposed “for permissible purposes, and . . . reasonably related to [those] purposes.”28 Judge Worswick found that the trial judge had ordered a public apology for the permissible purpose of rehabilitation and that the apology was reasonably related to that purpose, as “the juvenile court noted its concern that [K.H.-H.] would again offend based on his pattern of being disrespectful to women.”29 The Washington constitutional defense was unavailing because article I, section 5 had never been used to protect against compelled speech, and K.H.-H. failed to present reasons that the Washington Constitution should be broader than the Federal Constitution.30 Acting Chief Judge Bjorgen dissented in part. While he agreed with the panel that there was enough evidence to support a finding of guilt, he believed that the compelled letter of apology “offend[ed] the First Amendment.”31 He cited the Supreme Court’s rulings in West Virginia State Board of Education v. Barnette32 and Wooley v. Maynard33 for the proposition that “at the least . . . the State may compel speech only if necessary to prevent a grave and imminent danger.”34 He decried the majority’s use of “a presumed rational basis” test, concluding that “[t]he First Amendment requires more from us.”35 Instead, Acting Chief Judge Bjorgen argued that speech could be compelled only if the standards of Barnette were met — that is, if the apology were “necessary to prevent a grave and imminent danger.”36 In this case, he found that “[t]he State’s showing [did] not remotely approach those standards.”37 At first blush, the question at the heart of this case appears inane: A juvenile, convicted of an odious offense, faces no jail time and must merely apologize to begin to put the incident behind him. And yet he claims that his “freedom of speech” means that he need not say that he is sorry. But the principle at stake becomes clearer if the circumstances are changed slightly. Imagine, for example, that a juvenile is convicted of trespassing after refusing to move from a “Whites Only” section of a restaurant and told that he will serve jail time unless he sends a letter to the owner admitting fault and apologizing for the inconvenience.38 The implications manifest as much more dire indeed. Requiring an apology compels the juvenile to make a statement of belief that what he did was wrong and a statement of sentiment that he regrets what he did. Such an extraction should require far more than the good intentions of the sentencing judge. Because a required apology involves making an offender say something he does not want to say, it implicates the Supreme Court’s compelled speech doctrine. This doctrine has generally held that the State cannot force its citizens to speak messages that they do not wish to deliver.39 Its strong, broad interdiction of coercing speech has been watered down by courts in the context of prison and probation, where constitutional rights are weakened. The justifications for reducing First Amendment rights40 in the context of compelled apologies, however, are insufficient to warrant the level of control sought by the government. There is another way to achieve many of the State’s objectives without putting to offenders the direct dilemma of either making an expression against their wishes or going to jail for their silence. A natural place to begin is the Supreme Court’s compelled speech doctrine. The First Amendment’s “freedom of speech”41 has been understood as “necessarily comprising the decision of both what to say and what not to say.”42 Just as the State is not permitted to ban speech because it offends the sentiments of citizens,43 so too the State cannot require speech of citizens in support of its views.44 In the seminal case of Barnette, a group of West Virginia parents and children brought suit against a West Virginia school board resolution requiring students to salute the American flag or face expulsion.45 The Supreme Court, overruling a case decided just three years earlier,46 declared that the First Amendment could not countenance such an obligation: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox . . . or force citizens to confess by word or act their faith therein.”47 The prohibition against compelled speech was further strengthened in Maynard. There, a New Hampshire driver objected to the state’s motto of “Live Free or Die” on religious and political grounds and desired to obscure the phrase on his license plate.48 The Supreme Court enjoined the state from enforcing its laws preventing obstruction of the motto on First Amendment grounds.49 Finding that the state’s requirement that Maynard display its motto rendered his license plate a “‘mobile billboard’ for the State’s ideological message,” the Court described the burden as an obligation “to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable.”50 In broad terms, the Court stated: “[W]here the State’s interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual’s First Amendment right to avoid becoming the courier for such message.”51 Absent any other factors, K.H.-H.’s constitutional case would seem straightforward: the State’s demand of an apology requires nonfactual speech that K.H.-H. does not want to provide and is thus impermissible.52 Apologies include both an indication of the moral propriety of a law,53 and a public admission of fault.54 The State thus intended to use him as a vehicle for its message despite his personal disagreement.55 But the State in KH–H argued that this case was an exception to the general rule because K.H.-H.’s conviction diminished his right to be free from compelled speech.56 And indeed, those convicted and on probation do suffer restricted rights,57 with only a reasonable connection to “goals of probation” required for such restrictions.58 But this limited review for First Amendment rights of probationers makes little sense, and has led to judicial mischief across the country. The justifications for lowered protections for probationers generally have been premised on one of two theories: the idea that probation is a grace granted to offenders or that the offender has waived any objection by accepting probation rather than jail.59 The Supreme Court has rejected the former,60 and the latter implicates the unconstitutional conditions doctrine.61 Contentions that a compelled apology is acceptable because the offender’s age reduces his right to speech are also unavailing.62 Thus, the only justification is the acknowledged reduction of First Amendment rights in the prison and probation contexts.63 But the rationale for equal restrictions for prisoners and probationers in the freedom-of-speech context makes little sense. First Amendment restrictions in a prison system serve different interests than do restrictions on a probationer, who is already interacting in some manner with society.64 Without the broad discretion afforded prison officials for institutional security,65 the only interests whose furtherance would justify a reduction of probationers’ First Amendment rights are protection of the public and rehabilitation.66 Neither is convincing as a motivation for reducing the level of scrutiny for compelled speech. The government’s reliance on the need to protect the public makes some sense with regard to probability of harm. A citizen convicted of breaking the law, upon release to the public, is more likely to commit further crimes,67 and so the State’s suspicion that citizens on probation may break the law again may well be justified.68 But restrictions of free speech rights before they are exercised implicate the menace of prior restraints, a remedy long considered suspect in English and American speech jurisprudence.69 Circuit courts have reasoned, however, that some prior restraints of probationers are permissible for positive free speech rights (such as protest or association) on the rationale that exposure to situations similar to previous violations invites future ones70: the overeager protester may break the law in his zeal, so he is prevented from protesting.71 Yet even supposing that the First Amendment could countenance prior restraints for probationers, making a citizen speak a message not his own has little to do with stopping crimes. At best, it operates as a method of forcing a potential reoffender to reconsider his actions before attempting similar misdeeds in the future. This basis is better placed under the rubric of rehabilitation. The rehabilitation argument boils down to the question of how much personal autonomy the Constitution shields in cases where a citizen has been shown to have broken the law. Many protected demonstrations of First Amendment speech have been curtailed in the name of rehabilitating criminals.72 The State clearly has a compelling interest in preventing future violations of the law and in either convincing law-breakers of the justness of the law or accustoming them to a law-abiding life. In the prison context, the Supreme Court has upheld the severe curtailment of all forms of leisure reading as an incentive to correct behavior.73 In the realm of probation, judges have been known to restrict the right to procreate as a condition.74 These restrictions reflect the fact that probationers “do not enjoy ‘the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions.’”75 It is not clear, however, that the freedom from compelled speech is a “conditional liberty.” It can be distinguished from most other freedoms by the simple fact that it is a protection against a violation of the individual freedom of thought (an even greater violation than silencing76), tantamount to an attempted “inva[sion of] the sphere of intellect and spirit.”77 The danger must be “grave” indeed to warrant such forced professions.78 But the benefits of compelled apologies are more focused on punitive rather than rehabilitative purposes. A court-compelled apology is unlikely to effect true contrition or remorse; one commentator describes it as “a drop in the ocean of a convict’s socialization.”79 Rather than truly rehabilitate, forced speech is more likely at best to humiliate. Immanuel Kant described the purpose of forced apologies as retributive: “[T]he humiliation of the pride of such an offender . . . will compensate for the offense as like for like.”80 It is unclear how beneficial such humiliation will be in convincing offenders that a law is just and should be followed, but several scholars are skeptical.81 There is another way to achieve the rehabilitative objective sought by the State. If the government wishes to reward those who voluntarily express contrition before sentencing, it may do so.82 Indeed, rewarding voluntary contrition makes more sense, as it more closely aligns with the rehabilitation justification. Insincere apologies have been described as “worthless,”83 and serve mainly as an opportunity to humiliate the offender. True apologies help the offender, the victim, and society in general. At the same time, requiring a “sincere” apology from an offender84 forces him to either lie to the State and sell the apology or undergo an emotional transformation that changes his belief on the subject. Both are deeply problematic intrusions on the individual’s autonomy and run counter to the theory of the First Amendment. With regard to the latter, the “marketplace of ideas” relies on the conflict of beliefs in the hope that the truth will out.85 By adding false professions of belief, the State is artificially altering the market in an attempt to make its product more popular. But courts have already rejected this strategy.86 In KH–H, the Washington Court of Appeals was afforded a rare chance to address this problem. Given the short sentence duration and the coercive nature of the choice offered to offenders, most take the deal. An appellate court, removed from the conflict presented to a lower court,87 is likely the surest medium for removing this First Amendment violation. And there was no need to defer to the federal courts’ deficient reasoning in this realm.88 In nonetheless accepting the prosecution’s justification of “rehabilitation,” the court permitted the continuance of an egregious wrong in sentencing practices. The implication of the extent of the “rehabilitation” justification is that courts can demand that civil disobedients recant and jail them for their defiance. The particularly severe consequences at play when the State wishes to compel a citizen to speak against his will and confess a belief in something with which he disagrees strongly militate against adopting a test of mere reasonable relationship to “rehabilitation,” with enormous deference on what constitutes rehabilitation. Rather, a higher level of scrutiny should serve to determine whether the government’s interest is truly compelling enough. In most cases, it will fail. The behavior of which K.H.-H. was convicted was repugnant. And if the concern that K.H.-H. would continue to be disrespectful to women is well founded, Washington is right to denounce such a knavish attitude. But to convince him to announce the validity of its position, Washington must use persuasion, not coercion, notwithstanding his due conviction. As much as we might like to encourage contrition, when it comes to a choice between jail and a compelled apology, the First Amendment means never having to say you’re sorry.

