SERIOUS DOUBTS: HALF A CENTURY OF WRONGFUL CONVICTIONS BY GUILTY PLEA

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ABSTRACT

Nearly every criminal conviction in the United States now rests on a guilty plea, and about one quarter of the 3,842 exonerations recorded since 1989 involved an innocent person who pleaded guilty. This paper examines how coercive plea bargaining produces those wrongful convictions.

It first traces six recurring pressure points—false confession, perjury or false allegation, official misconduct, false or misleading forensic evidence, inadequate legal defense, and mistaken witness identification—through the cases of six innocent men who pleaded guilty in non-DNA cases.

It then surveys the history and rise of plea bargaining and the Supreme Court's role in normalizing the practice after *Brady v. United States*, which sustained its constitutionality on the expectation that trial courts could separate voluntary pleas from coerced ones.

Turning to reform, the paper evaluates the American Bar Association's 2023 Plea Bargain Task Force Report and its Fourteen Principles, the responses of the Cato Institute and the National District Attorneys Association, and other scholarly proposals, and offers a "reform from within" that would divide prosecutorial charging, plea, and trial functions.

The *Brady* Court promised to reexamine the constitutionality of bargained justice if innocent defendants pleaded guilty in significant numbers. That number has long since been reached.

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Introduction

Why do the innocent plead guilty? Half a century ago, in *Brady v. United States*, the Supreme Court declared that it "would have serious doubts about this case" if offers of leniency "substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves"—but its view was "to the contrary," resting on the expectation that trial courts would ensure every guilty plea was voluntary, intelligent, counseled, and accurate.[1] The record answers otherwise. The West Memphis Three.[2] The Norfolk Four.[3] The Exonerated Five.[4] The Beatrice Six.[5] These infamous wrongful conviction cases account for only eighteen of the 3,842 individuals exonerated since 1989. Wrongful convictions have stolen more than 35,983 years from their victims.[6] Wrongful conviction is the most pernicious failure of the American legal system—and it happens far more often than the system admits.

But some once doubted—United States Supreme Court Justices among them—that there could be such a thing as a wrongful conviction. Justice O'Connor wrote: "Our society has a high degree of confidence in its criminal trials, in no small part because the Constitution offers unparalleled protections against

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

2 Innocence Project, *Innocence Project Statement in Response to Arkansas Supreme Court Ruling in Damien Echols' DNA Testing Request* (Apr. 18, 2024), http://innocenceproject.org/innocence-project-statement-in-response-to-arkansas-supreme-court-ruling-in-damien-echols-dna-testing-request/.

3 Mid-Atlantic Innocence Project, *Norfolk Four*, http://exonerate.org/victory/norfolk-four-derek-tice-danial-williams-joseph-dick-and-eric-wilson/ (last visited July 15, 2026).

4 Innocence Project, *Central Park Five Tragedy Reframed in Netflix Series "When They See Us"* (May 24, 2019), http://innocenceproject.org/central-park-five-tragedy-reframed-in-netflix-series-when-they-see-us-2/.

5 Innocence Project, *JoAnn Taylor's Lawyer Answers 7 Key Questions About Her Guilty Plea Case* (Jan. 31, 2017), http://innocenceproject.org/7-key-questions-joann-taylor/.

6 Nat'l Registry of Exonerations, https://exonerationregistry.org/about (last visited July 24, 2026).

convicting the innocent."[7] Perhaps so. But today we rarely have trials—we have guilty pleas. Almost every criminal conviction rests not on the constitutional right to a jury trial but on a contract: a plea deal proffered by prosecutors and accepted by the accused. In 2025, 98% of federal criminal convictions ended in a guilty plea.[8] The same is true in the states: "[I]t is a rare state where plea bargains do not similarly account for the resolution of at least 95 percent of the felony cases that are not dismissed."[9]

Although the Supreme Court has recognized that plea bargaining *is* the criminal justice system, the practice dates only to the late 1800s. And about one out of every four exonerations involved a wrongful guilty plea—a case in which an innocent person pleaded guilty to a crime he did not commit.[10] That fact raises several questions. Why do so many people falsely admit to crimes they did not commit? Why do we no longer have trials when the federal Constitution enshrines the right? How did we get here? And what would it take to fix this broken system?

This paper answers those questions by exploring the intersection of the plea bargain system and wrongful conviction. Part I discusses cases that embody this paper's primary concern—the factors that led six innocent individuals to plead guilty in non-DNA cases.[11] DNA may seem the surest proof of innocence, but 91% of guilty plea exonerations involved no DNA at all.[12] If DNA

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7 Herrera v. Collins, 506 U.S. 390, 420 (1993) (O'Connor, J., concurring).

8 United States Sentencing Commission, 2025 Annual Report 16, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2025/2025-Annual-Report.pdf.

9 Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/.

10 *See infra* note 28. *See also* Andrew M. Pardieck, Vanessa A. Edkins & Lucian E. Dervan, *Bargained Justice: The Rise of False Testimony for False Pleas*, 44 FORDHAM INT'L L.J. 469 (2020) (presenting experimental evidence that innocent individuals plead guilty and even falsely implicate others).

11 *See infra* Part I.

12 NAT'L REGISTRY OF EXONERATIONS, https://exonerationregistry.org/cases?q=cases&f%5B0%5D=n_cchar%3AP&f%5B1%5D=n_pre_1989%3A0 (last visited July 26, 2026) (filtered to guilty-plea exonerations; 923 guilty-plea exonerations, of which 83 did not convict these defendants, other forces must have compelled—or coerced—them to plead guilty. Part II surveys the history and rise of plea bargaining in the United States and explains how the Supreme Court helped normalize the current system.[13]

Part III examines the American Bar Association's 2023 Plea Bargain Task Force Report and the Fourteen Principles it adopted to guide everyday practice.[14] It also reviews two responses to the report.[15] Part IV evaluates which reforms are realistic and how they might have changed the outcomes in Part I's cases.[16] The paper concludes with suggestions for actors across the system. Ultimately, it holds a mirror up to the plea bargain system and shows how coercive pressures lead innocent individuals to waive their right to trial and plead guilty to crimes they did not commit—sacrificing fundamental values for expediency.

I. PLEA BARGAINING AND WRONGFUL CONVICTION

Plea bargaining has been widely criticized as coercive,[17] system-

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involved DNA evidence).

13 *See infra* Part II.

14 *See infra* Part III.

15 *See infra* Part III.A.

16 *See infra* Part IV.

17 *See* AM. BAR ASS'N, PLEA BARGAIN TASK FORCE REPORT 6 (2023) [hereinafter ABA REPORT]; RAM SUBRAMANIAN ET AL., VERA INST. OF JUST., IN THE SHADOWS: A REVIEW OF THE RESEARCH ON PLEA BARGAINING 4–6 (2020) ("[A] criminal case is settled by plea bargain every two seconds during a typical workday in the United States.").

ically inequitable,[18] and a driver of mass incarceration.[19] Fiscal year 2025 saw 98% of federal criminal convictions end in guilty pleas.[20] The figure was nearly identical in 2022[21] and 2012.[22] State courts resolve felony cases by guilty plea at comparable rates.[23]

To address these "persistent criticisms," the American Bar Association (ABA) Criminal Justice Section published "Fourteen Principles" in 2023 to guide everyday plea practice.[24] The ABA

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18 *See* NAT'L REGISTRY OF EXONERATIONS, RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES 2022 (Sept. 2022), https://exonerationregistry.org/sites/exonerationregistry.org/files/documents/Updated%20CP%20-%20Race%20Report%20Preview.pdf; Adnan Sultan, *Opinion: The Problem with Plea Bargains and How NY Can Help the Innocent*, CITY & STATE NEW YORK (May 22, 2023), http://www.cityandstateny.com/opinion/2023/05/opinion-problem-plea-bargains-and-how-ny-can-help-innocent/386601/ ("[E]xcessive plea bargaining directly contradicts the values our criminal legal system purports to represent, like justice, accountability and truth-seeking. Instead, it creates a perverse set of incentives that exacerbate existing racial inequality and often coerces innocent people into pleading guilty to crimes they didn't commit."); #GUILTYPLEAPROBLEM, http://guiltypleaproblem.org/#about (last visited July 15, 2026).

19 Emily Yoffe, *Innocence Is Irrelevant*, THE ATLANTIC (Sept. 2017), http://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/ (tying plea bargaining to race and mass incarceration); Rakoff, *supra* note 7 .

20 U.S. SENT'G COMM'N, 2025 ANNUAL REPORT 16 (Apr. 7, 2026), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2025/2025-Annual-Report.pdf.

21 U.S. SENT'G COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.12 (2022).

22 U.S. SENT'G COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2012).

23 Rakoff, *supra* note 7. Plea bargaining has a global reach, too. *See, e.g.*, Allison D. Redlich et al., *The Psychology of Defendant Plea Decision Making*, 72 AM. PSYCHOL. 339, 340 (2017) [hereinafter *Plea Decision Making*] (noting the practice's spread across Europe and Asia); Jago Russell & Nancy Hollander, *The Disappearing Trial: The Global Spread of Incentives to Encourage Suspects to Waive Their Right to a Trial and Plead Guilty*, 8 NEW J. EUR. CRIM. L. 309, 311 (2017) (documenting trial-waiver systems' spread from nineteen jurisdictions before 1990 to sixty-six by 2015). *See also* Terry Skolnik, *Criminal Justice and the Erosion of Constitutional Rights*, 66 B.C. L. REV. 1679 (2025) (contending that coercive plea practices erode constitutional protections).

24 ABA REPORT, *supra* note 14, at 13 (explaining the choice to craft a single

Report found that plea bargaining's benefits—conserving limited resources and allowing defendants to "avoid some of the most severe aspects of the criminal system"—have come at the cost of fundamental values, placing "efficiency and finality" over "truth-seeking."[25] Worse, the Task Force reviewed "substantial evidence that defendants—including innocent defendants—are sometimes coerced into taking pleas and surrendering their right to trial."[26] Postconviction DNA testing "provides conclusive proof that our system does indeed convict the innocent—by both trial and plea—in nontrivial numbers,"[27] and "there are many reasons to believe that the number of false guilty pleas is actually much higher than is currently known."[28] As Judge Jed S. Rakoff wrote, the "prosecutor-dictated plea bargain system, by creating such inordinate pressures to enter into plea bargains, appears to have led a significant number of defendants to plead

set of principles grounded in the constitutional right to trial). Id. at 9.

25 *Id.* at 6.

26 *Id.* Clark Neily, *The ABA's 2023 Plea Bargain Task Force Report*, CATO INSTIT. (Feb. 22, 2023, 11:54 AM), http://www.cato.org/blog/plea-bargaining-stands-accused [hereinafter Neily, *Task Force Report*] ("[I]nnocent people are routinely coerced into pleading guilty to crimes they did not commit."). The scholarly literature on innocent defendants pleading guilty is legion. *See, e.g.*, F. Andrew Hessick & Reshma M. Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189 (2002); Russell D. Covey, *Signaling and Plea Bargaining's Innocence Problem*, 66 WASH. & LEE L. REV. 73 (2009); Lucian E. Dervan, *Bargained Justice: Plea-Bargaining's Innocence Problem and the* Brady *Safety-Valve*, 2012 UTAH L. REV. 51 [hereinafter Dervan, *Bargained Justice*]; John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157 (2014); Albert Alschuler, *A Nearly Perfect System for Convicting the Innocent*, 79 ALB. L. REV. 919 (2016); Jessica S. Henry, *Smoke but No Fire: When Innocent People Are Wrongly Convicted of Crimes That Never Happened*, 55 AM. CRIM. L. REV. 665 (2018) [hereinafter *Smoke but No Fire*]; Thea Johnson, *Fictional Pleas*, 94 IND. L.J. 855, 868 (2019) [hereinafter *Fictional Pleas*]; Keith A. Findley et al., *Plea Bargaining in the Shadow of Retrial: Bargaining Away Innocence*, 2022 WIS. L. REV. 533 (2022); Lucian E. Dervan et al., *Victims of Coercive Plea Bargaining: Defendants Who Give False Testimony for False Pleas*, 72 AM. U. L. REV. 1919 (2023) [hereinafter Dervan, *Coercive Plea Bargaining*].

27 Murat C. Mungan & Jonathan Klick, *Reducing False Guilty Pleas and Wrongful Convictions through Exoneree Compensation*, 59 J.L. & ECON. 173, 173–74 (2016) (footnotes omitted).

28 *Plea Decision Making*, *supra* note 20, at 348.

guilty to crimes they never actually committed."[29] Citing the system's "overwhelming coercive forces"—overcriminalization, pretrial detention used to extract pleas, "exploding plea offers" made before defendants can assess the evidence, and the "trial penalty" imposed on those who insist on trial and lose—Innocence Project attorney Adnan Sultan concluded: "[I]t's no surprise that innocent people plead guilty."[30]

Current figures from the National Registry of Exonerations (NRE), an online archive that indexes all known exonerations in the United States, support Sultan's position: of the 3,842 exonerees since 1989, 923 (24%) "surrender[ed] their right to trial" and pleaded "guilty to crimes they never actually committed."[31] Of those 923 guilty plea exonerations, 840 (91%) were exonerated *without* the help of DNA evidence.[32] As Judge Rakoff explained, even an innocent defendant's "chances of mounting an effective defense at trial may be modest at best. If his lawyer can obtain a plea bargain that will reduce his likely time in prison, he may find it 'rational' to take the plea."[33] Given the number of guilty pleas struck each year, the known exonerations likely represent only a small fraction of the true total.[34] "When you recall that, of the 2.2 million Americans in prison, over two million are

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29 Rakoff, *supra* note 7 (observing that roughly ten percent of the Innocence Project's proven rape-and-murder exonerees pleaded guilty, and that the NRE's early data showed the same ten-percent rate across 1,428 exonerations).

30 Sultan, *supra* note 15. *But see* Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1117 (2008) (challenging the view that plea bargaining's main failure is the "innocence problem," claiming many innocent defendants are better off in world with plea bargaining, and that inaccurate guilty pleas are only symptomatic of errors stemming from arrest, charge, or trial). *See also* Breanne Potter, Note, *Greater of Two Evils: Trial Penalty or Plea Penalty?*, 31 CARDOZO J. EQUAL RTS. & SOC. JUST. 137 (2024).

31 NAT'L REGISTRY OF EXONERATIONS, *Exonerations in the United States Map*, https://exonerationregistry.org/Exonerations-in-the-United-States-Map#crimeState (last visited July 15, 2026) (filtered to exonerees who pleaded guilty).

32 *Id.* (filtered to guilty-plea exonerations without DNA evidence).

33 Rakoff, *supra* note 7.

34 *See* BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 11–12 (2011) (explaining that known exonerations are "just the tip of an iceberg" and that we "cannot know how many other innocent people languish in our prisons").

there because of plea bargains, we are then talking about an estimated 20,000 persons, or more, who are in prison for crimes to which they pleaded guilty but did not in fact commit."[35] What, then, explains the number of factually innocent individuals who bartered their fundamental right to trial for a guilty plea?

According to the NRE, six factors contribute, alone or in combination, to wrongful conviction: false confession, perjury or false allegation, official misconduct, false or misleading forensic evidence, inadequate legal defense, and mistaken witness identification.[36] The sections that follow take each pressure point in turn and show how it pushed innocent defendants to plead guilty to crimes they never committed.

A. *Wrongful Guilty Pleas Induced by Physical Torture:* Brown v. Mississippi

In 1936, in *Brown v. Mississippi*,[37] the Supreme Court first excluded confessions from a state prosecution because the officers' "brutality and violence" denied due process.[38] The wrongfully accused Black defendants—Ed Brown, Henry Shields, and Arthur Ellington—stood indicted for murdering a white man;[39] Chief Justice Hughes retold the "extreme brutality" they suffered

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35 Rakoff, *supra* note 7.

36 NAT'L REGISTRY OF EXONERATIONS, *supra* note 28; *see also* Garrett, *supra* note 31, at 5–11 (analyzing the first 250 exonerations). This paper takes a similar tack but focuses exclusively on cases where falsely accused innocent individuals entered guilty pleas to crimes they did not commit and were exonerated without the benefit of DNA evidence.

37 297 U.S. 278 (1936).

38 *Id.* at 279, 287; Samuel Gross & Maurice Possley, *For 50 Years, You've Had "The Right to Remain Silent*," MARSHALL PROJECT (June 12, 2016, 10:00 PM), https://www.themarshallproject.org/2016/06/12/for-50-years-you-ve-had-the-right-to-remain-silent [hereinafter *Right to Remain Silent*]. Because the Supreme Court had not yet incorporated the Fifth Amendment's self-incrimination clause through the Fourteenth Amendment to apply to the states, Malloy v. Hogan, 378 U.S. 1 (1964), the *Brown* Court used the Fourteenth Amendment's Due Process Clause to exclude confessions based on a "voluntariness test." Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, 93 CALIF. L. REV. 465, 488 & nn.122–26 (2005) (citations omitted).

