

GUILT, INNOCENCE, AND DUE PROCESS OF PLEA  
BARGAINING

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PREVIEW: *LONG WEEKEND*

Begin with a melodramatic but illuminating thought experiment: Suppose in some future dystopia you have the bad luck to be selected for a twisted game show titled “What’s Your Call?” In “What’s Your Call?” the contestant’s loved ones are suspended over a vat of boiling oil and the sadistic emcee offers the hapless contestant a Sophie’s-like choice between dreadful alternatives. If the contestant does not make the call in sixty seconds, the emcee pushes a button, and the family falls to a horrible death before the eyes of the contestant and of the television audience.

In your case, the emcee says: “Say, friend, you look a little stressed! That’s understandable, under the circumstances. What *you* need is a little R&R. So we’ll give you a choice between a long weekend and a long vacation.”

“For your long weekend, we’ve reserved space at beautiful, scenic Guantanamo Bay where you’ll be subjected to seventy-two hours of enhanced interrogation. Yes, you’ll experience the whole spectrum of modern techniques: Sleep deprivation! Simulated drowning! Nonmedical rectal rehydration! Don’t worry that if you choose the long weekend they’ll make you have second thoughts about your choice—they may ask you some questions, but they won’t give you any chance to change your mind.” You glance at your family and glumly await your alternative.

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“If, on the other hand,” the emcee continues, “you really need to get away from it all, we can guarantee that you’ll never spend another day at the office again. We’ve reserved a space for you at a typical American penitentiary—for forty years! This will only mean the complete termination of your previous life, an all but complete separation from friends and family, and a dreary monotony enlivened only by pruno on holidays, the occasional brutality of the staff, and a regular schedule of sexual assault by your colleagues.”

“So, you’ve got a choice: the long weekend or the long vacation.” The emcee pauses for dramatic effect, then hits the button that starts the giant sixty-second stopwatch. Dramatic music leads up to the emcee’s standard tagline: “*WHAT’S YOUR CALL?*”

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The point of the thought experiment is not the difficulty of the choice. Every person to whom I have presented the hypothetical has chosen “long weekend” over “long vacation.” Torture and prison are both bad, but even accounting for posttraumatic stress disorder and deeply discounting the back end of “long vacation,” there is no real question here. So, what *is* the point?

I assert with great confidence that no civilian criminal court in the United States would admit a confession obtained during “long weekend,” even in a prosecution for aggravated murder.<sup>1</sup> With only a little less confidence I assert that no civilian criminal court in the United States would reject a guilty plea obtained to avoid “long vacation.”<sup>2</sup> But if our intuitions about “long weekend” being less

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1. See, e.g., *United States v. Ghailani*, 743 F. Supp. 2d 261, 287-88 (S.D.N.Y. 2010) (“If the government is going to coerce a detainee to provide information to our intelligence agencies, it may not use that evidence—or fruits of that evidence that are tied as closely to the coerced statements as Abebe’s testimony would be here—to prosecute the detainee for a criminal offense.”). The precise issue in *Ghailani* was whether the testimony of a witness identified by interrogating the accused could be admitted on the assumption that the interrogation was coercive. *Id.* at 264. The government chose not to contest the coercion issue and litigated the suppression motion on the theory that even if Ghailani’s admissions were coerced, the witness identified by those admissions should be allowed to testify because the taint of the illegality had attenuated. *Id.* at 265. Judge Kaplan’s opinion rejecting the admissibility of *derivative* evidence in the form of a live witness, in a terrorism case, substantiates quite clearly the inadmissibility of the coerced admissions themselves.

2. See, e.g., *United States v. Faris*, 388 F.3d 452, 457 (4th Cir. 2004) (“[E]ven if Faris was told that he could be sent to Guantanamo if he did not plead guilty, this would not undermine

dreadful than “long vacation” are to be trusted, this seems backwards. The threat of forty-years imprisonment has more power to induce cooperation than seventy-two hours of torment. So unless there is some normative distinction between a confession and a guilty plea, settled, workaday constitutional doctrine contradicts itself.<sup>3</sup>

Either confessions obtained by torture should be admitted or guilty pleas induced by threats that are worse than torture should be forbidden. We—as a legal system and as a society—are not prepared to countenance torture in ordinary criminal cases. The only logical alternative is to reconsider the constitutionality of catastrophic plea consequences.

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the voluntariness of his plea. Every guilty plea necessarily entails a choice among distasteful options. For this reason, courts have held that a guilty plea is not rendered involuntary merely because it was entered to avoid harsh alternatives such as the death penalty, *see Brady v. United States*, 397 U.S. 742, 749-50, 755 (1970); prosecution on additional charges, *see Bordenkircher v. Hayes*, 434 U.S. 357, 363-65 (1978); or expulsion from the witness protection program, *see Doe v. United States*, 51 F.3d 693, 702 (7th Cir.1995).” (footnote omitted) (parallel citations omitted). We shall see in due course that the *Faris* court’s—quite typical—reliance on *Brady* and *Bordenkircher* is misplaced. As a description of positive law, it is practically standard.

3. Note just how bizarre the syllogism in *Faris* is when clearly articulated:

Major premise: The Supreme Court has approved pleas entered to avoid death (*Brady*) or decades of imprisonment (*Bordenkircher*). *See Faris*, 388 F.3d at 457-58 (citing *Brady v. United States*, 397 U.S. 742, 749-50, 755 (1970); *Bordenkircher v. Hayes*, 434 U.S. 357, 363-65 (1978)).

Minor premise: Enhanced interrogation is less dreadful than death or life imprisonment.

Conclusion: A plea induced by the threat of enhanced interrogation is voluntary, even though any confession obtained by those techniques would be considered coerced. This Article changes the major premise to: “The Supreme Court has held that convictions based on confessions obtained by ‘enhanced interrogation’ techniques violate due process.”