#### Legalistic legitimizing of lies is immoral – the law ought to prioritize truth and not encourage deception

Cox 22 [Courtney M. Cox, Associate Professor of Law at the Fordham University School of Law with a D.Phil. from Oxford and a J.D. from the University of Chicago Law School, 2022, “Legitimizing Lies,” Fordham Law School Archive of Scholarship and History, https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2264&context=faculty\_scholarship]/Kankee

INTRODUCTION Lies are everywhere today. Their pervasiveness has amplified traditional debates about how the law can and should respond to lies. Within these debates, it is received, if contested, wisdom that the law and commonsense morality disfavor lying, with permissible lies form- ing an uneasily tolerated exception. 2 The doom scroll of lie-induced harms seems to reinforce this wisdom, underscoring the importance of ideals about truth. 3 But this largely unexamined reflex carries with it a danger: we risk blinding ourselves to the depth and breadth of the law’s response to lying and the complexity of justice’s commitment to truth. Legal scholars have long focused on law either penalizing or per- mitting lies, but the law takes other approaches to deception as well. In this Article, I show that the law also accepts lies in express satisfac- tion of legal requirements and likely requires lying in increasingly common situations. 4 This phenomenon often passes without notice. Courts are discreet and may not call these acts lies. 5 But a lie by any other name is two. And in accepting these acts (and mislabeling them), the law legitimizes lies. Using trade secrets as a case study, I show how law legitimizes lying. Trade secret law provides a remedy for theft of a company’s confidential information—but only if a company has taken “reasona- ble precautions” to keep the information secret. 6 Enter the lie: decoys, mislabeled scripts, phishing simulations, honeypots, obfuscation, mis- information, the $1.5 billion industry in “deception technology,” to name a few, are all deceptive precautions that straightforwardly sat- isfy this reasonable precaution requirement. 7 What is more, if decep- tion is really the “next big thing” in information security—as trade publications and even the Wall Street Journal recently declared8 —then trade secret law will increasingly require such precautions as “reason- able precautions.”9 Other areas of law similarly focused on avoiding harm, such as negligence, may follow. All of these precautions are deceptive practices, and many unde- niably involve lies. 10 They present falsehoods as true, in contexts where the audience is invited to rely on the representation made. 11 This fits squarely within current philosophical analyses of lying. 12 But these analyses have yet to gain recognition within the legal literature. Some scholarship—particularly commentary aimed at justifying stronger anti-lie prohibitions—focuses on a very narrow concept that excludes much of what the law counts as lies. 13 Other scholars include within the concept of a lie not merely the description of the action, but also the value judgment that lying is wrong—which then makes it very difficult to talk about what exactly is wrong (or not) with lying. 14 An important contribution of this Article is to bring recent philosophical work on lying to bear on the legal debate moving forward. 15 In addition to denying that common deceptive precautions are lies, there are other ways of resisting my claim that trade secret law legitimizes lying and exploring them proves fruitful. “Reasonable pre- cautions” sets a floor, but not a ceiling, on the precautions that may be taken to protect a trade secret. 16 Equity, criminal law, torts, and other doctrines and substantive laws not considered may provide such limits and create legal risk. Such limits are not categorical, but they are com- plicated.17 Far from undermining the analysis, such limitations raise further questions: if I am right, lawyers specializing in deceptive prac- tices—deception specialists—will be needed, 18 raising interesting ten- sions with the ethical rules that seem to preclude encouraging clients to lie.19 This is not a niche curiosity. Trade secret law protects key infor- mation assets: data and algorithms. 20 Meanwhile, digitization and re- mote work are eroding the effectiveness of facilities-based precautions, trends accelerated by the pandemic. 21 But corporate secrets are not the only thing at stake: that data includes personal data and those algorithms can be manipulated. 22 Trade secret decisions about “reasonable precautions” are harbingers of what is to come in other areas of the law, like negligence. What are we to make, then, of the phenomenon of the law legiti- mizing lies? And particularly, what the phenomenon entails about the relationship between law and truth? Some scholars and many practitioners believe that a corollary of the law’s commitment to truth is a general disfavor or prohibition on lies and deception, as lies and deception are often thought to under- mine truth. 23 This corollary is somewhat controversial 24 and perhaps unlawful,25 but it (or at least its normative version) is experiencing a renaissance. 26 It comes down to defaults: Is the law’s default setting to disfavor lies and make exceptions by permitting certain ones? Or is the law generally neutral, despite its supposed commitment to truth, picking out certain lies and deceptions to police? Which is true as a descriptive matter, and which should be true as a normative one? The trade secret case study presented here constitutes strong evi- dence that the neutral view provides the better descriptive picture, and that the neutral view may be more consistent with the commit- ment to truth than the anti-lie corollary. The case study also makes defending the corollary harder because ordinary morality cannot ground a legal objection to the law’s legitimizing lies. The moral status of the lies at issue are contested (as a descriptive, not normative, mat- ter), dooming any “Argument from Morality” that the law cannot work this way. 27 Challenging the Argument from Morality confirms the breadth of the claim—that law legitimizes lies—while providing a framework for further work. Trade secret law provides a natural starting point be- cause a common exception to the rule against lying is for protective lies—lies that protect persons or property by keeping a secret. 28 But interestingly, the exception for protective lies is not what defeats the Argument from Morality. And so my analysis’s implications extend beyond trade secrets and protective lies, to areas ranging from privacy to procedure to professional responsibility—to name only a few. Map- ping this ethical terrain provides a framework for further work in these other areas of law. These two strikes against the anti-lie corollary come at a time when rampant misinformation threatens the primary argument against the anti-lie corollary—that the best remedy for false speech is more speech. 29 But my case against the Argument from Morality is a de- scriptive one, about what ordinary morality holds and whether it can affect the law. We may still have normative concerns about whether, despite what ordinary morality suggests, the law should legitimize ly- ing in this manner. 30 I do not minimize these concerns, and I believe that those who do err. But the law has a solution: it can lie. Unlike others, I entertain the possibility that the law’s deception on this score is a feature, not a bug.31 And so I do not believe that the ultimate question—whether law should legitimize lying—is the next or even most important ques- tion to ask. The next questions instead concern how to lie as legally and ethi- cally as possible, if possible. The case study illustrates that lying is not special. It is like other dual-use technologies—tools that can be used either responsibly or illicitly, for good ends or bad. 32 The important question for lying, as with all dual-use technologies, is how it is used and whether such uses can be managed. Only then can we answer the ultimate question of whether and when the law should legitimize lies, and whether it should do so openly. This Article thus represents a sharp break, on multiple dimen- sions, from trends in the growing body of literature on the law of lies and deception. That literature generally focuses on whether and how the law can (or should) penalize lying, or else permit it. 33 These ques- tions have always been relevant in diverse areas from commercial law to procedural issues to criminal prosecution. 34 And these questions are of increasing importance and urgency as the problems of misinforma- tion and fake news loom paramount. 