39 *Brown*, 297 U.S. at 281.

through the state dissent.[40]

A posse hanged Ellington twice from a tree and whipped him;[41] he maintained his innocence and was released.[42] Days later officers whipped him again until he agreed[43] to confess to a statement the deputy prepared.[44] Brown and Shields were arrested next[45] and whipped with a buckled strap until they confessed "in every matter of detail as demanded by those present"—warned that the torture would resume if they changed their story.[46]

The torture was undisputed—"not a single witness was introduced who denied it"[47] —and one deputy, asked how severely Ellington was whipped, answered: "'Not too much for a negro; not as much as I would have done if it were left to me.'"[48]

The issue was "[c]ompulsion by torture to extort a confession."[49] A state may shape its own trial procedure,[50] but "[t]he rack and torture chamber may not be substituted for the witness stand."[51] Using the confessions "as the basis for conviction and sentence was a clear denial of due process."[52]

The Court held the convictions void.[53] Over the following decades physical torture declined—and psychological coercion took its place.[54] As Alschuler put it: "The lash, the rack, and the

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40 *Id.*

41 *Id.*

42 *Id.*

43 *Id.* at 281–82.

44 *Id.* at 282.

45 *Id.*

46 *Id.*

47 *Id.* at 284–85.

48 *Id.* at 284.

49 Brown v. Mississippi, 297 U.S. 278, 285 (1936).

50 *Id.*

51 *Id.* at 285–86.

52 *Id.* at 286.

53 *Id.*

54 Gross & Possley, *Right to Remain Silent*, *supra* note 35 (tracing interrogation's shift from torture to "isolation, deception, manipulation and exhaustion").

thumbscrew have given way to *Miranda* warnings, and lynchings and blood feuds have become rare. The history of plea negotiation, however, is a history of mounting pressure for self-incrimination[.]"[55]

B. Wrongful Guilty Pleas Induced by False Confession: James Blackmon

Of the 840 non-DNA guilty plea exonerations, 65 (8%) involved false confessions.[56] False confessors also implicate other innocents.[57] The most vulnerable are the young and people living with mental disabilities:[58] the risk-averse confess "just because they cannot 'take the heat' of an interrogation."[59] Among exonerated defendants under eighteen who confessed, 34% confessed falsely;[60] for exonerees with mental disabilities the figure is 70%—81% among murder exonerees—against 8% for everyone else.[61] Why? "The answer is simple and stark: They're being coerced."[62]

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55 Alschuler, Plea Bargaining, *supra* note 59, at 40.

56 *See supra* note 28 (filtered to false confession guilty-plea exonerations without DNA evidence).

57 Gross & Possley, *Right to Remain Silent*, *supra* note 35.

58 Gross & Possley, *Right to Remain Silent*, *supra* note 35.

59 Rakoff, *supra* note 7.

60 NAT'L REGISTRY OF EXONERATIONS, *Age & Mental Status of Exonerated Defendants Who Confessed* (Apr. 10, 2022), https://exonerationregistry.org/sites/exonerationregistry.org/files/documents/Age_and_Mental_Status_FINAL_CHART.pdf.

61 SAMUEL R. GROSS ET AL., NAT'L REGISTRY OF EXONERATIONS, GOVERNMENT MISCONDUCT & CONVICTING THE INNOCENT: THE ROLE OF PROSECUTORS, POLICE AND OTHER LAW ENFORCEMENT 53 (Sept. 1, 2020), https://exonerationregistry.org/sites/exonerationregistry.org/files/documents/Updated%20CP_Government_Misconduct_and_Convicting_the_Innocent%20(1).pdf [hereinafter GOVERNMENT MISCONDUCT].

62 Neily, *Task Force Report*, *supra* note 23 (listing prosecutors' "fearsome array of tools they can use to extract confessions and discourage people from exercising their right to a jury trial" like "charge-stacking (charging more or more serious crimes than the conduct really merits), legislatively-ordered mandatory-minimum sentences, pretrial detention with unaffordable bail, threats to investigate and indict friends or family members, and the so-called trial penalty.").

Thirty years after *Brown* came *Miranda v. Arizona*:[63] custodial statements are inadmissible without "procedural safeguards effective to secure the privilege against self-incrimination,"[64] waivable only "voluntarily, knowingly and intelligently."[65]

Because the interrogation room is built to coerce, most suspects waive at the outset.[66] Some who then confess are factually innocent.[67] False confessions cluster where the stakes are low[68] —but they reach murder cases too.

James Blackmon's IQ measured between 69 and 80.[69] In January 1988 he pleaded guilty to second-degree murder and received life;[70] he was exonerated in 2019 and died three years later.[71]

In 1979 a man stabbed Helena Payton in a shared bathroom at St. Augustine's College[72] and fled past several students;[73] she died a month later. Four years on, a psychiatric-hospital source reported a patient talking about the killing,[74] and police settled on Blackmon,[75] who had cycled through institutions since age

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63 384 U.S. 436 (1966).

64 *Id.* at 444. Soon after Miranda, and widely viewed to legislatively overturn it, Congress enacted 18 U.S.C. § 3501, which made all voluntary confessions admissible in federal prosecutions. The Supreme Court later held 18 U.S.C. § 3501 unconstitutional. Dickerson v. United States, 530 U.S. 428 (2000).

65 *Miranda*, 384 U.S. at 444; *see Dickerson*, 530 U.S. at 433–34 (summarizing the voluntariness test in confession jurisprudence over the last century).

66 Gross & Possley, *Right to Remain Silent*, *supra* note 35.

67 *See id.*

68 SUBRAMANIAN ET AL., *supra* note 14, at 46 n.214.

69 NAT'L REGISTRY OF EXONERATIONS, *James Blackmon*, https://exonerationregistry.org/cases/12694 (last visited July 15, 2026) [hereinafter *Blackmon*].

70 *Id.*

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.*

75 *Id.*

eleven.[76]

Two detectives interviewed him[77] eight times and informally more;[78] no student picked him from a lineup;[79] and he was never in custody, never given *Miranda* warnings, never told he was a murder suspect.[80]

James showed unmistakable mental illness: he told the officers he could levitate and read minds,[81] that he had killed many people[82] and had never killed anyone,[83] that he could cause earthquakes.[84]

The officers took him—unrecorded—to the dormitory, where he reportedly stopped at the stall and said, "This is where it happened."[85] Later that day he produced something close to a confession: "I — either he cut her in the woods somewhere where he had her at or either up in that building."[86] Arrested in December 1983,[87] he waited three years in jail for trial.[88]

The court credited a psychiatrist who called James a "streetwise manipulator and malingerer" and denied suppression.[89] James pleaded guilty to second-degree murder, reserving his appeal,[90] and lost.[91] Because he never admitted guilt,[92] his appel-

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76 *Id.*

77 *Id.*

78 *Id.*

79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.*

83 *Id.*

84 *Id.*

85 *Id.*

86 *Id.*

87 *Id.*

88 *Id.*

89 *Id.*

90 *Id.*

91 *Id.*

92 *Id.*

late attorneys described the plea as an *Alford* plea.[93]

An *Alford* plea let him maintain innocence while conceding the state's evidence.[94] In 2012 his case reached the North Carolina Innocence Inquiry Commission,[95] a state innocence-review agency[96] that requires a pleading claimant to convince all eight commissioners before a three-judge panel will hear him.[97]

Psychologist Allison Redlich identified the classic warning signs: two false-confession risk factors—mental illness and intellectual disability[98] —an account wrong about the victim, the killing, and the offense,[99] no detail the officers had not first supplied,[100] and statements contaminated by the crime-scene visit.[101]

The commission also found James apparently was not in North Carolina at all: he was in a New York courtroom the month before the attack[102] and the month after.[103]

The lone crime-scene fingerprint was not his;[104] in 2013 it was matched to one James Leach,[105] whose presence in the bath-

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93 In *North Carolina v. Alford*, 400 U.S. 25, 28 (1970), the Supreme Court held that the defendant's guilty plea to second-degree murder was valid despite his testimony that he did not commit the murder and was pleading guilty only because he faced the threat of the death penalty if he chose to exercise his right to trial.

94 *Blackmon*, *supra* note 66.

95 *Id.*

96 N.C. INNOCENCE INQUIRY COMM'N, http://innocencecommission-nc.gov/ (last visited July 15, 2026).

97 Carissa Byrne Hessick, Response, *The Real Problem with Plea Bargaining*, 101 TEX. L. REV. ONLINE 123, 129–30 (2023) (citing N.C. GEN. STAT. §§ 15A-1462(a), -1467(a), -1468(c)) [hereinafter Hessick, *The Real Problem*]. Individuals convicted after trial must convince only a majority of the Commission members. *Id.* at 130 (citing § 15A-1468(c)).

98 *Blackmon*, *supra* note 66.

99 *Id.*

100 *Id.*

101 *Id.*

102 *Id.*

103 *Id.*

104 *Id.*

105 *Id.*

room no one could explain.[106]

In 2018 the commission voted unanimously for judicial review,[107] and in 2019 a three-judge panel declared James innocent—after more than three decades.[108] His attorney: "Justice delayed is better than no justice at all."[109]

C. Wrongful Guilty Pleas Induced by Perjury or False Allegation: Brian Banks

Perjury or false allegation has caused 513 (61%) non-DNA guilty plea exonerations.[110] The best-known false-allegation plea is Brian Banks's.[111] In 2002 he was sixteen, a football star bound for the University of Southern California,[112] accused of raping a fifteen-year-old classmate in a school stairwell.[113] The accusation was untrue.[114]

Charged with two counts of forcible rape and sodomy with a kidnapping special circumstance,[115] Brian faced forty-one years to life.[116] Offered a maximum of seven years with assurances he would serve far less,[117] he pleaded no contest and received six.[118]

Five years later—paroled and registered as a sex offender—

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106 *Id.*

107 *Id.*

108 *Id.*

109 *Id.*

110 NAT'L REGISTRY OF EXONERATIONS, https://exonerationregistry.org/cases?q=cases&f%5B0%5D=n_cchar%3AP&f%5B1%5D=n_pre_1989%3A0&f%5B2%5D=perjury_or_false_accusation_467%3A1 (last visited July 26, 2026).

111 NAT'L REGISTRY OF EXONERATIONS, *Brian Banks*, https://exonerationregistry.org/cases/11096 (last visited July 15, 2026) [hereinafter *Banks*].

112 *Id.*

113 *Id.*

114 *Id.*

115 *Id.*

116 *Id.*

117 *See* Lucian E. Dervan et al., *Voices on Innocence*, 68 FLA. L. REV. 1569, 1571 (2016) (citation omitted).

118 *Banks*, *supra* note 107.

Brian heard from his accuser, Wanetta Gibson, on Facebook; in a videotaped meeting she admitted he had never raped her.[119] Her family had feared returning the $750,000 settlement it won from the school district.[120]

His conviction was vacated in 2012, his youth and football career gone. The system forced a sixteen-year-old's choice: forty-one years to life at trial, or the plea.[121] Of the 840 non-DNA guilty plea exonerations, 513 (61%) involved perjury or false allegation.[122]

D. Wrongful Guilty Pleas Induced by Official Misconduct: Lionel White, Sr.

Official misconduct has resulted in 475 non-DNA guilty plea exonerations.[123] In no-crime drug cases, 89% of defendants pleaded guilty.[124] Lionel White, Sr. shows how official misconduct and the trial penalty combine to coerce a plea to a crime that never occurred.[125]

In 2006 Chicago police charged Lionel with heroin posses-

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119 *Id.*

120 *Id.*

121 Brian is not alone. *See, e.g.*, JESSICA S. HENRY, SMOKE BUT NO FIRE: CONVICTING THE INNOCENT OF CRIMES THAT NEVER HAPPENED 20–21 (2020) [hereinafter CONVICTING THE INNOCENT] (discussing other no-crime cases where innocent individuals were falsely accused and convicted of rape or child abuse due to the accusers' lies for financial gain "or because of mental or emotional limitations").

122 *See supra* note 28 (filtered to guilty-plea exonerations without DNA evidence involving false confession and perjury or false accusation). DNA evidence contributed to only forty-seven out of 560 perjury/false allegation guilty plea exonerations.

[123] NAT'L REGISTRY OF EXONERATIONS, https://exonerationregistry.org/cases?q=cases&f%5B0%5D=n_cchar%3AP&f%5B1%5D=n_pre_1989%3A0&f%5B2%5D=official_misconduct_468%3A1 (last visited July 26, 2026).

124 NAT'L REGISTRY OF EXONERATIONS, 2022 ANNUAL REPORT 11 (May 8, 2023).

125 NAT'L REGISTRY OF EXONERATIONS, *Lionel White, Sr.*, https://exonerationregistry.org/cases/12158 (last visited July 15, 2026) [hereinafter *White, Sr.*].

sion;[126] his prior felonies exposed him to life without parole at trial,[127] and prosecutors offered five years.[128] He took it—telling the court, "I am pleading guilty because I'm scared. That's the honest to God truth, your honor."[129] From prison he wrote that Sergeant Ronald Watts and Officer Alvin Jones had framed him.[130]

He was right. In 2016 the Exoneration Project's Joshua Tepfer—who had already unwound two Watts convictions[131] — moved for a new trial,[132] describing Watts's "corrupt, more-than-decade-long criminal enterprise."[133]

Lionel's conviction was vacated in 2017 with a certificate of innocence;[134] the Conviction Integrity Unit dismissed seventeen more Watts convictions,[135] and Tepfer estimates the unit may be responsible for at least 500 others.[136]

Official misconduct "is a major cause of convictions of innocent defendants."[137] It figures in 2,338 of the 3,842 exonerations (about 61%).[138] Of those, 522 exonerees pleaded guilty,[139] 91% of them without DNA evidence.[140] A 2020 NRE report put police misconduct in 35% of exonerations,[141] defining "police"

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126 *Id.*

127 *Id.*

128 *Id.*

129 *Id.*

130 *Id.*

131 *Id.*

132 *Id.*

133 *Id.*

134 *Id.*

135 *Id.*

136 *Id.*

137 GOVERNMENT MISCONDUCT, *supra* note 58, at 1.

138 *See supra* note 28 (filtered to exonerations involving official misconduct).

139 *See supra* note 28 (filtered to guilty-plea exonerations involving official misconduct).

140 *See supra* note 28 (filtered to guilty-plea exonerations involving official misconduct, without DNA evidence).

141 GOVERNMENT MISCONDUCT, *supra* note 58, at 12.

broadly;[142] in drug cases the rate is 34%—about four times the prosecutorial rate[143] —driven partly by "clusters of cases in which police planted drugs on innocent suspects."[144]

The Watts cases are one of seventeen "group exonerations"—groups "deliberately framed for crimes that did not occur" through "police perjury and corruption."[145] The method is planted or falsely booked drugs.[146] By 2018 group exonerations exceeded 2,500 people—overwhelmingly Black or Hispanic.[147]

In Los Angeles's Rampart scandal, CRASH officers lied in reports, planted contraband, and "shot and wounded unarmed suspects, and then planted guns on them";[148] about 156 convictions fell, most of young Hispanic men who had falsely pleaded guilty to drug or gun charges.[149]

New York's Mollen Commission found the same pattern citywide, tied predominantly to narcotics,[150] sustained by falsified records and perjury;[151] Manhattan judges vacated 125 con-

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142 *Id.* at v.

143 *Id.* at 13.

144 *Id.* (citation omitted). Note, however, that for white-collar exonerations, prosecutor misconduct (57%) is greater than five times the rate of police misconduct (11%). *Id.* "White-collar exonerations have both the highest rate of misconduct by prosecutors and the lowest rate of misconduct by police of any crime category." *Id.*

145 GOVERNMENT MISCONDUCT, *supra* note 58, at 23.

146 *Id.*

147 *Id.* (citing NAT'L REGISTRY OF EXONERATIONS, *Mass Exonerations and Group Exonerations Since 1989* (Apr. 9, 2018)).

148 *Id.*

149 *Id.* (citing Russell Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 WASH. U. L. REV. 1133 (2013)). The same sort of police misconduct played out in group exonerations in cities across the country: Washington, D.C.; Oaklyn, New Jersey; Philadelphia, Pennsylvania; Dallas, Texas; Oakland, California; Tulia, Texas; Louisville, Kentucky; Tulsa, Oklahoma; Benton Harbor, Michigan; Camden, New Jersey; Mansfield, Ohio; East Cleveland, Ohio; and Baltimore, Maryland. *Id.* at 5–8 (citations omitted).

150 *Id.* at 76 (citation omitted).