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## INTRODUCTION

I make four related claims. First, I claim descriptively that since the adoption of sentencing guidelines and mandatory minimum sentences, prosecutorial charging decisions have become practically dispositive of most criminal justice adjudications. Second, I identify two normative problems with prosecutorial dominance: the system inflicts too much punishment on the guilty, and it creates incentives that induce rational innocent people to plead guilty. Third, I lodge a legal claim: plea incentives that would make an innocent person likely to plead guilty violate due process, both on principle and as applied in the long line of the Supreme Court's coerced-confession cases. Fourth, I propose a remedial structure—the defense plea offer—that offers one image of what practical reform might look like.

Part I traces how the 1980s system of, roughly speaking, four pleas to every trial conviction devolved into the current system of nineteen pleas to every trial. Legislatures chose to make huge investments in policing and corrections while economizing on the due process component of meaningful hearings as gatekeepers between the policing and the corrections. These developments set the stage for my descriptive and normative claims about modern plea bargaining.

Part II turns to legal doctrine. The standard view, both in the Court and in the literature, holds that plea bargaining is not coercive so long as the prosecution proposes sets of charges supported by the evidence. Since the prosecutor has a right to bring either the high set or the low set, the lower set proposed for sentence after a guilty plea is an offer, not a threat, and an offer cannot coerce.

The standard view of plea bargaining is wrong. From a moral point of view, the standard view is myopic. Because it focuses on the two proposals the prosecutor makes, it is blind to both the defendant's rights to trial and to reliable adjudication, and it ignores the dozens of alternative outcomes the prosecutor vetoes. From a legal point of view, the standard view is circular. The constitutional issue is whether plea bargaining can be coercive. To privilege the

statutory law authorizing both outcomes proposed by the prosecutor is to give the statutory law priority over the constitutional law.

To analyze the idea of a coercive plea bargain, the correct baseline is not the framework of substantive but discretionary liabilities set up by our superficially prolix and draconian penal codes. The baseline should be set by the rights of an accused presumed to be innocent in a modern context in which empirical evidence suggests that presumption is at best imperfectly protected by the processes of police investigation and prosecutorial screening. From that baseline, current law tolerates what seems to be increasingly common: plea offers that are functionally coercive.

Assessing trial penalties under the Self-Incrimination Clause is problematic because the clause provides no baseline by which to measure compulsion. Due process is another matter. The Supreme Court's coerced confession cases have survived independently of *Miranda*.<sup>4</sup> The narrowest understanding of the coerced-confession doctrine is that police pressures that might cause a false confession violate due process. Yet, the pressures brought to bear by modern prosecutors make the goldfish rooms and arc lights of the 1930s seem nearly trivial by comparison.

The Supreme Court cases thought to distinguish catastrophic trial penalties from coerced confessions involved convictions challenged either long after plea or after trial, rather than immediately prior to pleas under protest. Such cases are distinguishable even if we ignore dramatic changes in the legal ecology, which no thoughtful jurist would ignore.

Part IV picks up the thread by proposing a remedial structure. When the defense is confronted by a plea offer that is coercive according to the innocent-person standard, the correct remedy is for the defendant to plead guilty subject to a trial offer—that is, a representation that the defendant would stand trial, at risk of some reasonable penalty for failing to accept responsibility. If the court were to grant the motion, it would dismiss *in terrorem* charges and—the Constitution trumping all sentencing rules—set a limit on the practical liability the defendant would face if convicted at trial.

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4. See *infra* notes 99-100 and accompanying text.

A constitutional right against coercion cannot be waived under the pressure of coercive threats. It follows that the right to object to coercive threats may not be subjected to coercive retaliation. If the proposed theory is sound, the prosecution could not make waiving the right to advance a trial offer a condition of a plea bargain, nor could the prosecution add charges or otherwise retaliate against a defendant who advanced a trial offer.

The proposed trial offer system responds to one manifestation of the current system's pathological reliance on executive discretion—the problem of the innocent accused placed in the position of having no reasonable alternative but to plead guilty. The far more common manifestation of executive hegemony is overpunishment. Sentences effectively set by the executive are, unsurprisingly, higher than those that prevailed when the courts played a more active role in sentencing. Part IV closes by exploring the relationship between the problems of rational innocence and overpunishment. Are they in irreducible conflict? After all, plea offers can be made less coercive by increasing the punishment on a plea to more closely resemble the one that would follow conviction after a trial. In the end, the conflict may not be real. If it turns out to be so, constitutional regulation of coercive-charging threats against those claiming innocence is a logical first step toward constitutional regulation of those admitting guilt but disputing the measure of just desert.

From the perspective of criminal-justice insiders, the entire project might well appear feckless, even daft. Indeed, even the proposal of disclosing and memorializing the spread between the plea offer and the trial threat sounds disconcerting. Yet, I urge the reader to review carefully what I have said so far and to revisit the initial shock effect when we conclude. Not one step in the argument is unsupported by powerful empirical evidence or by powerful lines of doctrinal authority. What I say is original only because the system we have has made it seem so. All I do here is remind us of how our principles are at odds with our practice, even when there is no compelling necessity of hypocrisy.

Indeed, from a pragmatic point of view, a system with more judicial oversight of prosecutorial charging decisions would, at worst, move resources away from policing and corrections and toward the adjudication function. Even those who see such a reallocation as a

social cost might accept that cost as a matter of principle. Many other thoughtful observers might not see that reallocation as a social cost at all.

## I. CONTEXT

### A. *The “Steroid Era” in U.S. Criminal Justice*

American sports fans remember the 1990s as Major League Baseball’s “steroid era.” During this period, the use of performance-enhancing drugs led to massive physiques and more, and longer, home runs.<sup>5</sup> After a period of exhilaration, fans turned against the players who had broken both league policy and federal criminal law.<sup>6</sup> Baseball still copes with the long-term damage players did to themselves and the problem of assessing records achieved during the now generally-reviled “steroid era.”<sup>7</sup>

This same period saw a steroid era in criminal justice. The system’s executive muscle—police at the front end of the process and corrections at the back end—grew rapidly. The resources devoted to adjudication—judges, prosecutors, and public defenders—grew very little. In effect, the system splurged on crime control and scrimped on due process.