35 But, as I argue here, there is another way to think about them, and it does not begin by assuming (or trying to justify the view) that lying is bad. The Article proceeds as follows. Part I canvasses the literature’s traditional framing of the law’s response to lying, and then offers con- ceptual clarity about what a lie is, correcting common errors in the literature. Armed with this background, Part II turns to the Article’s central case study: trade secrets. Part II shows how this increasingly important body of law accepts lies as a legitimate option for fulfilling its reasonable precaution requirement, and how it might require lying under increasingly common circumstances. Part III turns to various strategies for resisting this account, including the Argument from Mo- rality and the objection that these are not really lies, among others. Finally, Part IV builds from the case study in Part II and the analysis of Part III to explain the normative and ethical implications moving forward. Developing a positive, pragmatic theory of lies and deception in the law is growing increasingly urgent. Recent events and the scourge of online misinformation demonstrate, palpably, lying’s dangers and the difficulty of controlling deceptions. 36 Meanwhile, lying is fast be- coming one of the best—and possibly only—ways to defend against cyberthreats37 and to preserve autonomy in the shadow of mass sur- veillance. 38 This Article does not answer all of the questions these di- lemmas raise, but it takes a critical step by showing the full breadth of what constitutes lying and exploring the breadth and depth of the law’s response. I. ON THE SUPPOSED PROHIBITION AGAINST LYING There is much disagreement about lying, but most agree that ly- ing is generally wrong even if most (regrettably) lie. The traditional legal debates over the relationship between the law and lying focus on the scope of that prohibition, and so on issues of punishment, toler- ance, and justification. There is also much disagreement about what lying is, though it often goes unstated. As a result, the legal literature has often missed developments in the philosophical literature that clarify the concept of lying in important ways. To appreciate how the law’s response to lying is both broader and deeper than typically assumed, we need to appreciate the focus of the existing debate about the law’s response, and we need to get clear about what lying is—what actions, specifically, are we concerned with? In Section I.A, I describe the traditional debates. In Section I.B, I discuss the definition of lying and how it compares to deception. A. The Law of Lying There is general agreement within both ordinary and philosophi- cal morality that lying is wrong, at least in a majority of central cases. 39 But there is much less agreement about why, and the circumstances where lying is permitted (if any). Some situate the wrong of lying within a generally consequential- ist (or utilitarian) framework, 40 focusing on the bad consequences that result.41 These views are generally more permissive of lying because the wrong of a lie is contingent on the harm that might result. 42 Other theorists follow a nonconsequentialist approach, arguing, for example, that the wrong of a lie is that it is an affront to human autonomy, agency, or dignity. 43 These views are generally less permis- sive, though some define “lie” more narrowly so as to not count per- missible lies as lies.44 Immanuel Kant is probably the most famous for this approach, and many take his view to be that lying is wrong be- cause it uses another person—and, specifically, her reason—as mere means. 45 Still others have attempted to reconcile these two approaches. 46 In addition, there is a sense in which all lying is necessarily an affront to the truth, because it breaks many of the linguistic rules that make conversation possible. 47 Common to all these accounts is a general anti-lying attitude, and any plausible account of lying will need to ac- count for this discomfort with lying or else explain why such discom- fort is misplaced. Legal debates concerning lying generally fall into these same par- adigms. Some, like Saul Levmore and Richard Posner, have advanced a cost-benefit view of the law’s decision to penalize or permit lying, both as a general matter 48 and in specific contexts like contracts, 49 marketing, 50 and undercover reporting.51 As with the philosophical de- bates, this broadly consequentialist approach is more permissive of ly- ing than alternatives—and occasionally skeptical of a categorical prohibition. By contrast, others, like Aditi Bagchi, have offered non- consequentialist accounts which draw narrow exceptions to the prohi- bition, often limited to cases where lying serves as a defense against wrongdoing or is justified by background injustice. 52 Still others walk the line between these approaches, seeking to articulate a more uni- fied description of the varied moral norms animating the law’s deci- sion to penalize (or permit) lying and deception in given cases. 53 More so than the philosophical debate, the legal debate tends to address specific contexts in which lying and deception occur, rather than as a unified theory across different substantive areas. 54 This is perhaps not surprising, given the looming specter of the First Amend- ment and how its application varies with context. 55 The most compre- hensive treatment to date is that of Seana Shiffrin, who advances a “qualified [moral] absolutism about lying” in the nonconsequentialist tradition and argues for stronger legal regulation of lying than tradi- tionally thought possible or prudent. 56 Whatever the strengths or implications of these varying views, common to all of them is a generally prohibitive outlook that focuses on the line between lies that are prohibited (and so penalized) versus those that are permitted (and so not penalized). This is, perhaps, not surprising. The law is customarily viewed as embodying, or at least aspiring to, a commitment to truth. 57 Misrepresentations are barred by the rules of professional conduct and can provide the basis for civil liability; 58 criminal offenses involving fraud are the “most frequently charged” and “most widely and variously codified.” 59 Even where the law might be said to “welcome[] deception,” as with police interroga- tion tactics and other prosecutorial deception, it is often “not officially sanctioned” but condoned through “indifference” 60 —and perhaps un- easily so. And those lies that escape penalty are typically recast or reframed as something else, like “mere puffery.” 61 In other words, permissive lies are generally treated as the exception rather than the rule, some as true exceptions (i.e., justified), some by definitional ex- clusion, and some escaping penalty because of the law’s limitations (especially First Amendment limitations). 62 Recent events suggest this seeming default is not without reason. Theranos, a startup with a purportedly “cutting-edge blood-testing system,” catapulted to unicorn status—a startup valued at over $1 bil- lion—by misrepresenting a key fact about its proprietary blood-testing technology; namely, that the technology did not exist. 63 Worse still, Theranos defended its deceptive practices by crying “trade secrets.” 64 John Carreyrou’s chronicle of Theranos’s rise and fall reads like a case study of the numerous ways in which lies and deception cause harm: 65 There are the obvious direct and indirect harms from false beliefs in the reliability of Theranos’ technology, not only to investors and busi- ness partners, but also, more devastatingly, to patients. 66 There is the blatant use of others as mere means. And there is the undermining of trust among employees. Carreyrou even suggests that the Theranos scandal arose from a culture that rewarded deceptions: though taken to extremes, Theranos followed Silicon Valley’s “vaporware” playbook—the practice of securing investments for “already” devel- oped software and hardware innovations that would “take years to materialize, if . . . at all.” 67 When one adds the pervasive and detrimental effects of fake news and misinformation on social media, from politicians, and within the news itself—and the new dangers presented by sophisticated deep fake technologies that enable every ill from involuntary porn to so- phisticated forgeries—it is easy to fear the sky is falling. 68 Not surpris- ingly, much recent work argues for stronger prohibitions on lying. 69 But all this attention to the line between penalizing and permit- ting, between wrong lies and exceptions, overlooks the breadth and depth of the law’s potential responses. We will return to that question in Part II after getting some conceptual clarity about what a lie is. B. What Is a Lie?