151 *Id.* at 76–77 (citation omitted). *See Jabar Walker Exonerated After 25 Years of Wrongful Conviction in Manhattan Double Homicide*, INNOCENCE PROJECT (Nov. 27, 2023), http://innocenceproject.org/jabar-walker-exonerated-after-25-years-of-wrongful-conviction-in-manhattan-double-homicide/ ("Misconduct in the precinct was so rampant that an victions and dismissed charges against about 100 more.[152]

E. *Wrongful Guilty Pleas Induced by False or Misleading Evidence: Derrick Allen*

Innocent defendants often plead while insisting on innocence, fearing the state's evidence—sound or not—could convince a jury. *North Carolina v. Alford*[153] holds such pleas constitutional if "a voluntary and intelligent choice among the alternative courses of action."[154]

In February 1998, Derrick Allen called 911: a two-year-old girl in his care was unresponsive.[155] Paramedics found no pulse[156] and what appeared to be blood on her pantsuit.[157]

He was charged that same day with a statutory sex offense;[158] the medical examiner attributed the child's death to Shaken Baby Syndrome.[159]

A first-degree murder indictment followed,[160] with death-penalty approval—despite Derrick's insistence that he had nothing to do with the death.[161]

Pressed to accept the state's "bottom line" offer,[162] Derrick entered an *Alford* plea to second-degree murder and a first-de-

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investigation by the Mollen Commission . . . resulted in the arrest of 33 officers — a staggering one-sixth of the precinct — in the 1990s. The Mollen Commission found that officers in the 'Dirty 30' routinely engaged in perjury, record falsification, thefts during searches and seizures, and distribution of narcotics.").

152 NAT'L REGISTRY OF EXONERATIONS, *New York 1994* (Dec. 18, 2021), https://exonerationregistry.org/groups/4260.

153 400 U.S. 25 (1970).

154 *Id.* at 31, 37.

155 NAT'L REGISTRY OF EXONERATIONS, *Derrick Allen*, https://exonerationregistry.org/cases/13102 (last visited July 15, 2026).

156 *Id.*

157 *Id.*

158 *Id.*

159 *Id.*

160 *Id.*

161 *Id.*

162 *Id.*

gree sexual offense,[163] requiring the state to present a factual basis.[164]

Prosecutor Freda Black told the judge the blood was among her most important evidence.[165] But the lab's confirmatory blood test was negative—a result the analyst buried as a small dash beside the word "Takayama" in her notes.[166]

The state denied evidence of witness drug use[167] and never produced the polygraph of the child's other caregiver.[168] Derrick drew up to fifty-four years.[169]

A 2004 pro se petition[170] led, five years later, to vacatur and withdrawal of the plea,[171] and in 2010 to release on bail.[172]

Preparing for retrial, his new attorney found twenty-three pages missing from the detective's report—including that polygraph;[173] an independent lab review found analysts routinely buried negative results, tainting 230 other cases.[174]

In 2010 the court dismissed the charges and excoriated the prosecution:[175] the state had leveraged the death penalty to extract the plea while withholding evidence,[176] with lab results "deceptively written"[177] and a fair trial now "impossible."[178]

The appellate court reversed, but in 2016 prosecutors

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163 *Id.*

164 *Id.*

165 *Id.*

166 *Id.*

167 *Id.*

168 *Id.*

169 *Id.*

170 *Id.*

171 *Id.*

172 *Id.*

173 *Id.*

174 *Id.*

175 *Id.*

176 *Id.*

177 *Id.*

178 *Id.*

dropped the charges for good,[179] conceding they could not prove every element beyond a reasonable doubt.[180]

F. Wrongful Guilty Pleas Induced by Inadequate Legal Defense: Timothy Johnson

In December 1984, Timothy Johnson pleaded guilty to murder and two armed robberies.[181] Taressa Stanley, a store clerk, had been shot in the neck;[182] she died without identifying her attacker.[183]

On a felon-informant's tip, officers arrested Timothy the next day on capital charges.[184]

They also arrested his girlfriend, his disabled mother, and his stepfather.[185] His plea bought dismissal of their charges and took the death penalty off the table;[186] it cost him three consecutive life terms.[187]

Timothy's pro se motion and state habeas petition[188] produced a new trial in 2006:[189] counsel had never told him what rights his plea waived,[190] and the record "fell well short" of showing an informed waiver.[191] Tried at last in December 2013—witnesses dead, the gun and bullet lost[192] —he was acquitted. He later alleged that officers had dangled him over a bridge and

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179 *Id.*

180 *Id.*

181 NAT'L REGISTRY OF EXONERATIONS, *Timothy Johnson*, https://exonerationregistry.org/cases/11466 (last visited July 15, 2026) [hereinafter *Timothy Johnson*].

182 *Id.*

183 *Id.*

184 *Id.*

185 *Id.*

186 *Id.*

187 *Id.*

188 *Id.*

189 *Id.*

190 *See id.*

191 *Id.*

192 *Id.*

threatened to drop him unless he pleaded.[193]

G. Wrongful Guilty Pleas Induced by Mistaken Witness Identification: Anthony Embry

In May 1993, twenty-three-year-old Anthony Embry pleaded guilty to murdering Christopher Davis and drew twenty years.[194] Three witnesses picked him from a photo lineup[195] — and also picked Falanda Miles, whom a jury acquitted on alibi evidence.[196]

Three years later a New York gang member, Louis Griffin, pleaded guilty to a RICO violation[197] and admitted his role in the Davis murder;[198] officials then moved to vacate Anthony's conviction.

As these cases illustrate, innocent individuals plead guilty to crimes they did not commit for many reasons, often in combination. Under *Alford*, defendants may even plead guilty while maintaining their innocence.[199] As the next Section details, wrongful guilty pleas account for about a quarter of all exonerations.

H. Non-DNA Guilty Plea Exonerations

Almost every criminal case ends in a guilty plea, and of the 3,842 exonerations to date, nearly a quarter (923) involved factually innocent defendants who falsely pleaded guilty to crimes they did not commit.[200] A factually innocent defendant is one who was falsely accused and charged with committing a crime but later exonerated.[201] Of the 923 wrongful guilty plea exonerations, 840

193 *Id.*

194 NAT'L REGISTRY OF EXONERATIONS, *Anthony Embry*, https://exonerationregistry.org/cases/11439 (last visited July 15, 2026).

195 *Id.*

196 *Id.*

197 *Id.*

198 *Id.*

199 In New York, pleading guilty to a crime without admitting guilt is termed a "*Serrano* plea." People v. Serrano, 206 N.E.2d 330 (N.Y. 1965).

200 *See supra* note 28.

201 The NRE defines "exoneration", in substance, as a conviction undone—by

(91%) did *not* involve DNA evidence.[202] DNA contributed to exonerating only eighty-three individuals (9%) who pleaded guilty,[203] compared with about 19% (565 of 2,919) of exonerees who did not. DNA, in short, does far less for those who plead. And of the 840 non-DNA guilty plea exonerations, 716 (85%) were "no crime" cases: "The exoneree was convicted of a crime that did not occur, either because an accident or a suicide was mistaken for a crime, or because the exoneree was accused of a fabricated crime that never happened."[204] As Jessica S. Henry notes in her book on no-crime cases, "no-crime wrongful convictions involve innocent people convicted of crimes that did not happen in the first place."[205] Before moving on, then, we must define the different types of pleas.

In a typical plea bargain, a defendant who committed a crime waives their right to trial and accepts a guilty plea to a lower charge or sentence, thus gaining a better deal overall than *if* the defendant were convicted at trial.[206] A fictional plea, however, is a "defendant's plea of guilty to a crime that all parties agree he did not commit."[207] Fictional pleas can be either fictions of fact

declaration of innocence, pardon, acquittal, or dismissal—on evidence of innocence not presented at trial or, in plea cases, unknown to the defense when the plea was entered. NAT'L REGISTRY OF EXONERATIONS, *Glossary*, https://exonerationregistry.org/understanding-registry (last visited July 15, 2026) [hereinafter *Glossary*].

202 *See supra* note 28 (filtered to guilty-plea exonerations without DNA evidence).

203 *Id.*

204 *See supra* note 28 (counting exonerations tagged both no-crime and guilty-plea, without DNA evidence); *Glossary*, *supra* note 198; *see also* CONVICTING THE INNOCENT, *supra* note 118, at ix ("[N]early one-third of all known exonerations involve people wrongfully convicted of crimes that never happened.").

205 CONVICTING THE INNOCENT, *supra* note 118, at xi.

206 *Fictional Pleas*, *supra* note 23, at 868; *see also* INNOCENCE PROJECT, *The Issues: Coerced Pleas*, http://innocenceproject.org/coerced-pleas/ (last visited July 15, 2026) (defining plea bargaining).

207 *Fictional Pleas*, *supra* note 23, at 863; *id.* at 860 (defining a fictional plea as a guilty plea "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"); *id.* at 860 n.14 (changing the term and using the definition of "baseless pleas" coined by Mari Byrne in *Baseless Pleas: A Mockery of Justice*, 78 FORDHAM L. REV. 2961, 2966 (2010)).

or fictions of law.[208] In a factual fiction, the "defendant pleads guilty to a charge that is not supported by the factual allegations underlying the arrest," intending to "create a false record for future downstream actors."[209] The purpose is to avoid specific collateral consequences if the defendant were to be convicted of the original charged offense.[210] *Nolo contendere*[211] (no contest) and *Alford* pleas[212] are excluded from this definition because, although a defendant can contest their guilt when entering either type of plea, "the initial factual allegations generally support the charge."[213] That is, whatever offense the defendant ultimately pleads to, under a *nolo* or *Alford* plea, some relationship exists between it and the initial allegations. The distinction among a traditional guilty plea, a *nolo* plea, and an *Alford* plea is primarily about the "willingness of the defendant to take responsibility and admit guilt."[214]

A fiction of law is one in which a defendant pleads guilty to a crime that does not exist—that is, the crime is not found in any statute, and their one-time purpose is to swap one charge for another and, like factual fictions, to avoid collateral consequences.[215] Although not a *formal* legal fiction, fictions of law are rarer than factual fictions, but they do exist.[216] For example, some courts have allowed defendants to plead guilty to nonexistent crimes if they receive a benefit,[217] if it is part of a negotiated

208 *Fictional Pleas*, *supra* note 23, at 860.

209 *Id.* at 863 & n.28.

210 *Id.* at 857 (explaining that fictional plea deals "have long been used to avoid strict criminal penalties associated with a particular charge").

211 Nolo contendere is defined as "a plea by which the defendant does not contest or admit guilt." BLACK'S LAW DICTIONARY 596 (Bryan A. Garner ed., 5th pocket ed. 2016).

212 An Alford plea is defined as "[a] guilty plea that a defendant enters a part of a plea bargain without admitting guilt." *Id.* at 32.

213 *Fictional Pleas*, *supra* note 23, at 863 n.28.

214 *Plea Decision Making*, *supra* note 20, at 341.

215 *Fictional Pleas*, *supra* note 23, at 860–61, 863–64.

216 *Id.* at 864.

217 *Id.* at 864 n.31 (citing Downer v. State, 543 A.2d 309 (Del. 1988); People v. Myrieckes, 734 N.E.2d 188, 194 (Ill. App. Ct. 2000)).

plea deal,[218] if it's knowingly entered into,[219] or where a defendant pleads to a criminal attempt even though a *conviction* on the same charge would not be available.[220]

Another difference between typical and fictional plea deals is their tradeoffs: although both save the government the same resources by avoiding trial, a defendant entering a fictional plea "accepts *more* punishment or a *higher* charge than is typically offered in the same case or than the defendant may have been offered initially in the case," again, to avoid some significant collateral consequence.[221] At least one writer has called the practice "systemic lying": that is, "coordinated lying among many actors in the criminal justice system when there is a 'strong and collective dissonance between moral beliefs and legal prescriptions.'"[222] Immigration court is one example: "Fictional pleas—through minor sleights of hand or outright manipulation of facts or law—avoid deportation and other collateral consequences, while allowing the prosecutor to secure a disposition in the criminal case."[223]

Conversely, a wrongful guilty plea deal, as this paper uses the term, is one where a factually innocent individual was wrongfully accused of committing a crime and, for one or more reasons, waived their right to trial and instead pleaded guilty to *some* offense—regardless of whether it was a crime they were initially charged with or indicted under. Much like a fictional plea, a wrongful guilty plea serves as a way for innocent defendants "to avoid a collateral consequence they should never have

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218 *Id.* (citing McPherson v. State, 163 P.3d 1257, 1262–63 (Kan. Ct. App. 2007)).

219 *Id.* (citing Spencer v. State, 942 P.2d 646, 649 (Kan. Ct. App. 1997)).

220 *Id.* (citing People v. Genes, 227 N.W.2d 241, 243 (Mich. Ct. App. 1975)).

221 *Id.* at 869.

222 *Id.* at 859 (quoting Julia Simon-Kerr, *Systemic Lying*, 56 WM. & MARY L. REV. 2175, 2179 (2015)).

223 *Id.* "Such creative bargaining, which involves negotiating around collateral consequences, is common among the players in the criminal system. Parties often use creative bargaining when the field of plea options based on the facts of the case are limited. Sometimes there are no options available based on the underlying facts of the allegation. In these cases, the attorneys must turn to fiction. This turn to fiction leads to a certain level of collusion among prosecutors and defense attorneys, and even judges, who accept pleas on the record that are unsupported by the factual allegations." *Id.* at 858 (footnote omitted).

been subjected to in the first place because they are indeed innocent."[224] Both a wrongful guilty plea and "the fictional plea now create[] yet another tool by which the prosecutor can tempt an innocent defendant into pleading guilty and thereby avoid some other serious, noncriminal consequence."[225] But unlike a fictional plea deal, a wrongful plea deal can include *nolo* and *Alford* pleas, too. Conceptually, then, a fictional plea is an open secret,[226] whereas a wrongful guilty plea is the secret the system will not admit.[227] But the United States plea bargaining system did not start this way.

II. PLEA BARGAINING IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM

A. *The History and Rise of Plea Bargaining*

Plea bargaining—the practice by which "prosecutors and trial judges offer defendants concessions in exchange for their pleas"[228] —is a relatively new facet of the American criminal justice system,[229] one that did not "exist in colonial America"[230] and was "almost unheard of before the Civil War."[231] Plea bargaining

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224 *Fictional Pleas*, *supra* note 23, at 869 (recognizing this general critique of plea bargaining and noting that innocent defendants plead guilty for many reasons); *id.* at 861 ("[W]hen an innocent person pleads guilty to a crime he did not commit, that plea can rightly be viewed as a fiction.").

225 *Id.* at 869.

226 An open secret is defined as "a supposedly secret but generally known matter." MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/open%20secret (last visited July 15, 2026).

227 A dirty little secret is defined as "something bad that someone does not want people to know." MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/dirty%20little%20secret (last visited July 15, 2026).

228 Alschuler, *Plea Bargaining*, *supra* note 59 ("Plea bargaining consists of the exchange of official concessions for a defendant's act of self-conviction."); BLACK'S LAW DICTIONARY, *supra* note 208, at 596 (defining "plea bargain" as "[a] negotiated agreement" whereby a defendant "pleads guilty . . . in exchange for some concession by the prosecutor").

229 Alschuler, *Plea Bargaining*, *supra* note 59, at 5.

230 Yoffe, *supra* note 16.

231 Dylan Walsh, *Why U.S. Criminal Courts Are So Dependent on Plea Bargaining*, THE ATLANTIC (May 2, 2017), was uncommon and became pervasive only well into the 1800s.[232] According to both case reports and treatises, not only did Anglo-American courts *not* encourage guilty pleas, but they vigorously *discouraged* them—for centuries.[233]

In the 1920s, Progressive Era legal scholars—the Reformers—established crime commissions to review the nation's justice system.[234] Their findings exposed the phenomenon of plea bargaining—and they were "aghast."[235] They described the system as "prosecutorial 'corruption,' manipulated by criminals to 'escape' their due punishment."[236] "Plea bargaining began to thrive in the early twentieth century because judges and prosecutors began accepting bribes from defendants in return for 'plea agreements' that guaranteed reduced sentences."[237] The commissions all but condemned the practice as corrupt: compromises appeared to let criminals escape their due punishment, undermining the law.[238]

The Reformers, however, viewed prosecutors' willingness to

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http://www.theatlantic.com/politics/archive/2017/05/plea-bargaining-courts-prosecutors/524112/.