To begin with policing: “From 1992 ... to 2004, State and local law enforcement agencies added about 230,400 full-time employees, including 123,800 sworn officers and 106,600 nonsworn employees. During this time the number of violent crimes ... nationwide decreased by more than 565,000.”<sup>8</sup> That amounts to a 27.2 percent increase in overall employees and a 20.4 percent increase in the number of sworn officers.<sup>9</sup>

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5. GEORGE J. MITCHELL, REPORT TO THE COMMISSIONER OF BASEBALL OF AN INDEPENDENT INVESTIGATION INTO THE ILLEGAL USE OF STEROIDS AND OTHER PERFORMANCE ENHANCING SUBSTANCES BY PLAYERS IN MAJOR LEAGUE BASEBALL 71-72 (2007), <http://files.mlb.com/mitchrpt.pdf> [<https://perma.cc/N9QJ-QH99>].

6. *Id.* at 11-12.

7. *See id.* at SR-8.

8. BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS [BJS], U.S. DEPT OF JUSTICE [DOJ], NCJ 212749, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2004, at 3 (2007), <http://bjs.gov/content/pub/pdf/cslllea04.pdf> [<https://perma.cc/D5YF-E4DV>].

9. *Id.*



Not only did law enforcement agencies deploy more officers, those officers made more arrests than they had before. In 1980, police made 9,703,181 arrests.<sup>10</sup> In 2000, there were 13,980,297 arrests, roughly 40 percent more than in 1980.<sup>11</sup> During the 1990s, crime fell sharply: the homicide rate per 100,000 population was 10.2 in 1980, 9.4 in 1990, and 5.5 in 2000.<sup>12</sup>

The higher arrest rate translated into more prosecutions. From 1987 to 2004, state criminal court filings rose by 67 percent.<sup>13</sup> The incarceration rate rose too, from 139 prisoners per 100,000 population in 1980 to 292 in 1990 to 478 in 2000.<sup>14</sup> So during a period of falling crime rates, the number of prosecutions and the number of prisoners per capita rose by roughly two-thirds.

The resources devoted to adjudicating criminal cases did not keep up. From 1987 to 2004, “[s]tate trial courts increased judicial staffing by 11% overall, adding 2,600 judges in courts across the country.”<sup>15</sup> Between 1992 and 2001, the number of state prosecutors rose 39 percent.<sup>16</sup> The system’s neglected stepchild, indigent defense, has not fared that well. “From 1999 to 2007, public defender program caseloads increased by 20% while staffing increased by 4%.”<sup>17</sup>

An increasing reliance on guilty pleas enabled the system to cope with caseloads that rose far faster than the resources for adjudication. In the federal system, “[i]n 1980, one defendant went to trial

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10. FED. BUREAU OF INVESTIGATION [FBI], CRIME IN THE UNITED STATES: 1980 UNIFORM CRIME REPORTS 200 (1981).

11. FBI, CRIME IN THE UNITED STATES: 2000 UNIFORM CRIME REPORTS 216 (2001).

12. FBI, *State-by-State and National Crime Estimates by Year(s)*, UNIFORM CRIME REPORTING STAT., <http://www.ucrdatatool.gov/Search/Crime/State/StatebyState.cfm> [<https://perma.cc/DB66-WNVN>] (last revised Mar. 29, 2010) (select “United States-Total,” “Violent crime rates,” and the date range “1980 to 2000”).

13. LYNN LANGTON & THOMAS H. COHEN, BJS, DOJ, NCJ 217996, STATE COURT ORGANIZATION, 1987-2004, at 2 (2007), <http://www.bjs.gov/content/pub/pdf/sco8704.pdf> [<https://perma.cc/B8PT-LSJG>].

14. Hindelang Criminal Justice Research Ctr., Univ. at Albany, *Persons under Correctional Supervision: Table 6.29.2012*, SOURCEBOOK CRIM. JUST. STAT., <http://www.albany.edu/sourcebook/pdf/t6292012.pdf> [<https://perma.cc/8F9H-T9YT>] (last updated 2013) [hereinafter Hindelang Criminal Justice].

15. LANGTON & COHEN, *supra* note 13, at 2.

16. CAROL J. DEFRANCES, BJS, DOJ, NCJ 193441, PROSECUTORS IN STATE COURTS, 2001, at 2 (2002), <http://www.bjs.gov/content/pub/pdf/psc01.pdf> [<https://perma.cc/ZY3B-JDTK>].

17. LYNN LANGTON & DONALD FAROLE, JR., BJS, DOJ, NCJ 228229, STATE PUBLIC DEFENDER PROGRAMS, 2007, at 18 (2010), <http://www.bjs.gov/content/pub/pdf/spdp07.pdf> [<https://perma.cc/D38H-2Z4W>].

for every four who pled guilty. By 1999, that ratio fell to one in twenty.”<sup>18</sup> However, defendants have a constitutional right to trial, and under *Jones v. Barnes* they are not required to accept the advice of counsel to plead guilty.<sup>19</sup> How did the system induce defendants to plead at much higher rates than had prevailed hitherto? Prosecutors needed more leverage, and they got it.

The two key developments were sentencing guidelines and statutory mandatory minimum sentences.<sup>20</sup> The prosecutor’s selection of the charges and ability to offer sentencing departures came to control the sentence imposed, so long as the prosecution could credibly threaten conviction at trial.<sup>21</sup> By charging possessory offenses that could be established solely by officer testimony—“proxy crimes” such as possession with intent to distribute and possession of a firearm by a felon—prosecutors could avoid the perils of civilian witnesses susceptible to either threats or claims on loyalty. Absent judicial discretion over sentencing, which guidelines and mandatory minimums curtailed, prosecutors could credibly threaten catastrophic consequences based on charges that could be proved beyond a reasonable doubt with officer testimony.