#### Plea bargains encourage lying. Trials are premised on truth

Johnson 22 [Thea Johnson, associate professor of law at Rutgers Law School, 6-1-2022, Lying at Plea Bargaining,” Georgia State University Law Review, https://readingroom.law.gsu.edu/cgi/viewcontent.cgi?article=3139&context=gsulr]/Kankee

But each of these lies also achieved something important for the defendant and the other stakeholders in the plea process. They allowed the parties to resolve the cases in a way that led them to some rough form of justice—a justice that would not be available if the case had been resolved with a plea that did not rely on a lie. The process therefore allowed the parties to sidestep the law without changing the law. Indeed, this is what plea bargaining achieves every day in courtrooms across the country. It provides a mechanism to negotiate around—often unfair—laws. At the same time, it helps keep those laws intact by diverting problems with their impact into the realm of plea bargaining rather than law reform. This Article explores lying at plea bargaining to tell a story about plea bargaining more broadly. Indeed, the lies described here are plea bargaining, not a secretive adjunct to the process. But the focus on lying centers our attention on the paradox at the heart of plea bargaining: pleas help resolve injustice, while making sure the laws that create such injustice remain unchanged. And the lies that the parties tell at plea bargaining serve as the most powerful case study for this paradox. To demonstrate this paradox, this Article does two things. First, it identifies a taxonomy of lies one sees at plea bargaining. These lies fall into three broad categories: lies about facts, lies about law, and lies about process. Depending on one’s perspective, the criminal justice system produces a litany of injustices.4 Implicitly authorized, systemic lying 5 offers a means of dealing with these perceived injustices, and as the taxonomy below demonstrates, lying assists stakeholders in avoiding the results of unfair laws or inequitable outcomes. In many cases, the stakeholders in charge of producing those inequitable outcomes simply work around the system through often invisible lies. Thus, untruthful plea bargains allow defendants to avoid sex offender registration, deportation, severe prison sentences, or fines. In some cases, untruthful pleas have even allowed innocent defendants to avoid the death penalty.6 Second, this Article explores the paradox that these lies reveal and what they tell us about the prospects of meaningful criminal justice reform. For many defendants, lying offers the only way to escape injustice in their individual cases. Yet such lying makes it impossible to fundamentally improve the broader criminal system, which would make the lies unnecessary in the first place. Or put another way, lawyers have created strategies to resolve cases fairly in an unfair system, and these strategies exist because the modern plea process is simultaneously very flexible and not transparent. These strategies obscure how the system would function if it worked as designed, making it difficult or even impossible to transform the unfair laws and policies that lawyers and judges find themselves scrambling to work around. The taxonomy then leads to a critical finding for criminal justice reformers, local and federal legislators, and a public with a renewed interest in the criminal system. In any given jurisdiction, the scope and size of the current criminal system is profound, characterized by thousands of criminal statutes, numerous sentencing schemes, and a bewildering array of collateral consequences. Although, in theory, these “inputs” should produce a defined set of potential “outputs” (in other words, the charges, sentences, and other penalties that an individual defendant faces), they do not. Instead, as seen in the examples at the start of this Article, the parties involved stretch and bend each individual case until they reach a desired resolution. This flexibility without boundaries is made possible by the lack of transparency at plea bargaining. Both those working inside the criminal system and those peering in have no real understanding of how this morass of laws would work if plea bargaining did not serve as a safety valve for many of its worst features. That said, although efforts to make the system more transparent (and, by extension, less flexible) would result in fewer lies and a better understanding of the system, these efforts would also do tremendous harm to individual defendants. If we imagine lying at plea bargaining disappearing tomorrow, defendants throughout the criminal system would lose their primary means of circumventing the injustices of the system. They would feel real, immediate harm. Hence, the paradox also presents a reformer’s dilemma that pits transparency and truth against flexibility and individualized notions of justice. Lying at plea bargaining continues because it allows defendants the opportunity to negotiate fair resolutions to their cases in the face of an unfair system, even as that lying makes way for—and sustains—the unfair laws it seeks to avoid. In an entrenched system, should a reformer who cares about justice embrace transparency or keep the system functioning as is? This dilemma reflects real debates among lawyers and policymakers, both seeking a path towards fairer outcomes. As this Article demonstrates, the dichotomy between saving the system or the individuals who are processed through that system often ignores broader visions of transformation that do not fit neatly into either category. The Movement for Black Lives and abolitionist movements present at least one such reimagining, which highlight how reform around the edges does not address the systemic injustice at the core of our criminal system. Indeed, we must recognize that the lies in the taxonomy described here are workarounds for a system so barbaric that lawyers are willing to lie to help defendants avoid the worst of it. Such a system will not be fixed through more transparency or more flexibility for the stakeholders. Rather, the paradox presented here calls for a reconceptualization of the system as a whole. Part I of this Article explores the ways in which trials—the natural comparison point for pleas—constrain and discourage outright lying. It then identifies the characteristics of the plea process that make lying both possible and probable. Part II details the taxonomy of plea bargaining lies, which include lies about facts, lies about law, and lies about process. Finally, Part III explores how this taxonomy of lies demonstrates the paradox of plea bargaining, namely that the strategies lawyers have come up with to avoid the injustices of the system are the same strategies that make the system unknowable to those outside of it, thus allowing the core injustice of the criminal system to survive. Part III then offers some solutions to improve the current model but makes clear that such solutions will not disentangle the laws, sentencing schemes, and mandatory collateral consequences that encourage lying in the first place. I. TRIALS, PLEAS, AND LIES In 1966, the Supreme Court declared that “[t]he basic purpose of a trial is the determination of truth . . . .”7 This purported goal of the criminal system makes sense. A system that seeks truth will likely produce just results. Truth does not guarantee justice but “is an essential precondition for it. Public legitimacy, as much as justice, demands accuracy in verdicts.”8 Even though trials are largely vanishing from the criminal system,9 scholars and courts have examined plea bargaining and its relationship to trials because the comparison remains useful. There is a large body of constitutional and procedural law that has developed around trials with the goal of making trial outcomes fairer and more accurate. The outcomes produced by plea bargaining have received much less attention from courts. Thus, scholars and courts ask: what trial rights should extend to a defendant at plea bargaining? Is plea bargaining done in the shadow of the trial? What is the goal of plea bargaining beyond trial avoidance? And most importantly, should plea bargaining’s basic purpose be the determination of truth? Truth-seeking is a foundational goal of the trial, even though, as a practical matter, the truth may not always emerge. There are many ways in which the legal system messages that trials are truth-seeking endeavors. For instance, truth appears as a core principle of the adversarial system throughout opinions by the Supreme Court and lower courts;10 the overarching logic of the rules of evidence places truth as a central value;11 and studies on public perceptions note that trials are understood to be spaces where truth emerges.12 As such, explicit lies are generally prohibited at trials, and there are many ways in which trials require the truth. Witnesses must testify under oath13 and can be punished with a perjury charge if they fail to tell the truth.14 In theory, evidence rules exclude unreliable evidence and highlight reliable evidence.15 A series of ethical rules also require candor by the parties before the tribunal.16 Finally, cross-examination is intended to be an “engine” for truth-seeking, allowing adverse parties to root out dishonesty or other flaws in witness testimony.17 Thus, trials are the means by which we discover what really happened in a criminal case, even though truth is not always prioritized at trial or may not be absolutely knowable.18 But plea bargaining as a practice does not share the deep roots of trials. Plea bargaining only became commonplace in the 1920s19 and did not receive a stamp of approval from the Supreme Court until 1970.20 Plea bargaining became popular in the early twentieth century for two reasons: first, because it allowed judges and lawyers to hide their own corrupt practices—namely, using bribes to grant defendants a beneficial plea deal—and second, because the normalized use of pleas allowed courts an efficient means of dealing with the burdens of a rapidly expanding criminal system.21 The history of plea bargaining demonstrates that pleas were always open to manipulation and corruption.22 As a result, early courts were suspicious of plea bargaining. A modern view of plea bargaining shows that as a matter of law and practice, those fears were well-founded; it is much easier to lie during a guilty plea than to lie at trial. This is because the plea process, unlike the trial, is both a flexible instrument for resolving cases and often hidden from public view. As Jenia I. Turner wrote in her review of the many problems produced by plea bargaining’s lack of transparency, “[t]he opacity of plea bargaining stands in marked contrast to the constitutional commitment to public criminal proceedings, enshrined in the Sixth Amendment right to a public trial and the First Amendment right of public access to the courts.”23 Constitutionally, plea bargains have few formal requirements. The primary requirement, with some exceptions,24 is that the defendant accepts guilt.25 Plea bargains involve the waiver of several rights, such as the right to a trial or the right to confront one’s accusers.26 Like other constitutional waivers, the defendant can only give up such rights if the plea is made “voluntarily, knowingly and intelligently.”27 One basic premise of a guilty plea is that to secure the bargain of a plea, the defendant relinquishes, among other rights, his trial and appeal rights.28 This practice has, of course, resulted in fewer appeals on issues involving plea bargains and further hid the realities of the plea system. But the Supreme Court jurisprudence on this issue only tells a sliver of the story. Plea bargaining is a local creature. As Andrew Manuel Crespo explains, plea bargaining is controlled not only by substantive and constitutional criminal law but also by the “subconstitutional procedural law of the states—an interlocking set of legal frameworks that comprises the law of joinder and severance, the law of preclusion, the law of cumulative sentencing, the law of pretrial charge review, the law of dismissal and amendment, and the law of lesser offenses.”29 Although these interlocking legal frameworks constrain prosecutors to some extent, they also make plea bargains more difficult to understand and regulate in any sort of generalized way. Beyond the law, the local practice of judges and attorneys also control plea bargaining. Within the same courthouse, one judge may agree to accept Alford pleas,30 while another may not. Some judges insist on a full memorialized record for every plea, whereas others merely accept the agreements of the parties.31 As one judge in Ohio put it, there are “disparate judicial philosophies that exist and operate among the hundreds of state court judges regarding the judge’s role in the plea negotiation process[,] . . . [and] each individual judge has his or her own approach [to the plea process] . . . .”32 The formal and informal polices of a prosecutor’s office also play a critical role in regulating plea bargains, and those policies are difficult to pin down with any sort of specificity. Although some prosecutors have recently prioritized publishing their office policies,33 many formal policies remain secret, available only to the attorneys in the office.34 In addition, unwritten policies may exist in a particular office. Rachael Rollins, the former District Attorney for Suffolk County in Massachusetts, noted that her open policy of not charging certain types of crimes explicitly adopted the unspoken policies of her predecessors.35 The fact that she publicized a previously secret policy makes clear how difficult it is to understand the local level regulation of plea and charge bargaining. Even more narrowly, individual prosecutors—despite office-wide policies—may have their own sense of justice in any individual case and therefore their own internal rules for plea bargaining.36 This combination of lax constitutional norms and wide-ranging procedural rules, along with a nearly endless number of formal and informal polices governing any particular jurisdiction, means that plea bargaining is, at best, loosely regulated. Plea bargaining has, in fact, become much more like a system of civil settlement with the parties negotiating along multiple paths.37 Although there is evidence that lawyers in specific jurisdictions often ascribe a “set price” to certain charges that provide the parties some guidance on the likely sentence offer in a case,38 it remains difficult to say how a specific set of charges and a defendant’s particular background will calculate at plea bargaining. In this environment, lying can flourish. II. A TAXONOMY OF LYING