232 Alschuler, *Plea Bargaining*, *supra* note 59, at 5 (reasoning that other practices such as compounding "have left rich histories" and inferring that plea bargaining would have also had it been an established practice) (quoting 2 L. RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW 313–25 (1956); Philip B. Kurland & D.W.M. Waters, *Public Prosecutions in England, 1854–79: An Essay in English Legislative History*, 1959 DUKE L.J. 493)); William Ortman, *When Plea Bargaining Became Normal*, 100 B.U. L. REV. 1435, 1441 (2020) [hereinafter Ortman, *When Plea Bargaining Became Normal*] (noting Friedman and Percival's finding that 40% of Alameda County convictions from 1880 to 1910 ended in guilty pleas, and that by the 1920s "guilty pleas had replaced guilty verdicts as the primary pathway to criminal convictions"). *Id.* at 1446.

233 Alschuler, *Plea Bargaining*, *supra* note 59, at 5 ("[A] few American criminal-court records of the early nineteenth century reveal an extremely low guilty-plea rate."); Dervan, *Bargained Justice*, *supra* note 23, at 58 ("The evolution of plea bargaining into a force that affects over 95 percent of defendants in the American criminal justice system took place mainly in the nineteenth and twentieth centuries.") (citations omitted).

234 Ortman, *When Plea Bargaining Became Normal*, *supra* note 229, at 1437.

235 *Id.*

236 *Id.*

237 Dervan, *Bargained Justice*, *supra* note 23, at 59.

238 Ortman, *When Plea Bargaining Became Normal*, *supra* note 229, at 1438.

negotiate plea bargains as a weakness.[239] One study noted that although plea bargaining might "be perfectly justified in many cases . . . it may also be used to excuse weak and careless prosecution" because it is "easier to bargain away the rights of the state . . . than to go through the effort of trying the case."[240] Another study commented that "the case may be weak because the prosecutor himself is weak, or (as is more often true) conscious of lack of preparation."[241]

Yet the Reformers were not just concerned with corruption; they also espoused broader claims of criminal justice: that it should be efficient and "individualized"—that is, geared toward dealing with criminals, not crimes—ideas that are today "cornerstones of our plea-fueled system of criminal justice."[242] But, because the plea bargaining system was new to the Reformers, they were more concerned with corruption and efficiency than with whether the practice was fair to defendants.[243] "They only rarely considered whether plea bargaining was or could become coercive."[244] And yet that is the main criticism of today: "Plea bargaining is coercive . . . because prosecutors (by their charging decisions), judges (by the sentences they impose), and legislators (by enacting criminal statutes with extreme maximum penalties) inflate post-trial punishments to make plea offers look attractive in comparison."[245] By the end of the 1920s and the start

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239 *Id.* at 1463.

240 *Id.* (citation omitted).

241 *Id.* (citation omitted).

242 *Id.*

243 *Id.* at 1466.

244 *Id.* at 1467 (citing Alfred Bettman & Howard F. Burns, *Prosecution*, *in* CRIMINAL JUSTICE IN CLEVELAND 85, 193 (Roscoe Pound & Felix Frankfurter eds., 1922), who explained: "The whirligig too often snatches up the innocent or those who merit leniency and hurls them into punishment without giving them the time or opportunity to demonstrate their innocence or grounds for dealing leniently with them.").

245 *Id.* at 1467; *id.* at 1499 (citing Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1034 (2006), for the proposition that "those who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes").

of the 1930s, a new movement was underway: Legal Realism.[246]

The Realists took a different view of plea bargaining—they embraced it.[247] Researchers used then-modern empirical methods and applied them to legal studies.[248] One study of a federal district court in Connecticut concluded that federal criminal justice operated *magnificently*.[249] Indeed, the report found that the criminal justice system was efficient because prosecutors selected cases carefully, which was possible only because guilty pleas resolved the vast majority of cases.[250] The report defended plea bargaining "as the normal—and perhaps inevitable—way of doing criminal justice under modern conditions."[251] Significantly, it recommended one procedural reform: "that legislation permitting and perhaps regulating the open compromise of criminal cases would be desirable."[252]

Two other Realist reports supported plea bargaining in the same way.[253] One contrasted the *ideal of law enforcement* with its *reality*.[254] Another paper explained that plea bargaining was necessary because criminal law was overbroad and, to fill the gaps that legislative change could not address, "justice is administered in particular cases by way of procedural devices that circumvent the substantive law's overbreadth."[255] Both authors

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246 *Id.* at 1473.

247 *Id.*

248 *Id.* at 1474.

249 *Id.* (citing the 1931 Progress Report conducted by Charles Clark, William O. Douglass, and Thurman Arnold).

250 *Id.* at 1475.

251 *Id.* at 1477 (quoting George W. Wickersham, Foreword to AM. L. INST., A STUDY OF THE BUSINESS OF THE FEDERAL COURTS, PART I: CRIMINAL CASES 1, 13 (1934)).

252 *Id.* (citation omitted).

253 *Id.* at 1478–79.

254 *Id.* (citing Thurman W. Arnold, *Law Enforcement—An Attempt at Social Dissection*, 42 YALE L.J. 1, 18 (1932)). Arnold set the ideal against the real by pairing assumption with contradiction: the assumption that "[t]he bargaining process by which guilty pleas are induced in exchange for smaller sentences is one to be condemned as contrary to our ideals of criminal justice," and the contradiction that "[c]riminal cases should be frankly compromised in the discretion of the prosecution." Arnold, *supra*, at 18 (internal footnotes omitted).

255 *Id.* at 1479 (citing JEROME HALL, THEFT, LAW AND SOCIETY 68 (1935), and disclaimed the Progressives' belief that plea bargaining was integral to prosecutorial corruption and instead claimed it was "the mark of an advanced system."[256]

In the decades following the 1930s, the Realists' ideal of normalizing plea bargaining prevailed.[257] Two criminal justice surveys endorsing plea bargaining were published,[258] each maintaining that the system served the interests of both sides in criminal adjudication as well as society's.[259] As to defendants and prosecutors, plea bargaining removed the risks and uncertainty of trials and helped to mitigate harsh mandatory sentencing.[260] As to society, plea bargaining was a necessity because, without it, the criminal justice system would cease to function.[261] Indeed, as one report put the point: "[o]ur system of criminal justice has come to depend upon a steady flow of guilty pleas."[262]

Ultimately, the Realists' view became entrenched.[263] Still, two concerns remained: undue leniency toward criminals, and the one this paper elucidates—that "inducing guilty pleas might not be fully voluntary."[264] The next section traces how the guilty-plea requirement came to turn on voluntariness.

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comparing modern plea bargaining to the benefit of clergy).

256 *Id.* (citation omitted).

257 *Id.* at 1486; *id.* at 1439–40 (explaining that the Legal Realists of the 1930s helped "in normalizing plea bargaining," and that objections to its coerciveness came "too little and too late to make much difference"); Dervan, *Bargained Justice*, *supra* note 23, at 71 ("[T]he rising tide of plea-bargaining and the courts' growing reliance on such swift justice was likely already unstoppable.").

258 *Id.* at 1487 (citing DONALD J. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL (Frank J. Remington ed., 1966); PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUST., THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967)).

259 *Id.* at 1487–88.

260 *Id.* at 1488.

261 *Id.*

262 *Id.* (quoting TASK FORCE ON THE ADMIN. OF JUSTICE, PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUST., TASK FORCE REPORT: THE COURTS 10 (1967)).

263 *Id.* at 1489.

264 *Id.* at 1488.

B. Guilty Pleas and the Voluntariness Requirement

One early objection eventually materialized: as caseloads, pretrial detention, mandatory minimum sentencing, and prosecutorial discretion grew alongside the ideal of efficiency,[265] guilty pleas might not be voluntary.[266] "[Plea bargaining] may even be used to coerce a plea of guilty to a small offense out of a defendant conscious of his innocence but still afraid of the possibility of an unjust conviction on the larger charge."[267] One attorney who spent five months observing criminal proceedings reported that "[u]nquestionably there are innocent men who have pleaded guilty to a misdemeanor from fear of being 'railroaded' to the penitentiary for a long period of years."[268] Over the following decades, Supreme Court decisions amplified the cost, length, and intricacy of criminal trials, deepening the system's dependence on plea bargaining.[269]

Although plea bargaining increased, the practice never diminished the requirement that guilty pleas be voluntary.[270] "[A]

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265 *See* Ortman, *When Plea Bargaining Became Normal*, *supra* note 229, at 1488, 1492.

266 *See* Ortman, *When Plea Bargaining Became Normal*, *supra* note 229, at 1488, 1492 & n.370; *id.* at 1466–67; *id.* at 1468 (arguing that Progressives understood plea bargaining's coercive potential because "[t]he condition precedent for coercive plea bargaining—large trial penalties—was evident on the face of the criminal justice surveys") (internal footnotes omitted); *see id.* (discussing State v. Coston, 37 So. 619, 620 (La. 1904) where the "Louisiana Supreme Court reckoned that pleading guilty to a 'minor offense' is 'what an innocent man might do who found that appearances were against him, and that he might be convicted notwithstanding his innocence.'").

267 *Id.* at 1492 & n.369 (quoting ERNEST W. PUTTKAMMER, ADMINISTRATION OF CRIMINAL LAW 171 (1953)); Comment, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L.J. 204, 220 (1956) ("The greatest danger inherent in the policy of utilizing the plea as a factor in sentencing is that innocent men will be influenced to plead guilty.").

268 *Id.* at 1493 (quoting Samuel Dash, *Cracks in the Foundation of Criminal Justice*, 46 ILL. L. REV. 385, 393 (1951)).

269 Alschuler, *Plea Bargaining*, *supra* note 59, at 5 (discussing the "trial complexity" theory); *see also* Ortman, *When Plea Bargaining Became Normal*, *supra* note 229, at 1442 (discussing other theories, including "caseload pressure," the "professionalization" of police and prosecutors, and "contextual" theories) (citations omitted).

270 Godsey, *supra* note 35, at 467 (summarizing a century of involuntary-plea of guilty shall not be accepted unless made voluntarily."[271] To be sure, as early as 1897, in *Bram v. United States*,[272] the Supreme Court explained that a confession is involuntary if it was "'extracted by any sort of threats' or 'obtained by any direct or implied promises, however slight.'"[273] Voluntariness was thus a constitutional requirement, and in the three decades before the Court decided *Miranda*, it found confessions involuntary in no fewer than twenty-three cases.[274] The Fifth Circuit, at least for a time, also recognized as much. *Shelton v. United States*[275] captured the essence of *Bram,* but it would be short-lived. In *Shelton*, the Fifth Circuit held that guilty plea deals induced by promises of lighter sentences are involuntary and noted that "[j]ustice and liberty are not the subjects of bargaining and barter."[276] But the Fifth Circuit sitting en banc reversed.[277] The Supreme Court did not hear the case, as one author put it, "for fear the result would throw the entire American criminal justice system into chaos."[278]

Just over a decade later, in 1968, the Supreme Court decided

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confession doctrine).

271 Ortman, *When Plea Bargaining Became Normal*, *supra* note 229, at 1494 (quoting Kercheval v. United States, 274 U.S. 220, 223 (1927)).

272 168 U.S. 532 (1897).

273 Ortman, *When Plea Bargaining Became Normal*, *supra* note 229, at 1494 (quoting Bram v. United States, 168 U.S. 532, 542–43 (1897)).

274 Steven B. Duke, *Does Miranda Protect the Innocent or the Guilty?*, 10 CHAP. L. REV. 551, 563 (2007) (citing Welsh S. White, *Miranda's Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211, 1220 (2001)).

275 242 F.2d 101 (5th Cir. 1957), *rev'd en banc*, 246 F.2d 571 (5th Cir. 1957), *rev'd*, 356 U.S. 26 (1958).

276 Ortman, *When Plea Bargaining Became Normal*, *supra* note 229, at 1494 (quoting *Shelton*, 242 F.2d at 113).

277 *Id.* (citing Shelton v. United States, 246 F.2d 571, 573 (5th Cir. 1957) (en banc)).

278 Dervan, *Bargained Justice*, *supra* note 23, at 72 (citing Shelton v. United States, 242 F.2d 101 (5th Cir. 1957), judgment set aside, 246 F.2d 571 (5th Cir. 1957) (en banc), *rev'd* per curiam on confession of error, 356 U.S. 26 (1958)); *id.* at 73 ("According to Professor Albert Alschuler, evidence indicates that the government likely confessed its error for fear that the Supreme Court would finally make a direct ruling that all manner of plea bargaining was wholly unconstitutional.").

United States v. Jackson,[279] a case about a federal statute that permitted an increased punishment for defendants convicted by jury.[280] Although it was not a plea bargain case, it nevertheless raised the issue of enhanced punishment for defendants who exercised their Sixth Amendment constitutional right to trial.[281] The *Jackson* Court held that the statute's death penalty provision was unconstitutional because it "needlessly penalize[d] the assertion of a constitutional right."[282] As the Court explained: "It is no answer . . . that federal trial judges may be relied upon to reject coerced pleas of guilty and involuntary waivers of jury trial. 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."[283] Until *Jackson*, the Court struck down laws that *needlessly* encouraged defendants to forgo their constitutional rights.[284] "By 1968, the Supreme Court had struck down every guilty plea induced by threats of punishment or promises of leniency that had arrived on its docket."[285] As the next Section explains, the plea bargain system would not stay that way.

C. *The Supreme Court's Complicity in Normalizing Plea Bargaining*

Two years after *Jackson*, in 1970, the Supreme Court issued a decision that would leave an indelible mark on the plea bargain system and help transform it into the Leviathan it has become: *Brady v. United States*.[286] Although plea bargaining did not start as standard practice, over a four-decade period, it became just that.[287]

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279 390 U.S. 570 (1968).

280 *Id.* at 571–72.

281 *Id.* at 581.

282 *Id.* at 583.

283 *Id.*.

284 *See id.*

285 Dervan, *Bargained Justice*, *supra* note 23, at 76 (citation omitted).

286 397 U.S. 742 (1970).

287 Ortman, *When Plea Bargaining Became Normal*, *supra* note 229, at 1438–39. Many have argued that *Brady v. United States* was wrongly decided for at least several reasons. *See*, *e.g.*, Tina Wan, *The Unnecessary*

Starting with *Brady v. United States*,[288] the Supreme Court "eliminated, in substance but not in name, the voluntariness requirement for in-court confessions."[289] In so doing, it issued a decision that "was inconsistent with over a century of precedent and the Court's prior animosity towards bargained justice."[290]

Brady was charged with kidnapping under 18 U.S.C. § 1201(a) and faced the ultimate penalty: death.[291] After he learned that his codefendant confessed, pleaded guilty, and would testify against him, Brady claimed his plea was not voluntary because the statute—the same provision held unconstitutional in *Jackson*—coerced him to plead guilty.[292]

But the Court disagreed: *Jackson* did not hold that under § 1201(a), all guilty pleas encouraged by the threat of a death sentence are involuntary.[293] Although *Jackson* precluded imposing the death penalty under the statute in that case, the Court confirmed that it created neither a new standard nor a new application of the test for determining whether a guilty plea was valid.[294] "[G]uilty pleas are valid if both 'voluntary' and 'intelligent.'"[295] And on that score, Brady's guilty plea was valid.[296]

The Court held that Brady's guilty plea was voluntary even though he might have been motivated to avoid a possible death sentence.[297] As the Court explained, "because guilty pleas are not constitutionally forbidden," the practice was "inherent in the

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Evil of Plea Bargaining: An Unconstitutional Conditions Problem and a Not-so-Least Restrictive Alternative, 17 S. CAL. REV. L. & SOC. JUST. 33 (2007); Robert Schehr, *The Emperor's New Clothes: Intellectual Dishonesty and the Unconstitutionality of Plea Bargaining*, 2 TEX. A&M L. REV. 385 (2015). See also infra Section IV.I (arguing that a "right to plea bargain" would fail the Dobbs test).

288 397 U.S. 742 (1970).

289 Ortman, *When Plea Bargaining Became Normal*, *supra* note 229, at 1494–95.

290 Dervan, *Bargained Justice*, *supra* note 23, at 76.

291 *Brady*, 397 U.S. at 743.

292 *Id.* at 743–46.

293 *Id.* at 747.

294 *Id.*

295 *Id.* at 747 (citing Boykin v. Alabama, 395 U.S. 238, 242 (1969)).

296 *Id.* at 748.

297 *See id.* at 758.

criminal law and its administration."[298] The Supreme Court legitimized plea bargaining so long as the guilty plea was made voluntarily and intelligently and confirmed that "agents of the State may not produce a plea by actual or threatened physical harm or by mental coercion overbearing the will of the defendant."[299] After *Brady v. United States* and its progeny,[300] courts would find defendants entered guilty pleas voluntarily unless they had no legal counsel, no understanding of the consequences of the plea,[301] or were threatened with physical force.[302]

According to commentators, *Brady v. United States* implemented "a multiprong rationalization strategy," which required

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298 *Id.* at 751–52; Alschuler, *Plea Bargaining*, *supra* note 59, at 9. The *Brady* Court also explained that "[c]entral to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment." *Brady*, 397 U.S. at 748 (emphasis added). It is this latter part of the Court's statement that informs part of this paper's conception of the wrongful guilty plea: innocent criminal defendants could very well be coerced into accepting fault for offenses they are not even indicted under.