The discretionary power of state prosecutors is less complete but still substantial. About half of the states have sentencing guidelines, and all of them have mandatory minimums for some offenses.<sup>22</sup> In the state courts, guilty pleas account for 95 percent of felony convictions.<sup>23</sup>

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18. Irwin H. Schwartz, *Consequences of the Disappearing Criminal Jury Trial*, CHAMPION, Nov. 2001, at 7.

19. 463 U.S. 745, 751 (1983).

20. See Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 85 (2005) (“The federal system over the last three decades has featured increasingly severe sentences, and the adoption of federal sentencing guidelines in the late 1980s enhanced the power of prosecutors and judges to reward cooperation from defendants. In those districts where prosecutors took full advantage of the tools available to them under the sentencing laws, it became more expensive than ever for a federal defendant to insist on a trial; fewer paid the price each year.”).

21. See *id.* at 85-86.

22. See Ben Trachtenberg, *State Sentencing and New Prison Admissions*, 38 U. MICH. J. L. REFORM 479, 487-88 (2005).

23. Wright, *supra* note 20, at 90 n.36.

*B. Modern Plea “Bargaining”*

In a great many cases, charge selection is not the beginning of an adversarial process, but the *outcome* of the case, practically speaking. Catastrophic trial penalties make the prosecution’s plea offer all but inevitable. For example, consider *Graham v. Florida*, which held that life-without-parole sentences for nonhomicide juvenile offenders violated the Eighth Amendment.<sup>24</sup> The Supreme Court casually recited what is really a quite remarkable procedural history.<sup>25</sup>

Justice Kennedy reviewed the trial court proceedings as follows:

In July 2003, when Graham was age 16, he and three other school-age youths attempted to rob a barbeque restaurant in Jacksonville, Florida.... The restaurant manager required stitches for his head injury. No money was taken.

Graham was arrested for the robbery attempt. Under Florida law, it is within a prosecutor’s discretion whether to charge 16- and 17-year-olds as adults or juveniles for most felony crimes. Graham’s prosecutor elected to charge Graham as an adult. The charges against Graham were armed burglary with assault or battery, a first-degree felony carrying a maximum penalty of life imprisonment without the possibility of parole; and attempted armed-robbery, a second-degree felony carrying a maximum penalty of 15 years’ imprisonment.

On December 18, 2003, Graham pleaded guilty to both charges under a plea agreement. Graham wrote a letter to the trial court. After reciting “this is my first and last time getting in trouble,” he continued “I’ve decided to turn my life around.” ...

The trial court accepted the plea agreement. The court withheld adjudication of guilt as to both charges and sentenced Graham to concurrent 3-year terms of probation. Graham was required to spend the first 12 months of his probation in the county jail, but he received credit for the time he had served awaiting trial, and was released on June 25, 2004.<sup>26</sup>

Graham committed fresh crimes in violation of his probation, inducing the judge to impose the previously suspended life-without-parole

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24. 560 U.S. 48 (2010).

25. *Id.* at 52-53.

26. *Id.* (citations omitted).

sentence.<sup>27</sup> The Court went on to hold unconstitutional the imposition of a life-without-parole sentence on a nonhomicide juvenile offender.<sup>28</sup>

Focus, however, on the so-called plea bargain. The gap between the prosecution's plea offer and trial threat was the difference between little more than time served and a life sentence—for a teenage offender. As a legal matter, both life without parole and three years of probation were permissible outcomes, and the choice between them was voluntary.

Federal prosecutors have even more leverage than their state counterparts. Federal judges are constrained by the United States Sentencing Guidelines.<sup>29</sup> Moreover, the U.S. Attorney's offices have discretion to charge violations of numerous statutes carrying mandatory minimum sentences.<sup>30</sup> One notorious example of this use of mandatory minimums is *United States v. Angelos*.<sup>31</sup>

According to an informant, the defendant, Weldon Angelos, sold eight ounces of marijuana to the informant on three occasions.<sup>32</sup> The informant saw a gun at two of these sales.<sup>33</sup> Agents found additional firearms at the homes of Angelos and of his girlfriend.<sup>34</sup> Under 18 U.S.C. § 924(c), carrying a firearm during and in relation to any drug trafficking is subject to a mandatory five-year minimum sentence for the first offense and a mandatory twenty-five year minimum sentence for each subsequent offense, with probation disallowed and all sentences to run consecutively.<sup>35</sup>

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27. *Id.* at 54-57.

28. *Id.* at 82.

29. See generally U.S. SENTENCING GUIDELINES MANUAL (U.S. SENTENCING COMM'N 2015).

30. See Memorandum from Eric Holder, Attorney Gen., to U.S. Attorneys & Assistant Attorney Gen. for the Criminal Div. (Aug. 12, 2013), <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policy-pon-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf> [<https://perma.cc/4D8R-2RW6>] (recognizing attorney discretion and providing guidelines on when to refrain from triggering mandatory minimum sentences).

31. See 345 F. Supp. 2d 1227 (D. Utah 2004).

32. *Id.* at 1231.

33. *Id.*

34. *Id.*

35. 18 U.S.C. § 924(c) (2012).