#### Plea bargains are intrinsically lies – backpedaling is perjury

Johnson 22 [Thea Johnson, associate professor of law at Rutgers Law School, 6-1-2022, Lying at Plea Bargaining,” Georgia State University Law Review, https://readingroom.law.gsu.edu/cgi/viewcontent.cgi?article=3139&context=gsulr]/Kankee

C. Lies About Process Finally, this taxonomy identifies lies about process. Lies about process are critical to the functioning of the criminal system; they are the grease that keep the wheels turning. Indeed, as I describe below, these lies about process facilitate the formal acceptance of the guilty plea, while shielding from view the realities of how and why defendants decide to plead guilty. They give the process legitimacy while maintaining the lack of transparency that is a key characteristic of the plea process. 1. The Plea Colloquy Once a defendant is ready to plead guilty, they must enter a plea on the record and engage in a plea colloquy with the judge.110 That colloquy is necessary because the judge has the duty to establish that the defendant is waiving their rights knowingly and voluntarily.111 The judge does this by asking a series of questions about the defendant’s decision to plead guilty and their knowledge of their rights.112 But to meet the constitutional standard, defendants often lie during these colloquies. These lies are done with the knowledge and approval of the other actors in the courtroom, including the judge, prosecutor, and defense attorney. In fact, such lies are encouraged so that pleas can be recorded quickly and in accordance with statutory and constitutional mandates. But defendants, despite what they say on the record, often do not enter plea bargains knowingly or voluntarily. For instance, to plead guilty “knowingly,” the Supreme Court has held that defendants should be advised by competent counsel and made aware of the nature of the charges against them.113 But defendants frequently plead guilty early in the case, often at their first appearance, before they have had a chance to review discovery or consult with counsel.114 Further, millions of misdemeanor defendants across the country plead guilty without any counsel at all.115 To get the benefit of the plea, those defendants are required to affirm that they understand a panoply of rights that they are giving up116 without having a single conversation with a lawyer. Even defendants with a lawyer often do not understand the collateral consequences of pleading guilty or sometimes even the direct consequences. Yet the guilty plea hinges on the lie—told every day in courts across the country—that the defendant understands the nature and consequences of the charges. The same issues come up with establishing the voluntariness of the plea. A voluntary plea is one in which the defendant’s plea is not “induced by threats” and improper promises.117 The plea colloquy in every jurisdiction requires the court to ask the defendant on the record if they were promised anything in exchange for pleading guilty to assess whether such threats or improper promises are the heart of the agreement.118 The “right” answer to that question is “no” because such promises might undermine the “voluntariness” of the plea. Instead, courts maintain the fiction that defendants only plead guilty in exchange for the promised sentence and charge laid out on the record.119 But, of course, defendants are promised all sorts of things, formally and informally, to induce their guilty pleas. These promises cannot, however, be acknowledged on the record if the plea is to stand constitutional muster. For instance, the Ninth Circuit held that a defendant’s guilty plea was not involuntary when the government promised to drop charges against his son in exchange for his guilty plea.120 But had the defendant claimed that he was pleading guilty only to protect his son as he later did on appeal,121 the trial court would have likely rejected his plea, even though the government held out his son’s prosecution as its main inducement for him to take the plea. Acknowledging that he was pleading to save his son would not have been the “correct” answer, even though it was the truthful answer. In the same vein, a defendant generally cannot admit that they are pleading guilty to sidestep immigration consequences, reduce their sentence, or for any of the other reasons defendants regularly plead guilty. Although some courts may allow the defendant to give their true reasons for accepting a plea,122 many others require the defendant to stick to a circumscribed script at the colloquy. The following is how one judge described the process: [I]f the judge makes a sentencing commitment in chambers, it is an unspoken rule in some courtrooms that such a commitment is not to be communicated publicly, especially at the plea hearing. Therefore, defense counsel must often privately instruct [the] client to unequivocally answer “no” when asked at the hearing if any promises have been made to induce the plea[.] Occasionally in the courtrooms where this occurs, a defendant will forget this important instruction from the attorney and state at the plea hearing something to the effect . . . : “Yes, my attorney told me I would receive a minimum sentence.” There are scores of transcripts where something like this has occurred. The embarrassed defense attorney will then [ask to speak to their client off the record] [a]nd then miraculously the client will resume back on the record, “No[,] your honor, no promises have been made to me.”123 The excerpt above makes explicit the common understanding among stakeholders that a defendant’s “correct” answers to the plea colloquy’s queries are not necessarily accurate answers. The colloquy may seem like a classic legal fiction—a bit of oil to keep to the wheels of justice churning. But true legal fictions are acknowledged as such; future courts understand that when we say a corporation is a person, the corporation does not, in fact, breathe air. Pleas of guilty, on the other hand, receive the imprimatur of truth. When the defendant says they are pleading guilty because they are guilty and not through any promises or inducements, future courts hold that against them.124 In fact, the high-profile case of Michael Flynn, the once National Security Advisor to former President Donald Trump, makes this clear. Flynn pleaded guilty on the record and then claimed, after his plea, that the government induced his plea by a series of inappropriate threats, including that they would charge his son with a crime if he did not plead guilty.125 Flynn pleaded guilty and then later attempted to withdraw his plea.126 Former U.S. Attorney General William Barr supported Flynn and told CBS News of the case, that “people sometimes plead to things that turn out not to be crimes.”127 A retired judge, appointed by the district court to review the case, recommended a perjury charge for Flynn’s attempts to withdraw his plea.128 Yet the threat of the perjury charge by the district court makes clear that courts view the act of taking the plea as the truth. This means that the plea colloquy has the force of truth, even though it is quite often, at the moment of its inception, a lie. 2. Alford Pleas As described above, in an Alford plea, a defendant declares his innocence at the time of the plea while also accepting a conviction and any associated punishment.129 A court accepts the defendant’s claims of innocence only if the court is satisfied that the defendant is actually guilty, despite holding no trial or meaningfully testing the evidence. And this is the lie about process—namely, the court makes a finding of guilt, even though, in most cases, they only heard a mere recitation of facts from the prosecutor. To understand how an Alford plea functions, we must briefly review the Alford case itself. In Alford, the defendant was charged with the capital offense of first-degree murder.130 Before accepting a plea, the trial court heard sworn testimony from both sides.131 The prosecution presented an officer, who gave a summary of the evidence.132 The defense put on Alford himself, who testified under oath that he had not committed the murder, but to avoid the death penalty, he would plead guilty to the reduced charge of second-degree murder.133 Relying on its prior jurisprudence involving nolo contendere pleas,134 the Court upheld Alford’s plea of guilty: Thus, while most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty. An individual accused of [a] crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.135 And so, the Alford plea was born. In a footnote, Justice White affirmed that Alford pleas were only acceptable in cases where guilt was established: Because of the importance of protecting the innocent and of [e]nsuring that guilty pleas are a product of free and intelligent choice, various state and federal court decisions properly caution that pleas coupled with claims of innocence should not be accepted unless there is [some] factual basis for the plea, and until the judge taking the plea has inquired into and sought to resolve the conflict between the waiver of trial and the claim of innocence.136 But the standard for a factual basis fails to rise to the level of proof beyond a reasonable doubt; indeed, there is no clear standard, except that the judge be convinced the defendant is guilty, even when the defendant swears under oath—as in Alford—that he is not.137 Furthermore, the Supreme Court provides no guidance to trial courts on how developed a factual record must be to accept an Alford plea. One might imagine that, given that a factual record is not required, Alford pleas would be used only for low-level crimes when, presumably, the stakes are low, and the factual record is simple. But interestingly, Alford pleas are frequently used to resolve cases involving violent crimes. One study estimated that, from 2003 to 2004, 76,000 individuals entered Alford pleas and that 50% of defendants who took an Alford plea were incarcerated for violent crimes such as murder, assault, and sexual assault.138 Twenty-five percent were incarcerated for property crimes, 20% for drug crimes, and only about 4% for public-order crimes.139 These numbers indicate that Alford pleas are not reserved for minor or non-serious crimes. Instead, courts regularly resolve serious, violent cases with pleas in which the defendant swears innocence and no meaningful adjudicatory process was undertaken to get to the truth of what happened. III. THE PARADOX OF PLEA BARGAINING

#### Negotiations bargain over facts to manufacture convenient versions of the truth to lie about

Johnson 22 [Thea Johnson, associate professor of law at Rutgers Law School, 6-1-2022, Lying at Plea Bargaining,” Georgia State University Law Review, https://readingroom.law.gsu.edu/cgi/viewcontent.cgi?article=3139&context=gsulr]/Kankee