299 *Brady*, 397 U.S. at 750; Dervan, *Coercive Plea Bargaining*, *supra* note 23, at 1928; Lucian E. Dervan, *Fourteen Principles and a Path Forward for Plea Bargaining Reform*, 38 CRIM. JUST., Winter 2024, http://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2024/winter/fourteen-principles-path-forward-plea-bargaining-reform/ [hereinafter Dervan, *Fourteen Principles*] (*Brady* "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.").

300 Schehr, *supra* note 284, at 402 & n.100 ("The 1970s significantly, and even dramatically, transitioned the Court away from concerns over voluntariness and the protections afforded by the Fifth Amendment during plea negotiations by rendering seven decisions that helped to clarify a new procedural posture that was far more accepting of legislative sentencing initiatives and the assertion of prosecutorial authority constituting pleas.") (citing North Carolina v. Alford, 400 U.S. 25 (1970); Parker v. North Carolina, 397 U.S. 790 (1970); Santobello v. New York, 404 U.S. 257 (1971); Chaffin v. Stynchcombe, 412 U.S. 17 (1973); Bordenkircher v. Hayes, 434 U.S. 357 (1978); Corbitt v. New Jersey, 439 U.S. 212 (1978)).

301 *See*, *e.g.*, Padilla v. Kentucky, 559 U.S. 356, 374 (2010) (holding the Sixth Amendment requires that "counsel must inform her client whether his plea carries a risk of deportation").

302 Ortman, *When Plea Bargaining Became Normal*, *supra* note 229, at 1495.

trial judges to ensure guilty pleas were made voluntarily.[303] The heart of that strategy sought to differentiate between (permissible) promises of leniency in exchange for a defendant's guilty plea and (impermissible) threats of severity for exercising one's right to trial.[304] As the *Brady* Court made the distinction, it could not "hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State."[305]

This may be a distinction without a difference. Professor William Ortman explains that "a meaningful distinction between threats and promises exists only when there is a normative baseline against which to evaluate departures."[306] He notes that *Brady v. United States* failed to explain *why* the correct baseline is the maximum exposure a defendant faces if found guilty at trial.[307] The problem with the *Brady* Court's analysis is that it places no limit on the pressure prosecutors can exert on defendants to plead guilty "[b]ecause criminal statutes often make extreme punishments theoretically available."[308] So not only did *Brady v. United States* "render the 'voluntariness' of pleas substantively moot," but courts no longer served as guardians against coercive plea bargaining.[309]

Plea bargaining had existed since the late 1800s, but "from 1893 to 1969 the Court expressed strong suspicion about the efficacy of plea-bargaining since there were documented abuses of the Fifth Amendment by law enforcement and prosecutors."[310] Over this seventy-six-year period, the Court attempted "to reign [sic] in overzealous prosecutorial implementation of plea-bargains, the normative affirmation of pleas that existed at the end of the 1960s, and that was later codified in [Federal] Rule 11" thus "clear[ing] the way for a decade's worth of obsequious Supreme Court decisions that effectively banished to the furthest

303 *Id.*

304 *Id.*

305 *Id.* at 1495–96 (quoting *Brady*, 397 U.S. at 753).

306 *Id.* at 1496 (citation omitted).

307 *See id.* at 1496.

308 *Id.*

309 *Id.* at 1496–97.

310 Schehr, *supra* note 284, at 402.

reaches of pedantic academic jurisprudential argument questions pertaining to the constitutionality of plea-bargaining."[311] Thus, by the time the Court decided *Brady v. United States* in 1970, "[t]he criminal justice system was addicted" to it.[312]

As many commentators maintain, the problem with plea bargaining writ large can be seen in the road to and in the *Brady* decision itself.[313] Because the system juxtaposes an arguably lenient plea deal against the theoretical maximum a defendant faces at trial, over 95% of criminal cases end in guilty pleas.[314] And that is because "'an innocent defendant may accept leniency rather than risk conviction and a severe sentence.'"[315]

As a result, because the criminal justice system would cease to exist without plea bargaining, the *Brady* Court normalized the practice.[316] As Professor Ortman put it: "[T]he Supreme

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311 *Id.*

312 *See* Ortman, *When Plea Bargaining Became Normal*, *supra* note 229, at 1497 (citing Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1161 (2011)).

313 Alschuler, *Plea Bargaining*, *supra* note 59, at 40 ("In a series of decisions which implied that any other course would be unthinkable, the Court upheld the propriety of plea bargaining.") (footnotes omitted).

314 Schehr, *supra* note 284, at 389 ("In *Lafler v. Cooper*, Justice Kennedy admitted, '[C]riminal justice today is for the most part a system of pleas, not a system of trials.' 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.'") (footnotes omitted).

315 Ortman, *When Plea Bargaining Became Normal*, *supra* note 229, at 1467 (citation omitted); Jenia I. Turner, *Plea Bargaining*, *in* 3 REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 75 (Erik Luna ed., 2017). Turner contends that prosecutors' ability to offer steep plea discounts, against a backdrop of severe baseline sentences, exerts intense pressure on defendants to forego trial and plead guilty. *Id*. She cites NRE data showing that, as of January 2017, guilty pleas accounted for about 18% of recorded exonerations (343 of 1,956), a share that has since risen to 24% (923 of 3,842). *See* NAT'L REGISTRY OF EXONERATIONS, *supra* note 28 (last visited July 20, 2026).

316 Ortman, *When Plea Bargaining Became Normal*, *supra* note 229, at 1497–98 (citing RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 130 (2019)); Schehr, *supra* note 284, at 389 (describing plea-bargaining as "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.").

Court explicitly accepted plea bargaining as the new normal, even if it stood in sharp tension with the rest of the Court's unconstitutional conditions jurisprudence and seemed to put an unlawful price on the exercise of the jury trial right."[317]

As a result of the Supreme Court's decision in *Brady v. United States*, "[c]ourts, policymakers and scholars for the most part view plea bargaining as an inevitable feature of our criminal process."[318] But *Brady* also created a litmus test for innocent defendants.[319] The Court wrote that if the plea-bargaining system operated to the extent that a significant number of innocent defendants pleaded guilty, it would be compelled to "reexamine the constitutionality of bargained justice."[320] Today, plea bargaining is the rule, not the exception: in 2023, about 97% of federal criminal convictions and 95% of state convictions were resolved by guilty pleas.[321] And the Supreme Court has expressly stated as much: "[plea bargaining] *is* the criminal justice system."[322] Significantly, of the ninety-seven exonerations in 2025, thirty-one (32%) were no-crime cases: that is, "an exoneree was convicted of a crime that did not occur"; it "may have been an accident, an act of self-defense, a suicide that was mistaken for a crime, or the exoneree may have been accused of a fabricated crime that never happened."[323] Since 1989, of the 3,842 exoner-

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317 Ortman, *When Plea Bargaining Became Normal*, *supra* note 229, at 1498 n.417 (quoting RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 130 (2019)); *see generally* Wan, *supra* note 284, at 36 (arguing plea bargaining is an unconstitutional condition and no least-restrictive alternative).

318 Turner, *supra* note 312, at 73.

319 Dervan, *Bargained Justice*, *supra* note 23, at 97.

320 *Id.*

321 Dervan, *Fourteen Principles*, *supra* note 296; U.S. SENT'G COMM'N 2023, *supra* note 17, at 16 ("In FY 2023, the overwhelming majority of sentenced individuals pleaded guilty (97.2%)."); Carrie Johnson, *The Vast Majority of Criminal Cases End in Plea Bargains, a New Report Finds*, NPR: Law (Feb. 22, 2023, 5:00 AM ET), http://www.npr.org/2023/02/22/1158356619/plea-bargains-criminal-cases-justice (reporting the ninety-eight percent federal figure).

322 Ortman, *When Plea Bargaining Became Normal*, *supra* note 229, at 1435 (quoting Missouri v. Frye, 566 U.S. 134, 144 (2012)); *see also* Lafler v. Cooper, 566 U.S. 156, 170 (2012).

323 NAT'L REGISTRY OF EXONERATIONS, 2025 ANNUAL REPORT 2 (Apr. 6, 2026), https://n2t.net/ark:/88112/x2v16v.

ations, 1,533 (39%) involved "no crime."[324] In 98% of those cases (1,504/1,533), DNA did *not* contribute to the exoneration.[325] In its 2022 Annual Report, the NRE found that 48% of the no-crime exonerations were cases in which innocent individuals falsely pleaded guilty.[326] 2023 produced 153 exonerations, 46 (30%) of which were no-crime cases.[327]

Considering this massive miscarriage of justice specifically and the "persistent criticisms" of plea bargaining in general, in 2019, the American Bar Association's Criminal Justice Section organized a Plea Bargaining Task Force.[328] In 2023, the ABA issued a report discussing the current system and established "Fourteen Principles" to guide the practice. [329] It serves as just one of many proposed solutions to the quagmire of the current plea bargain system.

III. Plea Bargaining: Proposed Solutions

The problems with plea bargaining have garnered myriad proposed solutions. The following sections discuss the ABA's Fourteen Principles, two responses to them, and several other changes offered by scholars.

A. The ABA Report's Fourteen Principles

The ABA's Task Force included actors across the criminal justice system: prosecutors, defense attorneys, judges, advocacy groups,

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324 Nat'l Registry of Exonerations, https://exonerationregistry.org/cases?q=cases&f%5B0%5D=n_cchar%3ANC&f%5B1%5D=n_dna%3A1&f%5B2%5D=n_pre_1989%3A0 (last visited July 20, 2026) (filtered to no-crime exonerations).

325 *Id.* (filtered to no-crime exonerations without DNA evidence).

326 Dervan, *Fourteen Principles*, *supra* note 296 (citing Nat'l Registry of Exonerations, 2022 Annual Report 11 (May 8, 2023)).

327 Nat'l Registry of Exonerations, 2023 Annual Report 3 (Mar. 18, 2024), https://exonerationregistry.org/sites/exonerationregistry.org/files/documents/2023%20Annual%20Report.pdf.

328 ABA Report, *supra* note 14, at 6.

329 *Id.* at 1.

and the legal academy, among others.[330] As one scholar noted, the principles were designed 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."[331]

The Fourteen Principles, unanimously adopted and now ABA policy, are commonsense antidotes to the most pernicious aspects of today's coercive plea system: impermissible incentives, pretrial detention, the lack of discovery before a defendant decides to plead guilty, and insufficient plea-bargaining data.[332] "[O]ne common thread in every criminal courtroom across the country is the deep entrenchment of plea bargaining in the daily administration of criminal justice. Plea bargaining touches every element of criminal practice, including discovery, sentencing, collateral consequences, and procedural rights."[333] In the words of the ABA Report: "[T]he time for reform of the plea-bargaining system is now."[334]

Principle One begins with the premise that trials are both essential and central to the criminal justice system: "A vibrant and active docket of criminal trials and pre- and post-trial litigation is essential to promote transparency, accountability, justice, and legitimacy in the criminal justice system."[335] But the report recognizes that jury trials are today "rare legal artifacts" and, in some places, "nonexistent."[336] This is troubling because although guilty pleas are taken in open court, their negotiations take place in the dark without public, media, or court oversight and are thus an inadequate substitute for the Sixth Amendment right to an open, public trial.[337] Because guilty pleas provide less

330 Dervan, *Fourteen Principles*, *supra* note 296.

331 *Id.*; Dervan, *Coercive Plea Bargaining*, *supra* note 23, at 1919.

332 *See* Dervan, *Coercive Plea Bargaining*, *supra* note 23, at 1919.

333 ABA REPORT, *supra* note 14, at 12.

334 *Id.*

335 *Id.* at 10, 14.

336 *Id.* at 14 (footnote omitted).

337 *Id.*; United States v. Ruiz, 536 U.S. 622, 633 (2002) (holding that under the Constitution, the Government is not required to disclose material impeachment evidence before entering into a plea agreement with a criminal defendant); *see also* Markus Surratt, *Incentivized Informants,* Brady*,* Ruiz*, and Wrongful Imprisonment: Requiring Pre-Plea Disclosure of Material Exculpatory Evidence*, 93 WASH. L. REV. 523, 523 (2018) protection than trials do, "much is lost in a system that relies almost entirely on guilty pleas."[338] For example, accountability is lost because allegations of police misconduct—a scourge found in many wrongful guilty plea cases—never get challenged at pretrial hearings.[339] "Trial and pretrial litigation are essential for holding police and other state actors accountable, and plea bargaining has eroded these systems of accountability."[340] As a result, appellate review is limited, and courts never consider the merits of "countless potential legal issues."[341]

Principle Two provides: "Guilty pleas should not result from the use of impermissibly coercive incentives or incentives that overbear the will of the defendant."[342] The Report notes that "the state may induce the defendant to plead guilty with incentives that make it irrational for even an innocent person to turn down the deal. Such offers are inherently coercive."[343] So, too, is the raw power of a prosecutor to decide what charges to file.[344] The ABA Report offers some examples of "extreme" impermissible prosecutor coercion: threats to indict a defendant's child to dissuade a defendant from exercising their right to trial, "wiring" pleas so that one defendant's fate rests in the hands of a co-defendant, and, in at least one case, refusing "to make favorable plea deals with women in child abuse cases unless they agreed to sterilization."[345]

Indeed, "[t]here is ample evidence suggesting that a nontrivial number of innocent people plead guilty."[346] As Professor Carissa Byrne Hessick explains, plea bargaining gives prosecu-

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(arguing for mandatory pre-plea disclosure of material exculpatory evidence). Because there is no right to discovery in a plea, prosecutors can keep secret those parts of the case that are favorable to the defense—and the defendant cannot complain later because he pleaded guilty.

338 ABA Report, *supra* note 14, at 14.

339 *Id.*

340 *Id.*

341 *Id.*

342 *Id.*

343 *Id.* at 15.

344 *Id.*

345 *Id.* (footnotes omitted).

346 Hessick, *The Real Problem*, *supra* note 94, at 128 & n.24.

tors the power "to offer plea deals that no rational defendant would turn down. A rational defendant would accept any plea bargain in which her expected punishment is less than the punishment she will receive after trial."[347] We see this in countless examples; Brian Banks was just one.[348] According to Hessick, "an innocent defendant who is facing a sentence of five years if convicted at trial should accept a plea offer of less than six months if she believes there is a 10% chance she will be convicted at trial."[349] In other words, defendants should not be punished for exercising their right to trial. Similarly, the ABA Report discourages the practice of punishing defendants who exercise their pretrial rights, such as seeking bail, discovery, investigating, and filing motions.[350]

Principle Two also includes five other recommendations: (1) providing all defendants with consistent sentence reductions, not only defendants who accept responsibility; (2) abolishing or avoiding mandatory minimums; (3) encouraging legislation to provide judges with safety-valve authority; (4) prohibiting the use of threatening capital punishment to induce guilty pleas; and (5) memorializing and filing plea offers with the court.[351] Whereas the ABA Report calls for local bar associations and the ABA to give prosecutors "formal ethical guidance" to ensure they understand that threatening the death penalty to induce a guilty plea is unethical,[352] the ABA has called for abolishing mandatory minimum sentencing.[353] The ABA Report, conversely, proposes that, at the very least, they should not be used as a "coercive tool during plea bargaining."[354]

Principle Three identifies one of the main reasons defendants decide to forgo trial and suggests a solution: "[W]hile some difference between the sentence offered before trial and the sentence received after trial is permissible, a substantial difference

347 *Id.*

348 *See Banks*, *supra* note 107.

349 Hessick, *The Real Problem*, *supra* note 94, at 128 & n.23.

350 ABA Report, *supra* note 14, at 15.

351 *Id.* at 15–16.

352 *Id.* at 16.

353 Dervan, *Coercive Plea Bargaining*, *supra* note 23, at 1963.

354 *Id.* (citing ABA Report, *supra* note 14, at 15).

undermines the integrity of the criminal system and reflects a penalty for exercising one's right to trial. . . . [T]he trial penalty[] should be eliminated."[355] Langbein said it plainly decades ago: "This sentencing differential is what makes plea bargaining coercive."[356] To demonstrate the magnitude of the problem, the ABA Report states that "in federal felony cases there is on average a seven-year difference between the sentence after trial and the sentence after a plea"; in drug cases, the average difference is nine years.[357] Recall that Brian Banks faced forty-one years to life but accepted a no contest plea with a maximum seven-year sentence—after assurances he would serve much less.[358] Lionel White, Sr. faced a potential life sentence without the possibility of parole[359] yet pleaded guilty to possession of a controlled substance in exchange for five years.[360] The ABA Report calls on legislators to repeal mandatory minimums and on prosecutors to avoid charging defendants under such statutes.[361]

Although the ABA Report does not provide a point where the trial penalty becomes coercive, it recommends that all jurisdictions enact policies so that it "is reasonable and non-coercive."[362] The ABA Report explains it endeavors to "empower the primary players in the plea bargaining process—judges, prosecutors, and defense attorneys—to shift the culture and norms around plea bargaining to ensure fair outcomes and processes."[363] To that end, all actors are responsible for preventing defendants from being subjected to the trial penalty.[364]

Principle Four is similar: "Charges should not be selected or amended with the purpose of creating a sentencing differential,

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355 ABA Report, *supra* note 14, at 16.