The U.S. Attorney's office charged three distribution counts, one § 924(c) count, and two lesser charges.<sup>36</sup> The government told the defense that:

[I]f he pled guilty to the drug distribution count and the § 924(c) count, the government would agree to drop all other charges, not supersede the indictment with additional counts, and recommend a prison sentence of 15 years. The government made clear to Mr. Angelos that if he rejected the offer, the government would obtain a new superseding indictment adding several § 924(c) counts that could lead to Mr. Angelos facing more than 100 years of mandatory prison time.<sup>37</sup>

When the defendant refused to plead, the government then "obtained two superseding indictments, eventually charging twenty total counts, including five § 924(c) counts which alone carried a potential minimum mandatory sentence of 105 years."<sup>38</sup> The prosecution rebuffed subsequent defense efforts to reopen plea discussions, and after a trial, the jury convicted on sixteen counts, including three § 924(c) charges.<sup>39</sup>

Angelos had no significant criminal history, so on the drug charges the Guidelines prescribed a range of seventy-eight to ninety-seven months.<sup>40</sup> The § 924(c) mandatory minimums, however, added fifty-five years (five years on the first count and twenty-five each on the second and third counts, which the government added only after the refusal to plead).<sup>41</sup> With manifest reluctance Judge Cassell rejected the defendant's Eighth Amendment challenge to the sentence.<sup>42</sup> As of 2012, Weldon Angelos has an expected release date of 2051.<sup>43</sup>

Catastrophic trial penalties are not isolated incidents. John Gleeson, a federal district judge in Brooklyn, New York, said

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36. *Angelos*, 345 F. Supp. 2d. at 1231.

37. *Id.*

38. *Id.* at 1232.

39. *Id.*

40. *Id.*

41. *Id.*

42. *See id.* at 1256-60.

43. *See* Derek P. Jensen, *Chaffetz Unveils Prison Program to Reduce Recidivism and Lower Crime*, SALT LAKE TRIB. (May 31, 2013, 10:53 AM), <http://www.sltrib.com/56385962> [<https://perma.cc/9NL8-2AK8>].

“[p]rosecutors routinely threaten ultraharsh, enhanced mandatory sentences that *no one*—not even the prosecutors themselves—thinks are appropriate.”<sup>44</sup> A study by Human Rights Watch found that:

[P]rosecutors often charge or threaten to charge mandatory minimums not because they result in appropriate punishment, even in the view of the prosecutor, but to pressure defendants to plead guilty and to punish them if they do not. The pressure they could bring to bear on defendants led to soaring numbers of guilty pleas in drug cases: from 1980 to 2010, the percentage of federal drug cases resolved by a plea increased from 68.9 to 96.9 percent, where it remained in 2012.<sup>45</sup>

The study concluded that “plea agreements, once a choice to consider, have for all intents and purposes become an offer drug defendants cannot afford to refuse.”<sup>46</sup>

### *C. Two Practical Problems: Coercing the Innocent and Excessive Punishment*

The system’s overriding evil is the concentration of power in executive hands. The law determines who is to be punished—and how severely—less than it empowers prosecutors to make these determinations as they see fit. In 1981, Dean Vorenberg denounced prosecutorial power as excessive, indeed as indecent.<sup>47</sup> In the following decade, Congress adopted the Sentencing Guidelines and mandatory minimum sentences, dramatically *augmenting* prosecutorial power.<sup>48</sup> Charge selection, which had been very important before, became dispositive of most outcomes.

There are powerful reasons for supposing that if anyone is to have arbitrary power of the scope now exercised by prosecutors, that

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44. Erik Eckholm, *Prosecutors Draw Fire for Sentences Called Harsh*, N.Y. TIMES, Dec. 5, 2013, at A19 (quoting Judge Gleeson) (emphasis in original).

45. HUMAN RIGHTS WATCH, AN OFFER YOU CAN’T REFUSE: HOW U.S. FEDERAL PROSECUTORS FORCE DRUG DEFENDANTS TO PLEAD GUILTY 31 (2013) (footnote omitted).

46. *Id.* at 2.

47. See James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1523-37 (1981) (arguing that the scope of prosecutorial discretion is unnecessarily broad and that limitations are required to ensure the fair administration of justice).

48. See *supra* notes 20-21 and accompanying text.

power should be exercised by actors playing other institutional roles—judges or grand jurors, for example. The fundamental point is one of political principle rather than policy. No one should hold power to inflict decades of incarceration unconstrained by standards or transparent accountability. Society would not stand for Assistant U.S. Attorneys determining eligibility for Social Security benefits unguided by standards and unpoliced by either publicity or legal review. In the criminal process, graver—far graver—consequences turn on the opaque and unreviewable exercise of prosecutorial discretion.

The bedrock principles of liberal democratic theory from which the guilty plea system so grossly deviates are bedrock principles for good reasons. When they are disregarded, it is only a matter of time before government authority runs amok. In the plea bargaining context we now see two terribly practical downsides to prosecutorial hegemony.

First, the system prosecutors have dominated for the last thirty years has become the most punitive in the world and indeed, if we leave aside police states with camp systems, perhaps in history. Second, the arbitrary power to threaten catastrophic conviction consequences endangers the innocent—not only by confronting them with irrational risks if they stand trial but also by creating incentives to offer “substantial assistance” to prosecutors even if the grounds of cooperation need to be invented.<sup>49</sup>

### *1. Overpunishment*

Mass incarceration is a function of prosecutorial discretion. From a policy standpoint, prosecutors—self-selected for self-righteousness in the first place—respond to a set of mostly perverse incentives. They are judged by convictions over a time horizon much shorter than the consequences of their decisions.<sup>50</sup> They do not internalize the costs of incarceration, either institutionally or temporally. County-level prosecutors make most state charging decisions; the costs

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49. Wright, *supra* note 20, at 85-86.

50. For an empirical study finding that prosecutors aim to maximize sentence severity in their cases, see Richard T. Boylan, *What Do Prosecutors Maximize? Evidence from the Careers of U.S. Attorneys*, 7 AM. L. & ECON. REV. 379 (2005).

of imprisonment are borne by state-level corrections departments.<sup>51</sup> The Federal Bureau of Prisons is included in the Department of Justice's budget, but most charging decisions are made by the U.S. Attorney's office.<sup>52</sup>

Like many other seemingly unrelated problems, such as global warming and the underfunding of public pensions, mass incarceration results in part from the long time horizon of the problem and the short time horizon of public officials. Where is the interest group vengefully tracking the charging decisions of 1990s Assistant District Attorneys, with an eye to contributing funds to defeat their senatorial bids? Should, however, a current official take responsibility for the early release of geriatric prisoners, each released prisoner could become a headline tomorrow by committing some horrible crime.