II. A TAXONOMY OF LYING In both legal39 and philosophical40 literature, there are various views of what constitutes a lie, and as other scholars have observed, identifying and evaluating lying is a common problem in the legal system,41 not just during plea bargaining. For the purposes of the taxonomy of lies below, I adopt the “correspondence” theory of truth, which holds that “a belief is true if there exists an appropriate entity—a fact—to which it corresponds. If there is no such entity, the belief is false.”42 Correspondence theory looks to the world, using facts as its benchmarks of truth, to verify a given belief as true.43 It is enough to say that, as with a trial, there is an expectation that a rough correspondence exists between the elements of a crime a defendant pleads to and the acts he committed. And where parties knowingly enter pleas that have no such correspondence, there is lying in plea bargaining. The lies I discuss here are of a different nature than legal fictions, a commonly used device in the legal system that allows the system to function. Legal fictions are not meant to deceive; rather, both those inside and outside of the process understand the role of the legal fiction in the transaction or resolution.44 Lying at plea bargaining, on the other hand, is deception. Even if all criminal justice actors involved understand that the plea may be a lie, the plea deceives the outside world. The record of conviction reflects not the truth as the parties believe it to be, but rather the agreement they crafted. The lie at plea bargaining is transformed into truth for all future purposes.45 Plea bargains based on lies do not reflect the parties’ understanding of the truth of the defendant’s conduct. Meaning, at least one or more of the parties—defense attorney, prosecutor, or judge—know or genuinely believe that the plea is not a reflection of the defendant’s conduct. Yet they allow the plea to proceed. I borrow the term “genuinely believe” from the legal ethicist Marvin Frankel to indicate something beyond mere speculation or guesswork.46 We often suspect something might be true or false based on gut feeling or a survey of the facts, but genuine belief signifies that the party, after a full review of the available evidence, truly believes the plea does not indicate truth.47 I exclude the defendant as one of the parties from this list because the defendant is generally the only person who has full knowledge of the facts of his conduct, but that truth is not always ascertainable by, or even clear to, others. Furthermore, lying at plea bargaining involves a party (or parties) understanding some version of the case’s truth but then presenting a different version in court. The lying I describe here is not necessarily perjury.48 Nor does it require that some party tell a lie under oath. That said, lies in plea bargaining are formalized. Even when a plea is not taken under oath, there is an understanding that a plea, unlike a civil settlement, represents a truthful and accurate record.49 This is what Federal Rule of Criminal Procedure 11 calls for,50 as do most states’ local rules.51 Plea bargains based on lies are thus entered into the record as the truth, as any other guilty plea would be. Finally, the lies described below are all made possible by two fundamental features of the broader plea system—a lack of transparency and an abundance of flexibility. These lies represent how these features allow for the parties to stretch and bend the truth in often extreme ways. With these characteristics in mind, I present below a brief taxonomy of plea bargaining’s lies. This taxonomy is descriptive—a means to help us understand what lying at plea bargaining looks like. I do not mean to identify any of the lies here as either “bad” or “good,” but rather to showcase the ways in which plea bargains regularly result in lies,52 and that such lies conflict with our understanding of the outcomes produced by plea bargaining. A. Lies About Facts I begin the taxonomy with lies about facts. In these pleas, the parties manipulate the facts to achieve a desired result. For example, a case starts with a charging document detailing the facts. That charging document itself may be flawed, but the collection of facts through investigation allows the parties to come to some understanding of the truth of what occurred. In pleas that involve lies about the facts, however, the parties ultimately bend or discard facts to reach a resolution. 1. Fictional Pleas In a previous article, Fictional Pleas, I explored how plea bargaining provides an avenue for guilty defendants to plead guilty but to crimes they did not commit.53 Such guilty pleas involve: [A] guilty plea, a factual admission of the elements of a crime [or a plea of nolo contendere,] an “admission of guilt for the purposes of the case,” entered by a defendant for an offense that the defendant did not commit, and that all the parties in the case know the defendant did not commit.54 There are many examples of these pleas. For instance, Fictional Pleas begins with an example of a defendant who transformed a single felony sex offense into three separate misdemeanor sex offenses that each corresponded to a separate “act.”55 Even though all parties (including the judge) agreed there was only one criminal act, the three misdemeanor pleas proceeded.56 In this way, the defendant avoided sex offender registration and other onerous burdens accompanying a felony sex offense.57 Plus, the prosecutor still achieved a long sentence by running three misdemeanor sentences consecutive to one another, while avoiding the time and expense of a trial.58 In another jurisdiction, a defendant was charged with multiple counts of downloading child pornography, along with possession of criminal tools for his use of the computer to commit the crime.59 The defendant ended up pleading guilty to felonious assault, despite no factual record to support that charge.60 In many drug cases, defense attorneys work to transform drug charges into non-drug charges to help defendants avoid immigration consequences, often through the use of fictional pleas.61 One extreme example out of Washington involved a defendant accused of a violent robbery, who then pleaded guilty to “creating no less than one thousand illegal music recordings without consent.”62 As the public defender admitted during a later interview: “There were no allegations of sound recordings or videos. We were just being creative to get to the point we need to get in sentencing.”63 Fictional pleas abound in less serious cases as well. Many drivers use fictional pleas to escape traffic offenses that would add points to their license. For instance, a 2007 case in Iowa revealed that in one county, defendants were regularly pleading down from a variety of misdemeanor traffic offenses to a nonmoving violation charge of a “cowl-lamp” violation.64 A “cowl-lamp” is an antique fender lamp no longer used on modern vehicles, and Iowa law prohibited motor vehicles from being equipped with more than two side cowl-lamps.65 It is safe to say that hundreds of drivers in Iowa were not equipping their vehicles with three or more side cowl-lamps.66 Fictional pleas like this allow a defendant to escape some penalty associated with the crime that he did commit, including immigration consequences, sex offender registration, a higher charge or sentence, or points on one’s driver’s license. Prosecutors consent to these pleas because they benefit from the plea—namely, the certainty of a criminal conviction67—and they may not have a strong interest in seeing the defendant suffer the non-criminal penalty. In some instances, the plea may even politically benefit prosecutors in certain districts where local voters consider showing mercy through plea bargaining as an asset.68 No matter the motivation, the result is a plea that does not reflect, and sometimes does not even relate to, the underlying factual allegations that the parties believe to be the truth. And although some states seemingly prohibit the use of such pleas,69 for the reasons described in Part I, plea bargaining is loosely regulated on the ground, making it unlikely that statutes and court opinions can fully restrict their use by stakeholders.70 Indeed, lawyers seem increasingly comfortable being open about their use of fictional pleas, even while rejecting the term. The Michigan Supreme Court proposed a rule change that would restrict the procedures around plea bargaining to require that defendants provide a factual record only to the charges of conviction.71 As the court noted, the proposed change was meant to address the use of “fictional pleas.”72 Both prosecutors and defense attorneys objected to the proposal, arguing that such a requirement would prevent defendants from pleading guilty to crimes they did not commit—a tool that both sides identified as critical to producing just results for defendants and, interestingly, victims.73 The following are among the fictional pleas that lawyers said they relied on: pleading a driving while under the influence case down to a failure to report an accident;74 allowing a defendant to plead to an aggravated assault, even where there was no factual basis of an injury as required by the statute; using disorderly conduct—which requires proof of intoxication in a public place—to resolve a malicious destruction of property charge.75 2. Fact Bargaining Fact bargaining and its close cousin, charge bargaining,76 are perhaps the original forms of lying at plea bargaining. In fact bargaining, the defendant and prosecutor agree to certain facts, after the arrest but often before the indictment, that define the defendant’s charges. This, in turn, can change the charges. Parties engage in fact bargaining to achieve some particular outcome vis-à-vis the charges. For instance, the defendant may have been charged at arrest with possessing drugs and a gun, but through the process of fact bargaining, the facts are modified to indicate that the defendant only possessed drugs; the gun then disappears.77 Or in a statutory rape case, the prosecutor may agree to stipulate to the fact that the defendant and victim were a certain number of years apart in age to ensure the defendant falls under a less serious sexual assault statute, even if that “fact” is untrue.78 With fact bargaining, the parties reach resolution over the facts to determine the charges, which means the facts are not a fixed