356 John H. Langbein, *Torture and Plea Bargaining*, 46 U. Chi. L. Rev. 3, 12 (1978), *quoted in* Ortman, *When Plea Bargaining Became Normal*, *supra* note 229, at 1467 n.210.

357 *Id.* (citation omitted).

358 *Banks*, *supra* note 107.

359 *White, Sr.*, *supra* note 121.

360 *Id.*

361 ABA Report, *supra* note 14, at 17.

362 *Id.*

363 *Id.*

364 *Id.*

sentencing enhancement, punishment or collateral consequence to induce a defendant to plead guilty or to punish defendants for exercising their rights, including the right to trial."[365] The ABA Report acknowledges that prosecutorial discretion is a fundamental part of the criminal justice system; however, the system "must find ways to regularize the charging process and closely monitor prosecutorial charging decisions."[366] "Perhaps no single decision has more of an impact on the scope and context of later plea negotiations than the selection of charges at the outset of the case."[367]

Principle Five states: "The criminal justice system should recognize that plea bargaining induces defendants to plead guilty for various reasons, some of which have little or nothing to do with factual and legal guilt. In the current system, innocent people sometimes plead guilty to crimes they did not commit."[368] Principle Six provides that "[a] defendant should have a right to qualified counsel in any criminal adjudication before the defendant enters a guilty plea. Counsel should be afforded a meaningful opportunity to satisfy their duty to investigate the case without risk of penalty to their client."[369]

In a similar vein is Principle Seven: "There should be robust and transparent procedures at the plea phase to ensure that the defendant's plea is knowing and voluntary, free from impermissible coercion, and that the defendant understands the consequences of their decision to plead guilty."[370] Principle Eight provides: "The use of bail or pretrial detention to induce guilty pleas should be eliminated."[371]

Principle Nine directs that defendants receive all discovery, including exculpatory materials, with adequate time to review it before accepting or rejecting a plea offer.[372] Principle Ten recog-

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365 *Id.* at 18.

366 *Id.*

367 *Id.*

368 *Id.* at 20.

369 *Id.* at 21.

370 *Id.* at 22.

371 *Id.* at 23.

372 *Id.* at 24. *But see* United States v. Ruiz, 536 U.S. 622, 633 (2002) (holding that under the Constitution, the Government is not required to disclose material impeachment evidence before entering into a plea agreement nizes that although a plea waives certain trial rights, some rights should never be waivable in a plea agreement.[373]

Principle Eleven, echoing Principle Seven, ties a knowing and voluntary plea to the defendant's understanding of its collateral consequences.[374] Principle Twelve calls for training law students, lawyers, and judges in plea practice consistent with the Report.[375]

Principle Thirteen urges systematic data collection on the plea process—including the history of plea offers—to assess and monitor racial and other biases.[376]

Finally, Principle Fourteen calls for robust oversight at every stage to monitor the plea process for accuracy and integrity and to promote transparency, accountability, and legitimacy—a principle Part IV develops.[377]

B. The Cato Institute's Response

In February 2023, the Cato Institute published its response to the ABA Report.[378] It highlighted what it called the most important of the Fourteen Principles, citing Principles One, Two, Seven, and Thirteen.[379] Cato called the ABA Report a good start—but only a start. It counseled adding other reforms: educating citizens about the function of criminal jurors, creating a trial lottery system to audit the plea-bargaining process, and establishing plea integrity units, akin to conviction integrity units,

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with a criminal defendant).

373 ABA REPORT, *supra* note 14, at 25; *cf.* People v. N.H., No. 34, 2026 WL 1096314 (N.Y. Apr. 23, 2026) (holding that a defendant's right to a hearing on eligibility for alternative sentencing under New York's Domestic Violence Survivors Justice Act is not waivable in plea bargaining).

374 ABA REPORT, *supra* note 14, at 26.

375 *Id.* at 27.

376 *Id.* at 28. *See also* Andrea Kupfer Schneider & Cynthia Alkon, *Bargaining in the Dark: The Need for Transparency and Data in Plea Bargaining*, 22 NEW CRIM. L. REV. 434 (2019).

377 ABA REPORT, *supra* note 14, at 29.

378 Neily, *Task Force Report*, *supra* note 23.

379 *Id.*

that operate before a defendant accepts a plea deal.[380] It ends by noting that "[p]lea bargaining arose spontaneously over a period of decades behind closed doors in the dark corners of the criminal justice system," but that the ABA Report "represents a beam of disinfecting light."[381] As discussed below, the National District Attorneys Association (NDAA) takes a contrary view.

C. The National District Attorneys Association's Response

The ABA Report received less support from the NDAA than it did from the Cato Institute.[382] Indeed, the NDAA responded to the ABA Report because, in its view, the report "does not accurately portray what is happening in America's halls of justice."[383] Although the NDAA called the Report well-intentioned, it also stated that it "does not serve the interests of criminal defendants, crime victims, or community safety."[384] According to the NDAA, the ABA Report's Fourteen Principles are premised on two alleged flaws with the plea bargaining process: (i) that the state has "impermissible leverage," and (ii) that a lack of oversight and transparency allows abuses due to that impermissible leverage.[385]

As to impermissible leverage, the NDAA refutes the idea that prosecutors hold all the plea-bargaining cards and alone determine the final plea deal.[386] Instead, the NDAA maintains that a plea deal also lies with a defendant's attorney.[387] What is more, prosecutors have "dual burdens of both proof and persuasion and the duty to disclose in advance all witnesses and evidence in a

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380 *Id.*

381 *Id.*

382 NAT'L DIST. ATT'YS ASS'N, NDAA RESPONSE TO THE AMERICAN BAR ASSOCIATION'S 2023 PLEA BARGAIN TASK FORCE REPORT 1, http://ndaa.org/wp-content/uploads/NDAA-Response-to-ABA-Task-Force.pdf (last visited Dec. 14, 2024) [hereinafter NDAA RESPONSE].

383 *Id.*

384 *Id.*

385 *Id.*

386 *Id.*

387 *Id.*

case whether or not that evidence is admissible at trial."[388] Because that evidence can suggest guilt or innocence and often contains "elements of both," the plea is a negotiated process in which adversaries will consider "the potential risk of a poor result."[389] Therefore, "*there is nothing impermissible about plea negotiations*."[390]

The NDAA also takes issue with the ABA Report's conclusion that a "substantial difference between a plea offer and a post-trial sentence must 'reflect a penalty for exercising one's right to trial'"; i.e., the trial penalty is "based on a false assumption."[391] The false assumption is that a defendant's other constitutional criminal procedure rights "have not been honored; *but only if the result is a conviction*."[392] The NDAA calls this a false scenario under which all convictions are a penalty while all acquittals are justice for the defendant.[393] Accordingly, the trial penalty assumption does not appear in situations where a jury returns a mix of convictions and acquittals, a result that often happens in cases tried.[394]

By the NDAA's logic, the trial penalty argument is false because it does not include "the fact that the greatest discrepancies between the offered plea and the post-trial sentence frequently manifest where the defendant had the greatest power and control" or what the NDAA calls "cases where a key witness is 'in the wind;' where a victim is reluctant to endure the horror of reliving her trauma by testifying in front of twelve strangers; or where there were real grounds for both sides to anticipate an unfavorable jury verdict."[395] Because no penalty exists when a defendant is acquitted, there is likewise no penalty when a defendant is convicted.[396] "The only remorse comes when the outcome at trial produces a result that the accused considers worse

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388 *Id.*

389 *Id.*

390 *Id.*

391 *Id.*

392 *Id.*

393 *Id.*

394 *Id.*

395 *Id.*

396 *Id.* at 2.

than the lost opportunity to negotiate a better offer."[397] The NDAA adds that the ABA Report ignores the fact that both prosecutors and defense attorneys have no more than persuasive influence on sentencing—a decision determined solely by judges.[398]

The NDAA also maintains that there is no lack of transparency in plea agreements because it is an agreement that both parties submit to a judge to review and either accept or reject.[399] Moreover, the plea agreement is presented to victims who have an opportunity to voice their opinions to the prosecutor and court, and it is subject to scrutiny by the public, press, and voters.[400] As a result, transparency exists: the plea deal is recounted in court and supported with a factual basis.[401] And the plea bargaining process includes other values as well.

The NDAA cites its National Prosecution Standards for the notion that prosecutors are held to "robust practical and ethical requirements" when deciding when to offer a plea deal—standards that the ABA Report ignores.[402] Similarly, because the report does not call for the elimination of plea bargaining, it implicitly recognizes the practicality of resolving cases outside of trial.[403] The NDAA then lists four other values of a plea deal: (i) leniency via diversion; (ii) certainty for the defendant; (iii) finality to the legal process, community, and victims; and (iv) cost savings.[404] As to the last value, that plea deals facilitate a means to avoid overwhelming the criminal justice system, the NDAA writes: "Taken seriously, the task force's recommendation would require spending on the criminal justice system never seen in the history of the nation and not likely to be politically feasible in the future."[405]

Last, the NDAA's response acknowledges that any human

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397 *Id.*

398 *Id.*

399 *Id.*

400 *Id.*

401 *Id.*

402 *Id.*

403 *Id.*

404 *Id.*

405 *Id.*

system is subject to criticism and that "[p]rosecutors who misuse the plea process and act with malice make up only isolated incidents across a very broad spectrum of successful negotiations."[406] Thus, no mass abuse of a "voluntary negation process" exists.[407] "In fact, NDAA has provided the standards by which to judge them, not to mention the disciplinary processes available through state bar associations."[408] The NDAA ends by noting that because no local prosecutor was represented in the ABA's Task Force, it "missed the opportunity to engage with the broader prosecution community and, as a result, failed to perceive the realities on the ground that certainly do not call for sweeping change to the nation's system of plea negotiation."[409]

Having traced plea bargaining's link to wrongful conviction, its rise, and the ABA's proposal, we can now consider what the most relevant changes would mean for the criminal justice system.[410]

IV. Fixing a Broken System

A. Plea Bargain Reforms

Wrongful guilty pleas do not make us safer—individuals are jailed, imprisoned, and punished despite factual innocence—and they "chip away at the legitimacy of the criminal justice system."[411] "[W]hen defendants falsely plead guilty there are many potential victims—the defendant who has pleaded guilty, any innocent parties against whom the defendant provides testimony, the victim of the current crime, and any future victims, as well

406 *Id. But see* NAT'L REGISTRY OF EXONERATIONS, *supra* note 28 ("[O]f the 3,842 exonerees since 1989, 923 (24%) 'surrender[ed] their right to trial' and pleaded 'guilty to crimes they never actually committed.'").

407 NDAA RESPONSE, *supra* note 378, at 3.

408 *Id.*

409 *Id.*

410 William Ortman, *Second-Best Criminal Justice*, 96 WASH. U. L. REV. 1061, 1078 (2019) [hereinafter Ortman, *Second-Best Criminal Justice*] (citing Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 51 (1968)).

411 Dervan, *Coercive Plea Bargaining*, *supra* note 23, at 1960.

as society at large."[412] In the ABA Report, the Task Force recognized that although plea bargaining is not a monolithic practice and variations cut across the entire spectrum of the criminal justice system, it did target and address the most common concerns.[413]

But the ABA Report makes one claim that this paper rejects: "A plea also provides a clear and certain resolution to a case, which offers finality for the defendant, the victim, the courts, and the community."[414] True, the *government* will often get a "clear and certain resolution"—but not always,[415] and certainly not for all defendants.[416] Although the ABA Report acknowledges plea bargaining's benefits, it also recognizes that they have come at the cost of fundamental values, in a system in which "efficiency and finality trump truth-seeking."[417]

Perhaps the clearest expression of what this paper seeks to elucidate is that, according to the ABA Report, "the Task Force reviewed substantial evidence that defendants—including innocent defendants—are sometimes coerced into taking pleas and surrendering their right to trial."[418] Some examples include overcharging in general and mandatory minimums and collateral consequences in particular.[419] Even if prosecutors overcharge to gain bargained leverage instead of to obtain harsher sentences, as some argue,[420] such motivating factors should not matter because overcharging defendants "violates prosecutorial ethics in and of itself"[421] and "overcharging sets the stage for co-

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412 *Id.*

413 ABA REPORT, *supra* note 14, at 6.

414 *Id.*; *see* Jeffrey Bellin, *Plea Bargaining's Uncertainty Problem*, 101 TEX. L. REV. 539 (2023) (challenging this conventional idea and signifying uncertainty as the core problem with plea bargaining).

415 Consider, e.g., direct appeals, state post-conviction relief, and federal habeas proceedings.

416 *See*, *e.g.*, *Banks*, *supra* note 107.

417 ABA REPORT, *supra* note 14, at 6.

418 *Id. See infra* Part IV.B.

419 *See*, *e.g.*, Padilla v. Kentucky, 559 U.S. 356, 374 (2010).

420 H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, 83 n.147 (2011) (citations omitted).

421 *Id.* at 84 & nn.153–56.

ercive pleas by virtue of the very leverage unduly obtained."[422]

As Professor Caldwell astutely points out: "If our criminal justice system were trial-centered, prosecutors would only have reason to file charges on which they would likely secure a conviction."[423] But, because almost every case is resolved by guilty pleas, "prosecutors have an incentive to file more serious charges than those supported by the evidence with the 'hope that a defendant will be risk averse.'"[424] Indeed, "prosecutors understand and exploit these fears to induce defendants to plead guilty in cases where they otherwise would prefer to exercise their constitutional right to have the case decided by a jury."[425] That is, defendants are compelled "to accept pleas in cases they might otherwise fight at trial."[426] And, relatedly, "prosecutors lack any political incentive to refrain from overcharging because most communities want the state to be tough on crime."[427] Indeed, "Prosecutors also openly lobby legislatures to increase or maintain harsh sentences to give them leverage in plea negotiations."[428]

But the problems with plea bargains extend even further. For one, resolving so many cases by guilty plea erodes the system's integrity.[429] Often, official misconduct never surfaces be-

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422 *Id.* (quoting Rudolph J. Gerber, *A System in Collapse: Appearance vs. Reality in Criminal Justice*, 12 ST. LOUIS U. PUB. L. REV. 225, 226 (1993) ("From the very start prosecutors wish to create negotiating leverage to coerce a plea.")).

423 *Id.* (citations omitted).

424 *Id.* n.151 (citing Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2495 (2004) ("Prosecutorial bluffing is likely to work particularly well against innocent defendants, who are on average more risk averse than guilty defendants."); Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 CARDOZO L. REV. 2295, 2342 (2006) (arguing for eliminating plea bargaining because it motivates overcharging)).

425 ABA REPORT, *supra* note 14, at 6.

426 *Id.*

427 *Id.* (citation omitted).

428 Hessick, *The Real Problem*, *supra* note 94, at 126 (citing Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 728 n.25 (2005)); *id.* at 126 n.13 (citing examples from the congressional record "of the Department of Justice requesting more stringent sentencing laws because it makes prosecutors' jobs easier").

429 ABA REPORT, *supra* note 14, at 6.

cause of the dearth of pretrial hearings,[430] but when it does, it can be decades later. Such was the case of Lionel White, Sr., discussed above.[431] As a result, prosecutors might be more forgiving of their witnesses and less critical of the weaknesses in their cases.[432] But the same holds for defense counsel: knowing that there is a greater than 90% chance their client will plead guilty, attorneys are less likely to investigate their client's claims that they are either (i) innocent or (ii) overcharged and engaged in much less severe criminal conduct.[433] Plea bargaining thus "creates perverse incentives across the system for lawyers and judges who focus on disposition rates and getting through cases quickly rather than resolving cases justly."[434]

Moreover, when almost every case ends in a guilty plea, there is no public oversight and no role for the jury—perhaps the most fundamental right.[435] As Professor Akhil Reed Amar notes, "No idea was more central to our Bill of Rights—indeed, to America's distinctive regime of government of the people, by the people, and for the people—than the idea of the jury."[436] Indeed, "[t]he only right secured in all state constitutions drafted between 1776 and 1787 was the right of jury trial in criminal cases."[437] Though the right remains, the absence of trials says much about the force of plea bargaining.