The incentive structure predicts what we see in practice: mass incarceration. Prosecutors became dominant with the adoption of sentencing guidelines and mandatory minimums in the mid-1980s. Between 1980 and 2000, the system became dramatically more punitive. Using the per capita prison population—state and federal—as a measure of overall punishment and the per capita frequency of homicide as a proxy for crime generally, we can calculate an index of how much punishment per unit of crime the system is inflicting. Here are the ratios at ten-year intervals from 1960 to 2000.<sup>53</sup>

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51. See, e.g., John F. Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 GA. ST. U. L. REV. 1239, 1259 (2012) ("Prosecutors are county officials, but the state pays to incarcerate the defendants they convict; we should thus expect prosecutors to 'overuse' prison beds, since neither they nor their constituents bear the full cost.").

52. See DOJ, FY 2016 BUDGET REQUEST: PRISONS AND DETENTION, [http://www.justice.gov/sites/default/files/jmd/pages/attachments/2015/01/30/4.\\_prisons\\_and\\_detention\\_fact\\_sheet.pdf](http://www.justice.gov/sites/default/files/jmd/pages/attachments/2015/01/30/4._prisons_and_detention_fact_sheet.pdf) [<https://perma.cc/E5LU-JLYU>].

53. MARGARET WERNER CAHALAN, BJS, DOJ, NCJ 102529, HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES, 1850-1984, at 32 (1986); Hindelang Criminal Justice, *supra* note 14; FBI, *supra* note 12.

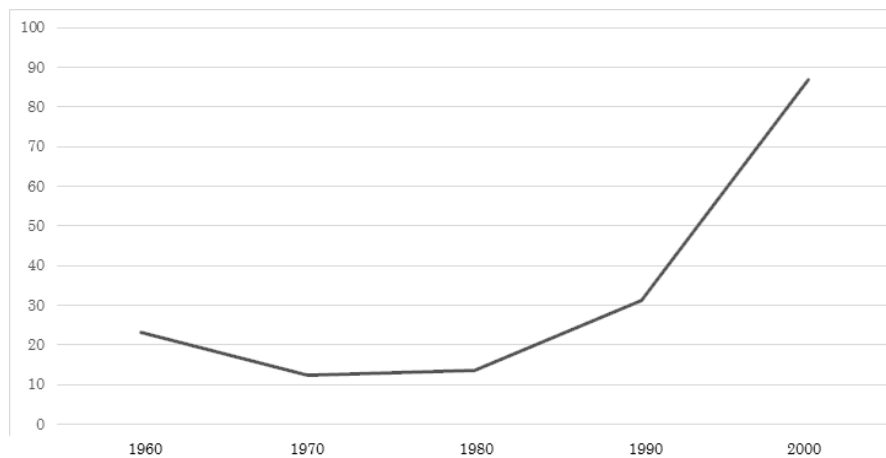


Table 1: Per Capita Prisoner-to-Homicide Ratio by Year

Year	Per Capita Prisoner-to-Homicide Ratio	Percentage
1960	119/5.1	(23.3)
1970	97/7.9	(12.28)
1980	139/10.2	(13.6)
1990	292/9.4	(31.1)
2000	478/5.5	(86.9)

Figure 1 gives a visual impression of how the national numbers changed. There was a sharp decline during the 1960s, a gradual increase during the 1970s through 1990, and a somewhat faster rise from 1990 to 2000 as prison population continued its growth trend while the homicide rate fell by almost half.

Figure 1: Per Capita Prisoner-to-Homicide Ratio



Many factors are at work. If, however, as most agree, prosecutors have exercised the most influence on outcomes since the 1980s, we should either applaud mass incarceration or think about reducing the scope of prosecutorial power.<sup>54</sup>

## 2. Coercion of the Innocent

Now we turn to the innocence problem. As of March 20, 2016, the University of Michigan Law School's National Registry of Exonerations listed 272 false convictions obtained by plea.<sup>55</sup> That number grows continually;<sup>56</sup> Judge Rakoff observed that "[b]arely a month goes by without someone who pled guilty being exonerated and released from prison."<sup>57</sup> Unlike innocent suspects who falsely confess after waiving *Miranda*, defendants who plead guilty are all but invariably represented by counsel.<sup>58</sup> The innocent who plead guilty made a rational calculation.

In a recent article, John Blume and Rebecca Helm carefully laid out the incentive structure that induces innocent people to plead guilty.<sup>59</sup> Their analysis distinguishes three types of cases.<sup>60</sup> First,

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54. See John Pfaff, *The Flawed NRC Report: The Mysterious Case of the Missing Prosecutor, Part 1*, PRAWFSBLAWG (May 30, 2014, 11:00 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2014/05/the-flawed-nrc-report-the-mysterious-case-of-the-missing-prosecutor-part-1.html> [https://perma.cc/9GZX-94WP] ("[B]etween 1994 and 2008, the probability that an arrest would result in a felony filing rose from 0.387 to 0.57, an increase of 54%. During the same time, the probability a felony case would result in a prison admission was flat at 0.26. In other words, growth is driven almost entirely by an increase in felony filings. This solves the 'who' question that the report's analysis can't answer: growth is driven almost entirely by the prosecutor. Once a felony case is filed, the defendant is no more likely to go to prison in 2008 than in 1994. But the probability that an arrestee finds himself confronting a felony charge soars.") (footnote omitted).

55. *The National Registry of Exonerations*, U. MICH. L. SCH., <http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=Group&FilterValue1=P> [https://perma.cc/8HUK-6YVU] (last visited Mar. 20, 2016).