dataset but rather may be massaged to fit whatever charge the parties deem fair. Fact bargaining, like charge bargaining, has been practiced for decades. For instance, in 1996, a study of federal probation officers found that a major concern for probation officers was that “plea agreements commonly fail to reflect the true facts of a case, thus distorting guideline calculations and mak[ing] it difficult for the court to consider properly whether to accept a plea agreement.”79 Approximately forty percent of probation officers reported that the “guideline calculations set forth in plea agreements in a majority of cases are not ‘supported by offense facts that accurately and completely reflect all aspects of the case.’”80 And yet, unlike some of the other pleas listed in this taxonomy, fact bargaining may not seem as obviously a “lie.” After all, it is a negotiation over the appropriate charges for the defendant, and one way to arrive at those appropriate charges is through mutual agreement on relevant facts. But a negotiation over facts is a negotiation over truth—or the degree of truth—and falls somewhere between a full-blown airing of the facts and a complete lie. For instance, to say a defendant possessed a small amount of drugs when he actually possessed a much larger amount of drugs is, to some degree, a lie about what police found when they arrested the defendant. That lie makes a difference in what sentence the defendant receives, and this divergence between punishments makes clear that legislators purposefully distinguished between two different drug amounts within the law for a particular reason.81 But fact bargaining allows the parties to maneuver around the legislative intent.82 Evidence that legislatures contemplate such maneuvering83 does not negate the lie at the base of the plea; rather it only explains the mechanisms that allow for it. 3. Guilty Pleas of Innocent Defendants After hundreds of overturned convictions and decades of DNA-based exonerations, there remains little doubt that people plead guilty to crimes when they are factually innocent of any crime.84 The Innocence Project highlights the terrible stories of people imprisoned for years—even decades—for crimes they did not commit but to which they pleaded guilty.85 Indeed, despite earlier protestations from the Supreme Court that plea bargaining does not result in the conviction of innocent people,86 more recent jurisprudence acknowledges that innocent people pleading guilty is a risk of plea bargaining. As Justice Scalia noted in Lafler v. Cooper: In the United States, we have plea bargaining aplenty, but . . . it has been regarded as a necessary evil. It presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense . . . .”87 There is no doubt that criminal justice actors know that innocent people plead guilty to crimes they did not commit. There are a few ways that such “innocence pleas” manifest themselves as lies. One is where the defense attorney, who holds the genuine belief that the defendant is innocent, allows, or even encourages, the defendant to proceed with the plea, putting a factually inaccurate plea (and potentially a factually inaccurate statement of facts) on the record.88 This sort of plea allows the defendant to avoid what would be the worse outcome after trial, generally a harsher sentence than the one offered with the plea. There is also anecdotal evidence that judges allow defendants to plead guilty even when they have reason to believe the defendant is innocent to prevent the defendant from receiving a long sentence after trial.89 Prosecutors also participate in innocence pleas, often in the form of Alford pleas (which are also discussed as lies of process in Part II.c.2).90 In an Alford plea, the defendant accepts a conviction on his record while openly proclaiming innocence.91 Effectively, the defendant says: “I am not guilty, but I agree to take the plea.” There are several examples of prosecutors using Alford pleas to convict defendants who the prosecutors may themselves believe are innocent.92 Perhaps the most famous example is the case of the “West Memphis Three.”93 In 1993, Damien Echols, Jessie Misskelley, Jr., and Jason Baldwin were charged as teenagers with murdering three eight-year-old boys in Arkansas.94 Despite flimsy evidence, the defendants were convicted. Echols was sentenced to death, and Misskelley and Baldwin were sentenced to life in prison.95 Exonerating evidence emerged many years after the convictions.96 As the courts considered whether the new evidence was grounds for a retrial, the prosecutor offered the three an Alford plea.97 Despite the new evidence pointing to their innocence, the defendants accepted the Alford plea, asserting their innocence, yet acceding that the state had sufficient evidence to convict them.98 For its part, the prosecution claimed to still believe that these defendants were guilty.99 Their willingness to allow the defendants to walk out of prison for the murder of three young boys clearly indicated that the state had no such certainty. Instead, it used a plea bargain, based on a lie, to allow the convictions to stand and the defendants to walk free,100 likely to avoid a later civil suit. Alford pleas have been similarly used in other cases where a defendant’s innocence has been established.101 This use of the Alford plea in this context is a different sort of lie than the traditional use of such lying during plea bargaining. Instead of the defendant’s oral claim of innocence performing the lie, it is the conviction itself which rests on the lie that the factual record supports a finding of guilt. But the result, like in other innocence pleas, is the same: a guilty plea based on a lie as a means of resolving a case involving innocent defendants. I conclude with a note about the defendant’s role in innocence pleas. It goes without saying that in innocence pleas, the defendant is also facilitating the lie. Presumably, the defendant is aware of whether he committed the crime, and when an innocent person pleads guilty to a crime he did not commit, he is lying. From a systemic perspective, these lies tell us much about the pressures that defendants face to plead guilty. But these lies are different in nature than those told by other stakeholders, mostly because the defendant is the only one who can be certain of the truth. The other stakeholders are usually acting on genuine belief rather than first-hand certainty. Further, what separates defendants from other stakeholders is that, illogically, defendants tend to have little to do with the plea process itself.102 They are often excluded from negotiations and only play a role at the time of the colloquy (where, as I note in Section C, the lie formally enters the record).103 Part III.B explores in greater detail the way these differences should shape our understanding of lying at plea bargaining, but it is critical to note that systemically authorized lies by defendants during the plea process are of a different nature than those told or approved of by lawyers and judges.104 B. Lies About Law Although many forms of lying involve manipulations of the law and facts—for instance, fact bargaining allows the parties to influence which charges (or laws) apply to the case through the negotiation of facts—it is generally harder to manipulate the laws. This makes sense; it is easier to massage the facts to fit a law than to massage the law to fit the facts. But, as explored below, there is one form of plea bargaining in which lawyers twist statutes until they no longer actually represent a true law: pleas to crimes that do not exist. 1. Pleas to Crimes that Do Not Exist Courts have allowed defendants to plead guilty to crimes that they could not be convicted of at trial because the crimes do not exist; there would be no statute on which to instruct the jury and therefore no crime to charge. Several courts have upheld guilty pleas to non-existent crimes. For instance, a Kansas court found a defendant could plead to an attempted second-degree unintentional murder, even though Kansas does not recognize attempted second-degree unintentional murder as a crime because “it is logically impossible for a person to have the specific intent to commit an unintentional killing.”105 The court reasoned: Although the practice of permitting plea agreements such as this one to stand may seem illogical at first glance, such agreements serve a legitimate purpose. Compromises have long been permitted by our courts. Criminal cases are resolved by plea bargains virtually every day. As long as due process requirements are met and the bargain is beneficial to the defendant that defendant cannot later validly collaterally attack either the plea or bargained-for sentence.106 An Ohio court came to a similar conclusion: if the defendant knowingly and voluntarily pleaded guilty and received a benefit, then he could plead to the non-existent crime of attempted involuntary manslaughter.107 Courts have not, however, allowed a defendant’s conviction of a non-existent crime after trial.108 Rather, it is only through plea bargaining that a defendant can secure a conviction to a non-existent crime. One can find several more examples of pleas to crimes that do not exist in other jurisdictions.109 The critic may decry the description of these pleas as lies. After all, anyone can go to the statute book and discover that there is no such crime as an attempted unintentional murder. Despite this, I characterize pleas to crimes that do not exist as lies for several reasons. First, like the fictional pleas described above, these lies are not an accurate reflection of the defendant’s conduct. If it is indeed impossible to attempt an unintentional crime, then a defendant’s confession of guilt to such a crime is impossible as well, making it a lie to make such a claim. Second, all actors involved in the plea agree that the plea does not represent the charged criminal conduct, so there is a knowing acceptance of the lie among the stakeholders. Third, it is not always clear to the outside world that the plea represents an impossibility. Although a lawyer may determine that the defendant could not be convicted of the same conduct at trial, such a conclusion may fall outside the purview of any non-criminal justice actors looking at the plea. Nonetheless, the conviction attaches to the defendant’s record, becoming a part of the defendant’s criminal history. C. Lies About Process