Last, plea bargaining only serves to further racial and class inequality in the criminal justice system.[438] This is especially true when it comes to sentencing, charge bargaining, and pre-

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430 *Id.*

431 *White, Sr.*, *supra* note 121.

432 *Id.*

433 *See id.* at 6–7.

434 *Id.* at 7.

435 ABA REPORT, *supra* note 14, at 7. U.S. CONST. amend. VI; see also 3 Joseph Story, Commentaries on the Constitution of the United States § 1773 (1833) (calling the criminal jury "the great bulwark of [our] civil and political liberties").

436 AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 161 (1997).

437 *Id.*

438 *See* ABA REPORT, *supra* note 14, at 6 (noting expert testimony showing that similar situated defendants of color had worse plea deals than white defendants).

trial detention.[439]

B. ABA Report Principle Five: Coercion Reform

Principle Five acknowledges that innocent individuals falsely plead guilty to crimes they did not commit.[440] One reason is that defendants "are subject to undue pressure and impermissibly coercive bargains that are nearly impossible to refuse,"[441] as Principle Two reflects: "Guilty pleas should not result from the use of impermissibly coercive incentives or incentives that overbear the will of the defendant."[442] With this in mind, the ABA Report proposed making it easier for defendants to reopen cases even after pleading guilty: "Because we know that innocent people plead guilty, defendants should have access to all available mechanisms for post-conviction review of innocence claims, regardless of the method of conviction."[443] Although many states prevent defendants who pleaded guilty from seeking DNA evidence to challenge their convictions,[444] other states have enacted legislation allowing this procedure.[445] Because we now know that wrongful convictions by guilty plea make up a quarter of all exonerations, there is no reason not to provide all defendants the same opportunity to seek justice.

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439 *Id.* ("Black defendants are more likely to be held in pretrial detention, which in turn increases the likelihood that they will plead guilty.").

440 ABA REPORT, *supra* note 14, at 20.

441 Dervan, *Coercive Plea Bargaining*, *supra* note 23, at 1961.

442 ABA REPORT, *supra* note 14, at 14.

443 *Id.* at 20.

444 Hessick, *The Real Problem*, *supra* note 94, at 130 (citing Samuel R. Wiseman, *Waiving Innocence*, 96 MINN. L. REV. 952, 955 n.14 (2012); Colin Miller, *Why States Must Consider Innocence Claims After Guilty Pleas*, 10 U.C. IRVINE L. REV. 671, 674–78 (2020)); *see also* People v. Tiger, 110 N.E.3d 509 (N.Y. 2018) (holding that a defendant who pleaded guilty was not entitled to a hearing on a freestanding claim of actual innocence under New York's postconviction statute).

445 *See generally* Felicia Langel, *Maryland Makes New Evidence Postconviction Review Provisions Available to Defendants with Plea Deals*, 78 MD. L. REV. ONLINE 41 (2019); MD. CODE ANN., CRIM. PROC. § 8-201 (West 2022).

C. ABA Report Principles Two, Three, and Four: Sentence, Charge, and Prosecutorial Reforms

When prosecutors bring charges in cases with weaker evidence, they might overcompensate by offering defendants substantially shorter sentences or lighter punishment than would result after a trial conviction. As discussed above, this is generally known as the trial penalty or sentencing differentials.[446] Because this practice is highly coercive, the ABA proposed that "[g]uilty pleas should not result from the use of impermissibly coercive incentives or incentives that overbear the will of the defendant,"[447] "a substantial difference . . . constitutes a penalty for exercising one's right to trial [and thus] should be eliminated,"[448] and "[c]harges should not be selected or amended with the purpose of creating a sentencing differential, sentencing enhancement, punishment or collateral consequence to induce a defendant to plead guilty or to punish defendants for exercising their rights, including the right to trial."[449] The ABA Report proposed the changes because these plea deals "may be so enticing that an innocent individual would be tempted to plead guilty."[450] This is the paper's central point: about 24% of exonerations involve factually innocent individuals who pleaded guilty to crimes they did not commit.

The above proposals are not aimed only at prosecutors but also at state legislatures.[451] "In many ways the trial penalty is entrenched in the system because of mandatory minimum sentences and sentencing guidelines that encourage acceptance of responsibility as a mitigating factor."[452] Judges should also be more involved—at least to act as a "safety valve" allowing departure from the significant, mandated sentencing that is currently

446 *See* Dervan, *Coercive Plea Bargaining*, *supra* note 23, at 1962.

447 ABA Report, *supra* note 14, at 15.

448 *Id.* at 17.

449 *Id.* at 18.

450 Dervan, *Coercive Plea Bargaining*, *supra* note 23, at 1962 (citing ABA Report, *supra* note 14, at 17).

451 *Id.*

452 *Id.* (citing ABA Report, *supra* note 14, at 17).

required under the law.[453] Further, enacting a "maximum sentencing differential" could help reduce coercion, at least to the extent that factually innocent defendants would proceed to trial while factual guilty defendants would accept a guilty plea consonant with their actual conduct.[454]

Yet even commentators who defend plea bargaining recognize the abusive role prosecutorial discretion can play. As Timothy Sandefur wrote, "[p]lea bargaining, like all government activities, is liable to abuse. . . . All of this would scare even the most hardened criminal, let alone an innocent defendant. And it could intimidate a defendant into accepting a plea bargain that may not be truly just."[455]

To that end, the ABA Report believes prosecutors should bring criminal charges only when "they are in the interests of justice."[456] Moreover, they must end "[t]he tactic of charging as many separate offenses as possible in the hopes of dismissing some in exchange for a guilty plea."[457] Additionally, prosecutors' offices should enact charging policies and an oversight process to ensure adherence to them.[458] "Prosecutor offices should institute oversight procedures to ensure that the original charges match the evidence and offense (as they are understood at the time), that additional charges are not being filed as punishment for the defendant requesting a trial, and that all charges brought are consistent with ABA standards."[459]

D. ABA Report Principle Six: Defense Counsel

Principle Six recognizes the fundamental role a qualified defense attorney plays in any criminal adjudication—let alone in plea bargain negotiations.[460] Indeed, "[c]ounsel should be afforded a

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453 Dervan, *Coercive Plea Bargaining*, *supra* note 23, at 1963.

454 *See id.*

455 Timothy Sandefur, *In Defense of Plea Bargaining*, REGUL., Fall 2003, at 28.

456 Dervan, *Coercive Plea Bargaining*, *supra* note 23, at 1964 (citing ABA REPORT, *supra* note 14, at 18–19).

457 *Id.*

458 *Id.*

459 *Id.* at 1965.

460 *Id.*

meaningful opportunity to satisfy their duty to investigate the case without risk of penalty to their client."[461] As one commentator said: "Thoroughly investigating a defendant's case is one of the most basic, yet important, responsibilities of a defense lawyer."[462] And it means "'explor[ing] all avenues leading to facts relevant to the merits of the case,' making 'efforts to secure information in the possession of the prosecution and law enforcement authorities,' and doing these things without regard to whether the defendant has confessed guilt or expressed a desire to plead guilty."[463] Although this is true for all criminal cases, it should be recognized that misdemeanor cases present a serious challenge because of the vast number of cases and how quickly they are resolved—often before a defendant can meet with an attorney.[464] Moreover, substantial collateral consequences—hefty fines and immigration removal, for example—are common.[465]

Two related recommendations follow. One is for the criminal defense bar to adopt a standard record documenting the terms of each plea offer, including the attorney's assessment.[466] Doing so would strengthen the duties to preserve issues for appeal and to advocate zealously.[467] It might also "serve as a mistake-proofing device" to help reduce errors that create ineffective assistance of counsel claims in postconviction relief proceedings.[468] If anything, a record of offers and terms would pull plea bargaining out of the dark in which it currently hides.

Another recommendation is for defense counsel to understand bias, not only of police or prosecutors but of themselves.[469]

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461 *Id.* (quoting ABA REPORT, *supra* note 14, at 21).

462 Joel Mallord, Comment, *Putting Plea Bargaining on the Record*, 162 U. PA. L. REV. 683, 700 (2014) (citing ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY § 4-4.1(a) (3d ed. 1999)).

463 *Id.* at 701 (quoting ABA STANDARDS, *supra* note 458, § 4-4.1(a)).

464 Dervan, *Coercive Plea Bargaining*, *supra* note 23, at 1965.

465 *Id.* (citing ABA REPORT, *supra* note 14, at 21).

466 Mallord, *supra* note 458, at 706.

467 *Id.*

468 *Id. See also* Cynthia Alkon & Andrea Kupfer Schneider, *How to Be a Better Plea Bargainer*, 66 WASH. U. J.L. & POL'Y 65 (2021) (offering concrete techniques to improve plea negotiation).

469 *See generally* Molly J. Walker Wilson, *Defense Attorney Bias and the*

Just like the "psychological pitfalls" that innocent criminal defendants succumb to, so too can defense attorneys.[470] "Heavy caseloads for prosecutors and defense lawyers, along with broad prosecutorial discretion, and perverse incentives exacerbate problems of cognitive bias, motivated reasoning, and ethical blindness."[471] Indeed, "[t]he same factors that lead attorneys to make errors—limited resources and time and early exposure to the prosecutor's evidence—also make the plea more attractive to the defense attorney. The vulnerable defendant who is most at risk for falsely confessing is also the defendant who is most likely to agree to accept a plea, even when he is innocent."[472]

By developing a detailed pretrial plea offer record, defendants might be able to better protect themselves when they later challenge their wrongful convictions. Because DNA evidence has contributed to exonerating only about nine percent of individuals who pleaded guilty to crimes they did not commit, defendants should have stronger protections to assert claims of coercion—that is, that their guilty pleas were involuntary. It could likewise prevent judges from "deal jumping": that is, when, after a defendant accepts what becomes an "illusory" plea deal, the judge disregards "the agreed-upon sentence and impose[s] whatever punishment the judge wishes"—at least in some jurisdictions.[473] Apart from the coercive plea deal, Brian Banks experienced this too.[474]

On the other hand, the ABA Report recommended that judges could and should have more authority to ensure plea bargaining is not coercive.[475] For example, most jurisdictions prevent judges from having any involvement in plea negotiations until the parties present an agreement to the court.[476] Yet, some

Rush to the Plea, 65 U. KAN. L. REV. 271, 271 (2016).

470 *Id.*

471 *Id.*

472 *Id.*

473 Michael D. Cicchini, *Deal Jumpers*, 2021 U. ILL. L. REV. 1325, 1326 (discussing cases in Wisconsin, New York, Florida, and Illinois).

474 *Banks*, *supra* note 107.

475 ABA REPORT, *supra* note 14, at 15–16; see also id. at 22 (urging judges to scrutinize the prosecutor's actions, not only the defendant's, before accepting a plea).

476 Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A* have argued that court involvement could reduce the risks involved with plea bargaining.[477] One study of the plea systems in Germany, Florida, and Connecticut found that having a judge's input earlier in the plea negotiations could provide greater transparency, accuracy, and fairness consonant with the ABA's recommendations.[478]

E. Reform From Within

One type of reform that appears innovative is "hard screening": pre-charge screening and refusing to bargain once criminal charges are filed.[479] This paper proposes a similar "reform from within" measure. It draws on the economics of the division of labor and David Ricardo's theory of comparative advantage.[480] "Division of labor combines specialization and the partition of a complex production task into several, or many, sub-tasks."[481] The idea is to compartmentalize prosecutorial functions, with accuracy as the goal. Instead of one prosecutor working a case from start to finish, there would be a group of "charge prosecutors" who work with police investigators. This group would review the evidence and seek to charge only those crimes that could be proven beyond a reasonable doubt. This is not novel; it is what all prosecutors do (or should be doing).

Once the charge group decides on criminal charges, they pass their findings to the "plea prosecutors." This department would be in direct contact with defense counsel, and its only job would be to secure a guilty plea to the approved charges. If a defendant wishes to plead guilty—when, for example, the evidence against her is overwhelming—the plea group could choose among the approved charges so long as the government gains some benefit from avoiding a costly trial. If a defendant instead chooses to

Comparative View, 54 AM. J. COMP. L. 199, 199 (2006).

477 *Id.* at 200.

478 *Id.*

479 Ortman, *Second-Best Criminal Justice*, *supra* note 406, at 1091.

480 Michael Munger, *Division of Labor*, ECONLIB, http://www.econlib.org/library/Enc/DivisionofLabor.html (last visited Dec. 14, 2024).

481 *Id. See also* Ben A. McJunkin & J.J. Prescott, *Collusive Prosecution*, 108 IOWA L. REV. 1653 (2023) (examining prosecutorial incentives and ethics in plea bargaining).

exercise her Sixth Amendment right, she will face trial on the approved charges against a prosecutor whose sole function is to try cases. And that is as it should be: even for the defendant who has nothing to lose and irrationally demands trial, we should want the most capable prosecuting attorney to try the case.

The result would be three separate divisions within the prosecutor's office, siloed from one another. Of course, this is a rough sketch, but it maintains the general process institutional actors are accustomed to. The linchpin, however, is a more robust ethical system that seeks to change the culture of law enforcement. This is a project focused on ethics—the lodestar of any justice system. Changing culture may be a challenge, to be sure. Still, these policy considerations might be easier to enact than some of the other well-intended changes. And, as the next section shows, when governments enact major changes, particularly to fundamental rights, one law reigns supreme: the Law of Unintended Consequences.

F. ABA Report Principle Eight: Pretrial Detention and Bail Reform

Research confirms what the mechanics predict: pretrial detention and guilty pleas move together.[482] The ABA Report accordingly urges prosecutors not to seek cash bail when a defendant would be unlikely to face incarceration even after a trial conviction.[483] As the Report puts it, "If the punishment is unlikely to ever include detention, one could argue that detaining someone in that case has only one purpose: to coerce a guilty plea."[484] Bail, it cites ABA policy, "should be reserved for cases where it is needed."[485] But when is bail "needed"?

For decades, unaffordable cash bail—and the pretrial detention it produced—served as a primary engine of coerced pleas: defendants surrendered claims of innocence and pleaded guilty simply to go home.[486] Every state has since revised its bail pro-

482 Dervan, *Coercive Plea Bargaining*, *supra* note 23, at 1966 & n.340 (citing a study that found detainment results in a 13% increased probability of conviction).

483 *Id.* (citing ABA REPORT, *supra* note 14, at 23).

484 *Id.*

485 *Id.* (citation omitted).

486 *See* Ortman, *Second-Best Criminal Justice*, *supra* note 406, at 1087. For cedure to curb burdensome cash bail and the bondsman industry it fed, but a few have constitutionalized pretrial preventive detention.[487] That shift relocates the injustice rather than ending it, trading detention for poverty for detention on an assumption of dangerousness. New Jersey illustrates the point. Commentators have praised its 2017 Criminal Justice Reform Act (CJRA) for shrinking the pretrial jail population, yet the numbers tell a different story—one in tension with Principle Eight.

From the CJRA's effective date on January 1, 2017, through December 31, 2024, New Jersey charged 303,266 defendants on a warrant.[488] Prosecutors moved to detain 135,779 of them,[489] and judges granted 59,599 of those motions.[490] Put concretely, across eight years prosecutors asked courts to jail nearly one in

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a fuller treatment of New Jersey's preventive-detention regime and a year-by-year breakdown of the figures discussed here, *see generally* Mike Apsan-Orgera, *The Unexceptional Exception: Preventive Detention Under New Jersey's Bail Reform* (2026) (unpublished manuscript), https://mikeapsan-orgera.com/writing-samples. *Cf.* United States v. Edwards, 430 A.2d 1321, 1355 (D.C. 1981) (Ferren, J., concurring in part and dissenting in part) (observing that detained defendants are "likely to lose employment, strain relationships with family and friends," and face "[c]onditions of confinement . . . so harsh or intolerable as to induce him to plead guilty" (quoting Campbell v. McGruder, 580 F.2d 521, 532 (D.C. Cir. 1978))). The pattern is as old as preventive detention itself: by the time the en banc court upheld the nation's first preventive-detention statute, the defendant challenging it had, while detained, "entered pleas of guilty in both cases." *Id.* at 1365 (Mack, J., dissenting).

487 The states are New Jersey, New Mexico, and Alabama. In 2022, Alabama adopted Aniah's Law, which, like the CJRA, permits pretrial preventive detention of individuals charged with certain serious noncapital offenses. ALA. CODE § 15-13-3(b) to (c) (Westlaw through the 2026 Reg. Sess. and 2026 1st Spec. Sess.). *See also* Muhammad B. Sardar, Note, *Give Me Liberty or Give Me . . . Alternatives? Ending Cash Bail and Its Impact on Pretrial Incarceration*, 84 BROOK. L. REV. 1421 (2019) (linking cash bail and pretrial detention to coerced guilty pleas).