56. Between December 18, 2014 and March 20, 2016, the list of false convictions obtained by plea grew from 162 to 272. *Id.*; see also Jed S. Rakoff, *Reply to Plea Bargains & Prosecutors: An Exchange*, N.Y. REV. BOOKS (Dec. 18, 2014), <http://www.nybooks.com/articles/archives/2014/dec/18/plea-bargains-prosecutors-exchange/> [https://perma.cc/C2WJ-86TJ].

57. Rakoff, *supra* note 56.

58. See *Missouri v. Frye*, 132 S. Ct. 1399, 1405 (2012).

59. See John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 172-80 (2014).

60. *Id.*

defendants falsely charged with minor crimes may find it in their interest to terminate punishment-by-process as quickly as possible.<sup>61</sup> A repeat, low-level offender may be in pretrial detention and grateful to accept an offer of time served on a false charge given that, with his record, the collateral consequences of another conviction are almost wholly redundant.<sup>62</sup> For substance abusers, a deal that offers entry into a treatment program may be a better life choice than contesting a false charge.<sup>63</sup> Those falling just above eligibility for indigent defense may fear the cost of retaining counsel through the trial process.<sup>64</sup>

Blume's and Helm's second category covers defendants who settle with prosecutors after winning a remand for new trial through the appellate process.<sup>65</sup> Important as it is for all concerned in such cases, these are, from a systemic perspective, extremely rare.<sup>66</sup> The accused must first be one of the one-in-twenty defendants who elects trial rather than plea, and *then* lose at trial *but* win on appeal.<sup>67</sup>

Their third category covers cases where the plea/trial differential is so catastrophic that a rational person would not rely on the trial process to prevent the catastrophe.<sup>68</sup> Compared with the first category, the third category occurs less frequently because pretrial detention on minor charges is far more common than a very wide spread between the plea offer and the trial threat.<sup>69</sup> But it covers a large number of cases, far more than in Blume's and Helm's second category.<sup>70</sup> How many innocent defendants would reject the plea offered to Terrance Graham or to Weldon Angelos?<sup>71</sup> If the

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61. *See id.* at 173-74.

62. *Id.* at 174.

63. James Barron, *JetBlue Flight Attendant Accepts Plea Deal*, N.Y. TIMES: CITY ROOM (Oct. 19, 2010, 1:54 PM), <http://cityroom.blogs.nytimes.com/2010/10/19/jetblue-flight-attendant-accepts-plea-deal/> [<https://perma.cc/67GQ-4U7V>] (describing a case where the defendant accepted a plea deal that required him to participate in mental health counseling and substance abuse treatment).

64. Blume & Helm, *supra* note 59, at 174.

65. *See id.* at 175.

66. *Id.* at 175 n.109.

67. *Id.*

68. *See id.* at 180.

69. *See id.* at 173.

70. *Id.* at 175 n.109.

71. *See supra* notes 24-28 and accompanying text (Graham avoided a life without parole sentence and received a sentence of three years probation by pleading guilty); *supra* notes 31-41 and accompanying text (Angelos risked more than 100 years of mandatory prison time by

defendant making that choice was your child and asserted to your face his innocence, what advice would you give?

There is a related risk to the innocent posed by the prosecutorial power to threaten catastrophic consequences. Ruthless plea “bargaining” can assist criminal investigations by “offering” low-level gangsters the choice between cooperating or suffering sentences out of proportion to any rational assessment of blame or harm.<sup>72</sup> Empirical evidence confirms the role of dishonest informants in bringing about wrongful convictions.<sup>73</sup>

The confirmed cases of false guilty pleas surely represent the tip of the iceberg.<sup>74</sup> Those in Blume’s and Helm’s first category quit fighting. Those in their third category make the false plea for good reasons and ordinarily will keep mum thereafter. It is worth recalling the statistics on pretrial DNA testing. Pretrial DNA testing, as of the 1990s, exonerated about a quarter of the suspects tested.<sup>75</sup> If

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asserting his right to trial).

72. See Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 12 (2010) (“[T]he possibility of a long sentence provides a powerful incentive for members of a criminal group to provide information to law enforcement and to assist in the prosecution of other offenders.”).

73. See, e.g., Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 GOLDEN GATE U. L. REV. 107, 107-08 (2006) (“Horror stories abound of lying jailhouse snitches and paid informants who frame innocent people in pursuit of cash or lenience for their own crimes.”). One study Natapoff examined traced 45.9 percent of wrongful convictions in capital cases to false testimony by informants. *Id.* at 107.

74. Few cases of false guilty pleas are in the public record. See Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 533 (2005) (“[A] large number of false convictions in non-capital cases are never discovered because nobody ever seriously investigates the possibility of error.”). But when incidents are confirmed, *multiple* guilty pleas are impugned. Large scale investigations have uncovered more systematic acts of deliberate dishonesty than mistakes that exonerate a single defendant. *Id.* at 536-37. Gross states:

Only twenty of the exonerees in our database pled guilty, less than six percent of the total: fifteen innocent murder defendants and four innocent rape defendants who took deals that included long prison terms in order to avoid the risk of life imprisonment or the death penalty, and one innocent defendant pled guilty to gun possession to avoid life imprisonment as a habitual criminal. By contrast, thirty-one of the thirty-nine Tulia defendants pled guilty to drug offenses they did not commit, as did the majority of the 100 or more exonerated defendants in the Rampart scandal in Los Angeles.

*Id.* at 536.

75. EDWARD CONNORS ET AL., NAT’L INST. OF JUSTICE, DOJ, NCJ 161258, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL, at xix, 20, 78 (1996), <https://www.ncjrs.gov/pdffiles/dnaevid.pdf> [<https://perma.cc/V4NF-N8P8>].

that number has changed, I have seen no report of it. The implication is that when a police investigation has identified a prime suspect in cases important enough to do a DNA test (that was then even more extraordinary and expensive than now), a fourth of the time the police investigation was wrong. The police investigation will be less painstaking in the first category and under more pressure to produce a result in the third category.