#### Systemic lying destroys the truthfulness of outcomes, making examination impossible because of corrupted data

Johnson 22 [Thea Johnson, associate professor of law at Rutgers Law School, 6-1-2022, Lying at Plea Bargaining,” Georgia State University Law Review, https://readingroom.law.gsu.edu/cgi/viewcontent.cgi?article=3139&context=gsulr]/Kankee

B. The Drawbacks of Lying to the System The benefits to individual defendants (and to prosecutors in individual cases) described above comes at a cost to the broader criminal legal system. The lack of transparency in the criminal system means there is a mismatch between the system’s inputs (the criminal laws and procedures applicable to a defendant’s criminal conduct) and its outputs (the convictions and attendant punishments a defendant receives). A combination of inputs should produce certain outputs. After all, in any given jurisdiction, it is clear which criminal statutes and associated sentencing schemes are available, even if, as I note in Part I,153 the criminal procedure may vary significantly between jurisdictions. It is also clear which state and federal collateral consequences and other non-criminal penalties, such as immigration consequences, mandatorily attach to a particular criminal conviction.154 Thus, although these are just some of the inputs that go into a plea bargain,155 one would expect these inputs, when combined in a particular way, to produce a specific output. But they simply do not. For instance, an adult defendant charged with a felony sex crime should face only a certain set of possible outcomes. The sentence will be defined by the law. There will almost certainly be sex offender registration attached. The defendant will have to pay the fines and fees associated with the charge. Although there may be room for negotiation around the edges, the law—in theory—demands a set of outcomes; however, lying allows the stakeholders to manipulate these inputs in ways hidden from public view, warping them until one cannot even predict the output of a felony sex crime. And by hiding these realities from view, lying inhibits the feedback loop that would allow those outside the criminal system to understand what occurs within the system. It does this by, on the macro-level, making it impossible to collect meaningful data for systemic review and on the micro-level, obscuring the stories of individual defendants that might shape the narrative around reform. In the end, lying at plea bargaining distorts our view of how and why the criminal system punishes individuals because lying alters the fundamental input mechanics of the system while also concealing the alterations themselves. To illustrate, let us continue examining the felony sex crime example. In the last few decades, every state and the federal system has adopted a sex offender registry.156 In most places, sex offender registration is now mandatory for felony sex offenses and many misdemeanor sex offenses.157 Efforts to overturn these mandatory and harsh consequences have been largely unsuccessful.158 As a result, when prosecutors choose to charge sex offenses, they also put the defendant at risk for the onerous burden of registration159 and often of some potential mandatory sentence. But what happens when prosecutors, defense attorneys, or even judges do not believe these penalties are appropriate, despite the defendant having been correctly charged—given the factual allegations—with a sex offense? As we saw in Part II.A, in these instances, stakeholders use fictional pleas to resolve non-registrable felony convictions, or they rely on fact bargaining to avoid sex offender registration or mandatory minimums.160 The stakeholders themselves decide the just resolution in the case, and this resolution only comes about through lying because law otherwise formally prohibits it. As such, by resolving individual cases with such pleas, legislatures and the public are denied an opportunity to examine how the sex offender laws are working because they lack reliable data about what conduct criminal law covers and miss the stories of those escaping mandatory punishments through the use of lying at plea bargaining. These lies should alter how we think about the use of convictions as markers of guilt. After all, these lies distort efforts to study the criminal justice system through data. The federal government, states, and cities rely on data to drive criminal justice policy, legislation, and reform.161 Most conviction data is the result of plea bargains because most convictions are the result of plea bargains. Lying at plea bargaining calls into question the endeavor to study the criminal justice system more systemically because so many of the measurables may be inaccurate. Again, if plea bargaining transforms sex offenses into non-sex offenses that do not represent the truth of what the defendant did or did not do, then attempts to use those convictions to measure either crime or criminal justice outcomes are deeply problematic. Furthermore, although some stories about defendants shine a light on the troubles with sex offender registration,162 lying at plea bargaining indicates that many more defendants are diverted from registration through pleas based on lies. Without knowing the intricacies of these lies, the public cannot understand how or why those defendants benefited from a fictional plea rather than a plea that requires registration. If there are sympathetic stories (or unsympathetic stories as in the recent Jeffrey Epstein case)163 that make sex offender registration not optimal for an individual defendant, the public and policymakers should hear those stories to better understand whether sex offender registration is working as intended. Otherwise, by using lies to avoid sex offender registration, stakeholders deny policymakers the recorded data points needed to determine the effectiveness of their policies. C. The Paradox of Reform

#### Coerced innocent guilty pleas are considered truthful, meaning the government can punish you for perjury for arguing your innocence

Hessick 21 [Carissa Byrne Hessick, Ransdell Distinguished Professor of Law at the University of North Carolina School of Law, where she also serves as the director of the Prosecutors and Politics Project, 2021, “Punishment Without Trial: Why Plea Bargaining Is a Bad Deal,” Abrams Press, ISBN: 9781419750304]/Kankee

How have our courthouses have become places of routine and systematic lies? A courthouse is where we are supposed to find out the truth. It’s the place where people have to swear to tell the truth. In fact, defendants swear an oath to tell the truth before the plea colloquy. We make them swear to tell the truth right before we make them lie. What’s worse, when defendants try to expose the lies at the heart of plea bargaining, they can actually be punished for it. Look at the case of Michael Flynn, President Trump’s former national security adviser, who pleaded guilty to lying to the FBI about his telephone calls with the Russian ambassador. After pleading guilty but before sentencing, Flynn hired a new lawyer who challenged the government’s case against him. The new lawyer sought evidence from the FBI about its investigation, and she used that new evidence and an affidavit from Flynn to argue that Flynn should be permitted to withdraw his guilty plea because he wasn’t actually guilty. The Flynn case quickly turned into a circus because President Trump’s attorney general, Bill Barr, abruptly filed a motion to dismiss all of the charges against Flynn. That motion was one of several actions that Barr took to undercut a special counsel’s investigation into Russian interference in the 2016 presidential election—actions that President Trump publicly encouraged from his Twitter account and press statements. Largely ignored in the political frenzy surrounding the Flynn case was the fact that the judge handling the case contemplated holding Flynn in contempt for his affidavit in support of withdrawing his guilty plea. In that affidavit, Flynn said that he did not know that the statements he gave to the FBI were false when he spoke to the FBI agents about his telephone calls with the Russian ambassador. He wasn’t lying, Flynn said. He just couldn’t remember what he’d talked about with the Russian ambassador. Because the crime that Flynn pleaded guilty to required him to “knowingly” lie to federal officials, the affidavit (a sworn written statement) contradicted Flynn’s sworn statement at his plea colloquy that he knew that he was lying when he spoke to the FBI. The statement Flynn made when pleading guilty and the statement he made to withdraw that plea couldn’t both be true—one of them had to be false—and so the judge in his case made quite clear that he thought Flynn had committed perjury. Perjury—lying under oath—is a crime. After reading through the media coverage and the documents filed in the Flynn case, I am unconvinced that Michael Flynn is actually innocent. The report by special counsel Robert Mueller on Russian interference in the election contains many references to interviews with Michael Flynn— references that contradict Flynn’s later claims that he couldn’t remember the content of his conversations with the Russian ambassador. Put bluntly, I don’t think Flynn is innocent, and I think President Trump’s decision to pardon him is one of several examples of the Trump administration playing politics rather than seeking justice. But even though I don’t think Flynn is innocent, I am deeply troubled by the idea that a judge would consider punishing a person for trying to withdraw a guilty plea on the theory that he committed perjury. There is no doubt that innocent people sometimes plead guilty. And if those people are lucky enough to uncover evidence that proves their innocence after they’ve pleaded guilty, they should not be punished for lying under oath. Many judges will not allow defendants to enter a guilty plea unless they first say that they are guilty. So when innocent defendants decide not to risk the additional punishment associated with going to trial, they should not have to worry about perjury charges if they later find evidence supporting their innocence. They shouldn’t be punished for lying because our system not only encourages that lying; it sometimes requires it. University of Virginia law professor Josh Bowers has a theory about why we accept these lies associated with plea bargaining but then react with horror when we hear that innocent people plead guilty to crimes they didn’t commit. Bowers points out that the criminal justice system accepts many lies. So long as the defendant admits that she did “something wrong,” then the system is willing to tolerate those other lies. But, as Bowers explains, the system “finds something sacrosanct and inviolable—even magical—in the bottom-line accuracy of the defendant’s admission that she behaved (in some fashion) illegally.” We are comfortable with all of those other lies as long as it is true that the defendant has done something illegal. But the very system that we created to pressure guilty defendants to plead guilty creates a situation in which innocent defendants are actually sometimes better off pleading guilty than going to trial. It’s this pressure on innocent people and the proof that some innocent people have pleaded guilty that are the most obvious examples of what is wrong with criminal justice in America. Criminal justice reformers who criticize plea bargaining often tell stories about innocent people who plead guilty. I myself tell such a story—Damian Mills’s—at the beginning of this book. And it is no wonder why many criticisms of our criminal justice system focus on innocent people who get convicted. Stories like Damian’s shock us. But we should be shocked by the system even when the defendant is not innocent. That’s because ours is still a bad system, even when the people pleading guilty are, in fact, guilty. It is a system that not only abandons the search for truth but also encourages—or even requires—lies. All of those lies obscure what is happening in the criminal justice system. We can’t evaluate the decisions that are being made by public officials and we can’t judge whether defendants are receiving the appropriate punishment. This is why everyone should be outraged by Mayor Bloomberg’s lies about the Plaxico Burress case. We should be outraged that we are being told that these heavy sentences are absolutely necessary and that they are imposed on everyone—when the truth is the precise opposite. \* \* \* \* \* \* That guilty defendants are forced to lie during the plea colloquy is not the only problem with a system that pressures guilty defendants to plead guilty. The system also deprives those defendants of important rights—rights that everyone has, regardless of whether they have committed a crime