488 *Chart D (Warrant): Pretrial Detention Decisions, January 1, 2017–December 31, 2017*, N.J. COURTS, http://www.njcourts.gov/sites/default/files/cjrreport.pdf; the corresponding Chart D in each annual report for 2018 through 2024 and the January–June 2025 mid-year report, *collected at Criminal Justice Reform Reports*, N.J. COURTS, https://www.njcourts.gov/public/concerns/criminal-justice-reform (all reports last visited July 14, 2026).

489 *See id.*

490 *Id.*

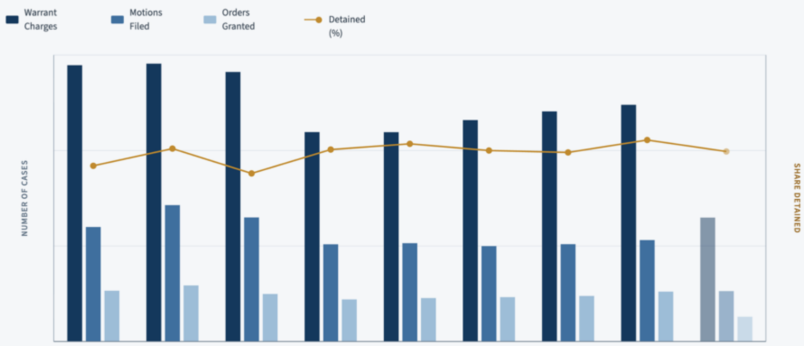
two warrant-charged defendants (45%)—all presumptively innocent—as too dangerous for any form of release.[491] The reports do not break down the kind of risk alleged, but detention required a judicial finding that no condition—cash bail, home detention, electronic monitoring, or any combination—"would reasonably assure the [defendants'] appearance in court when required, the protection of the safety of any other person or the community, and that [these defendants would] not obstruct or attempt to obstruct the criminal justice process."[492] Year by year, the figures show preventive detention under the CJRA holding steady—neither rare nor receding:[493]

491 *See id.*

492 N.J. STAT. ANN. § 2A:162-19(b).

493 Over the eight full years, prosecutors moved to detain in 44.8% of warrant cases, and judges granted nearly 44% of those motions—ordering 19.65% of all warrant defendants jailed pretrial. Figures are the author's calculations from the reports collected *supra* note 484.

New Jersey Pretrial Detention Decisions



* January–June 2025 reflects a partial year and is shown at reduced opacity.

Year	Warrant Charges	Motions Filed	Orders Granted	Detained (%)
2017	43,399	17,981	7,974	18.4%
2018	43,645	21,422	8,797	20.2%
2019	42,343	19,487	7,456	17.6%
2020	32,896	15,267	6,604	20.1%
2021	32,880	15,439	6,817	20.7%
2022	34,778	14,973	6,966	20.0%
2023	36,147	15,285	7,153	19.8%
2024	37,178	15,925	7,832	21.1%
Total, 2017–2024	**303,266**	**135,779**	**59,599**	**19.65%**
*Jan.–June 2025**	*19,463*	*7,909*	*3,880*	*19.9%*

Over the eight full years, prosecutors moved to detain in **44.8%** of warrant cases, and judges granted **nearly 44%** of those motions—ordering **19.65%** of all warrant defendants jailed pretrial.

Figure 1*. New Jersey Pretrial Detention Decisions, 2017–June 2025 (Chart D, Warrant)*

For nearly 60,000 presumptively innocent people, the judges agreed with the prosecutors.**[494]** The lesson generalizes: "even in New Jersey, a pioneering state that eliminated money bail in favor of widespread pretrial risk assessment, nearly one-fifth of defendants are detained pretrial. Ultimately, reforms predicated on pretrial risk assessment may expand the instances in which defendants are preventively detained and denied bail pretrial."**[495]**

A risk-based system can lower the overall detention count

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494 *See supra* note 484.

495 John Logan Koepke & David G. Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform*, 93 WASH. L. REV. 1725, 1738 (2018).

while enlarging the subset held on mistaken findings of dangerousness.[496] And for the defendant wrongly detained on that basis alone, the pressure is the one this paper traces throughout: plead guilty to end the detention, factually innocent or not.[497]

The problem originates in *United States v. Salerno*.[498] Chief Justice Rehnquist declared: "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception," adding that the 1984 Act's provisions "fall within that carefully limited exception."[499] Justice Marshall saw the sleight of hand. The majority deemed the BRA "a regulatory rather than a punitive measure," but "[t]he ease with which the conclusion is reached suggests the worthlessness of the achievement."[500] Once detention is called regulatory, its real work—pressuring the presumptively innocent to plead—escapes scrutiny as punishment.

New Jersey's figures belie the second half of that promise.[501] From 2017 through 2024, judges granted nearly 44% of all detention motions,[502] jailing 59,599 of more than 303,000 warrant-charged defendants (19.65%)—every one presumptively innocent.[503] A rate that high is hard to square with a "carefully limited exception."[504] And detention does not merely hold defendants; it convicts them. Empirical work shows that "pretrial de-

496 *Id.* at 1783 ("[E]ven where risk assessment tools are adopted to advance explicitly liberal reforms, nothing inherent to risk assessment guarantees liberal results.").

497 Ortman, *Second-Best Criminal Justice*, *supra* note 406, at 1088 ("[T]here are surely in-custody defendants in low-level cases currently pleading guilty to avoid prolonged pre-trial detention who would, if released, decide to contest the charges."). The same goes for factually innocent individuals in "high-level" cases who are detained based on erroneous determinations of risk. Indeed, this subgroup might very well be the most vulnerable to being coerced to accept guilty pleas to crimes they did not commit: factually innocent, wrongfully charged with serious crime, and detained pretrial.

498 481 U.S. 739 (1987).

499 *Salerno*, 481 U.S. at 755.

500 *Id.* at 759 (Marshall, J., dissenting).

501 *Id.*

502 *See supra* note 484.

503 *See* sources cited *supra* note 484.

504 *Salerno*, 481 U.S. at 755.

tention causally increases the likelihood of conviction and a carceral sentence,"[505] chiefly through pleas—"some number of defendants plead guilty only because they are detained."[506]

On these numbers, "'detention prior to trial or without trial'" is neither the exception nor carefully limited.[507] The gap between promise and practice is stark. Before the CJRA took effect, New Jersey projected that its risk tool would recommend release on recognizance—the least restrictive option—for 26.9% of defendants;[508] the actual rate was 7.5%, a swing of 19.4 points.[509] Comparing projected against actual supervision levels for 2017 and early 2018, one study found the two "nearly perfectly reversed" and conceded that, "[b]ased on available data, it is difficult to explain these gaps."[510] The companion analysis offers a ready explanation: the CJRA invites the state to move for detention, though the toll of jail on the detained is well documented—and was itself the catalyst for reform.[511] The bail system, in the end, "needed change to eliminate the counterproductive over-reliance on money bail, but giving up the constitutional protection against preventive detention was too great a cost."[512]

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505 Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 556 (2018).

506 *Id.* (explaining that scholars posit this phenomenon as a major source of wrongful convictions) (citations omitted); *see also* Colin Starger, *The Argument That Cries* Wolfish, MIT COMPUTATIONAL L. REP. 1, 6 (2020) (demonstrating, in a five-year study of Maryland's four largest counties, that 60% of all cases ended in nolle prosequi—or, as Chief Justice Rehnquist would call it, "detention without trial").

507 Mayson, *supra* note 501, at 506 (quoting *Salerno*, 481 U.S. at 755).

508 Koepke & Robinson, *supra* note 491, at 1773.

509 *Id.*

510 *Id.* at 1775 (questioning whether (1) more defendants than anticipated were charged with offenses carrying a presumptive recommendation of detention or more onerous supervision, (2) arrestees were systematically overestimated as too risky for pretrial release, or (3) judges increased release conditions even for arrestees deemed low risk).

511 JOINT COMM. ON CRIM. JUST., REPORT OF THE JOINT COMMITTEE ON CRIMINAL JUSTICE 1–2 (Mar. 10, 2014) [hereinafter JCCJ REPORT], http://www.njcourts.gov/sites/default/files/sccr/reports/finalreport2014.pdf.

512 David B. Harris, *Bail Reform Went Too Far – We've Given up Constitutional Protections*, NJ.COM (June 19, 2017, 3:32 PM), http://www.nj.com/opinion/2017/06/nj_bail_reform_went_too_far_in_elimi

G. ABA Report Principle Fourteen: Oversight and Transparency

The ABA Report ends with a unifying theme: "[T]here should be robust oversight by all actors in the criminal system to monitor the plea process for accuracy and integrity . . . and to promote transparency, accountability, justice, and legitimacy in the criminal system."[513] This can be achieved by collecting individual and aggregate data as well as creating an auditing and oversight process to understand how plea deals are resolved.[514] Apart from recording all plea offers, the ABA Report suggests that judges and lawyers should monitor the offers and final case dispositions.[515]

One recommendation is that charging decisions comply with ethical obligations and that they be overseen by the "most experienced prosecutors."[516] Oversight, moreover, should extend to the entire process.[517] This auditing process of guilty plea cases would, according to the ABA Report, "ascertain whether coercive tactics were used, whether the defendant received the necessary advice of counsel (including whether that counsel addressed all outcomes of the guilty plea), and whether a judge had indeed affirmed that the plea is knowing and voluntary."[518] Some solutions include a veto system that allows "juries to revoke prosecutors' judicial sentences";[519] "adopting a trial lottery that randomly selects cases for jury trial regardless of a plea";[520] and establishing plea integrity units providing "independent review of federal defendants' cases, trial audits that randomly check pros-

nating_prevent.html.

513 Dervan, *Coercive Plea Bargaining*, *supra* note 23, at 1967.

514 *Id.*

515 *Id.* at 1968.

516 *Id.*

517 *Id.*

518 *Id.* at 1968–69.

519 *Id.* at 1968 n.353 (citing Stephen E. Henderson, *The Jury Veto*, 40 YALE L. & POL'Y REV. 488, 488 (2022)).

520 *Id.* at 1968 n.353 (citing Kiel Brennan-Marquez et al., *The Trial Lottery*, 56 WAKE FOREST L. REV. 1, 1 (2021)).

ecutors' use of plea bargaining, and Founding-era-informed juries that ensure modern jurors know their right to acquit an unjust conviction."[521]

H. Other Reforms: More Adjudication, Less Bargaining

Because our criminal justice system is one of pleas and not trials, some have suggested injecting adjudication into the plea bargain process.[522] For example, Laura I. Appleman proposed a "plea jury."[523] Before any plea bargain, a jury must first determine: "(1) whether the facts stated fit the alleged crime; (2) whether the plea was knowing and voluntary; (3) and whether the proposed sentence was appropriate."[524]

Jed Rakoff proposed a related idea: junior judges could sit in on the plea process to lessen prosecutorial overreach. To be sure, some scholars caution that demanding more trials can backfire—reformers are themselves ambivalent about trials, and the demand may entrench the very plea system it aims to shrink. But that risk counsels careful design, not retreat.[525] In that way, courts could hear evidence and offer plea recommendations, something akin to a directed verdict standard.[526]

Other ideas include making grand juries independent reviewers of plea deals[527] and, in postconviction proceedings, having citizen review panels evaluate claims of innocence.[528]

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521 *Id.* at 1968 n.353 (citing Clark Neily, *A Distant Mirror: American-Style Plea Bargaining Through the Eyes of a Foreign Tribunal*, 27 GEO. MASON L. REV. 719, 741–45 (2020)).

522 Ortman, *Second-Best Criminal Justice*, *supra* note 406, at 1090.

523 *Id.* (citing Laura I. Appleman, *The Plea Jury*, 85 IND. L.J. 731 (2010)).

524 Ortman, *Second-Best Criminal Justice*, *supra* note 406, at 1090 (citation omitted). *See also* Chesa Boudin & Eric S. Fish, *Towards Pretrial Criminal Adjudication*, 66 B.C. L. REV. 1135 (2025) (proposing mechanisms to restore pretrial factual adjudication).

525 Schehr, *supra* note 284, at 388.

526 *Id.* & n.17.

527 Ortman, *Second-Best Criminal Justice*, *supra* note 406, at 1090 n.146 (citing Roger A. Fairfax, Jr., *Thinking outside the Jury Box: Deploying the Grand Jury in the Guilty Plea Process*, 57 WM. & MARY L. REV. 1395 (2016)).

528 *Id.* (citing Blume & Helm, *supra* note 23, at 186 (arguing panel would counteract plea bargaining's innocence problem)). *But see* Thea Johnson, *Trial Ambivalence*, 20 OHIO ST. J. CRIM. L. 269 (2023) (cautioning that

I. *Revisiting* Brady v. United States

Just over five decades ago, the United States Supreme Court upheld the constitutionality of plea bargaining.[529] In *Brady v. United States*, the Court wrote, "[w]e would have serious doubts about this case if the encouragement of guilty pleas by offers of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves. But our view is to the contrary."[530]

The Supreme Court was wrong then, and even more so today. It should have had serious doubts when it decided *Brady*. The Court staked its holding on an expectation: that trial courts would satisfy themselves that every guilty plea was voluntary, intelligent, and entered with adequate advice of counsel. Five decades of exonerations have refuted that expectation. Even competent counsel can feel the coercive pressure and facilitate wrongful guilty pleas. Nevertheless, the Court is unlikely to revisit *Brady* and plea bargaining—which is why reform must come from within the system, not from the Court. And were the Court ever inclined, its own method supplies the measure: an unenumerated right must be "deeply rooted in [our] history and tradition," and a practice "almost unheard of before the Civil War" makes a "right to plea bargain" a poor candidate under *Dobbs*.[531]

Each proposal above has merit, and each would have made a difference in the cases detailed above. But making any substantial reforms to a broken system takes more than innovative solutions: it takes education, political will, and—first—recognition that a problem exists. For decades, legal scholars have critiqued our quotidian justice—plea bargaining—as something of a Turkish bazaar.[532] But "[j]ustice and liberty are not the subjects of

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demands for more trials may entrench plea bargaining).

529 *Brady*, 397 U.S. at 758.

530 *Id.*

531 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 237 (2022) (citations omitted); *cf. id.* at 231 (deeming it dispositive that "[u]ntil the latter part of the 20th century, such a right was entirely unknown in American law"). On plea bargaining's late arrival, *see supra* Section II.A.

532 Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1119 (2011) bargaining and barter."[533] There is no doubt that the plea bargain system has earned the criticism it has received.[534] The question is not whether reforms would make a difference, but whether any will be made at all.

CONCLUSION

This paper opened by asking why the innocent plead guilty. Six factors—and six men—supply the answer. As physical torture declined, psychological coercion took its place.[535] The coercion changed form; the pleas kept coming. Officers coerced James Blackmon, a man living with serious mental illness, into falsely confessing to a murder he had nothing to do with. Brian Banks, sixteen, was falsely accused and coerced into pleading no contest to a crime that never occurred. Lionel White, Sr. was falsely accused by the very officers sworn to serve and protect him. Derrick Allen was nineteen when he was falsely accused of society's most reprehensible crime; the system failed him over and over. Timothy Johnson, twenty-four, pleaded guilty to murder to escape a death sentence—on the advice of counsel who never explained the rights his plea surrendered. And Anthony Embry, twenty-three, was misidentified in a shooting and pleaded guilty to a murder that cost him twenty years. All were young Black men. And all were pressured to accept fault for something they did not do. In half the cases, no crime was committed—*by anyone*.

These cases expose the worst features of American criminal justice and compel a reckoning. Only by admitting the problem can we begin to address it. The exonerated have taken the first

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("[P]lea bargaining remained all but unregulated, a free market that sometimes resembled a Turkish bazaar.").

533 Ortman, *When Plea Bargaining Became Normal*, *supra* note 229, at 1494 (quoting Shelton v. United States, 242 F.2d 101, 113 (5th Cir. 1957)).

534 The criticism includes that plea bargaining fails to protect defendants' rights, is a form of torture, is overly coercive, leads defendants to "game" the system, fails to take victims into account, reinforces inequality (particularly towards ethnic minorities), leads to disparate sentencing, gives defendants better deals than they deserve, and undermines our system of justice due to its overuse at the expense of jury trials.

535 *See* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748 (2011) ("Squeezing law is often like squeezing a balloon. The contents do not escape, but erupt in another area.").

step. The next belongs to the rest of us. In the end, no one should have to surrender the constitutional right to trial out of fear that a jury will get the verdict wrong—sometimes dead wrong.[536] *Brady* promised serious doubts. Half a century of evidence has supplied them.

536 NAT'L REGISTRY OF EXONERATIONS, *Posthumous & Historical Exonerations* (Feb. 8, 2023), https://exonerationregistry.org/sites/exonerationregistry.org/files/documents/Posthumous%26HistoricalExons.FINAL.2.8.23.pdf.