Of course, if the trial process were perfect, the prosecutor's threat to the innocent would be in vain. The trial exoneration cases demonstrate that the trial process is far from perfect.<sup>76</sup> Given what Dan Simon aptly terms "the limited diagnosticity of criminal trials," a rational person choosing between decades in prison and a shorter time served for a crime he did not commit will choose the latter.<sup>77</sup> The empirical evidence confirms the phenomenon of innocent people pleading guilty; the extent of the phenomenon remains unknown.<sup>78</sup>

The current degree of concentration of power in prosecutorial hands is wrong on principle. The departure from otherwise generally accepted legal and political principles has led to at least two disturbing practical consequences—mass incarceration and pressure on the innocent to enter false pleas.<sup>79</sup> In the rest of this Article, I focus on plea bargaining's innocence problem. At the end I consider whether constitutional law to prevent coercion might turn out to be part of the solution to the distinct overpunishment problem.

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76. DNA exonerations have produced an extensive literature. *See generally* BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* (2011); JIM PETRO & NANCY PETRO, *FALSE JUSTICE: EIGHT MYTHS THAT CONVICT THE INNOCENT* (2010); DAN SIMON, *IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS* (2012).

77. *See* Dan Simon, *The Limited Diagnosticity of Criminal Trials*, 64 *VAND. L. REV.* 143, 218 (2011) (noting that 90 percent of people imprisoned for felonies plead guilty, despite the fact that the evidence in many cases was limited and uncertain).

78. On guilty pleas by the innocent, see, for example, Russell D. Covey, *Mass Exoneration Data and the Causes of Wrongful Convictions* (2011), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1881767](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1881767) [<https://perma.cc/SN98-KTWE>]. A recent psychological experiment found that more than half of the innocent student-subjects were willing to admit wrongdoing in exchange for lenience. *See* Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 *J. CRIM. L. & CRIMINOLOGY* 1, 34 (2013).

79. *See supra* Part I.C.

## II. PLEA BARGAINING AS TORTURE

In a classic article, John Langbein drew a disturbingly close analogy between American plea bargaining and juridical torture in renaissance Europe.<sup>80</sup> I claim here that extreme trial penalties are not just analogous to coerced confessions, but they are constitutionally indistinguishable. If we agree that the “long weekend” is preferable to the “long vacation,” then plea bargaining cannot be distinguished from torture on the basis of behavioral pressure.<sup>81</sup> What other bases of distinction might be offered? We begin with the Supreme Court’s involuntary confessions cases and then turn to consider whether plea bargaining can be distinguished by a different normative baseline for measuring coercion.

*A. The Due Process Doctrine Prohibiting Coerced Confessions*

The fountainhead of the coerced confession cases is *Brown v. Mississippi*, the infamous flogging case decided in 1936.<sup>82</sup> At that time, two different legal doctrines applied to the practice of extrajudicial interrogation. First, a common law rule of evidence prohibited the introduction of statements obtained by threats or promises.<sup>83</sup> The common law rule was predicated on the risk of convicting the innocent based on false admissions.<sup>84</sup> Second, the Fifth Amendment privilege against self-incrimination authorized a witness to claim privilege rather than answer incriminating questions.<sup>85</sup>

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80. See John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 8 (1978).

81. See *supra* Preview.

82. 297 U.S. 278 (1936).

83. See, e.g., Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part I)*, 53 OHIO ST. L.J. 101, 166-67 (1992) (“Although a few courts occasionally submitted questionable confessions to juries, after 1810 it was a firmly accepted common law rule of evidence in the United States that a confession was inadmissible if obtained by a promise or threat.”) (footnotes omitted).

84. See *id.* at 168 (“Why were confessions excluded under this rule? Although many of the early cases ignored this question, it is clear that the overriding concern, as under the English rule, was that a confession might be false if induced by promises or threats.”) (footnote omitted).

85. U.S. CONST. amend. V; see Herman, *supra* note 83, at 163-64 (“After the Revolution,

Neither doctrine was helpful to the petitioners in *Brown*. The highest authority on the common law of evidence in Mississippi was the Supreme Court of Mississippi, not the Supreme Court of the United States. And precedent blocked any application of the Fifth Amendment privilege to state proceedings; in *Twining v. New Jersey*, the Court had held that the Fourteenth Amendment did not incorporate the Fifth Amendment privilege.<sup>86</sup>

In *Brown*, the Supreme Court reversed on due process grounds.<sup>87</sup> The Due Process Clause, at a very high level of generality, allows the government to injure individuals only after a fair hearing has determined that the injury is authorized by pre-existing law.<sup>88</sup> Coerced confessions might violate this general rule-of-law guarantee in different ways.

First, the torture might violate due process at the time inflicted, even if there is no subsequent charge or trial. It might be that investigatory torture violates the natural law strand in the legality criterion, that is, substantive due process. Alternatively, pretrial torture might be condemned for offending the fair hearing requirement by inflicting punishment without charge or trial. Second, the use of admissions obtained by force might violate the legality criterion by becoming complicit in the pretrial torture. Or the use of coerced admissions might offend the fair hearing requirement by permitting a decision based on unreliable evidence.

The brief opinion by Chief Justice Hughes, for the unanimous Court, is emphatic but elusive. It must be read quite carefully to tease out the precise way in which the convictions were obtained in violation of due process. The opinion does not state that the whipping by the deputies violated due process at the moment it was committed.<sup>89</sup> It likewise does not state that there was no constitutional violation before the trial.<sup>90</sup> *Brown* is simply silent on the constitutionality of the flogging itself.<sup>91</sup>

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the protection against compulsory self-incrimination took on a new dimension. Previously a common law right, it became constitutionalized.”)

86. 211 U.S. 78, 90 (1908), *overruled in part* by *Malloy v. Hogan*, 378 U.S. 1 (1964).

87. *Brown*, 297 U.S. at 287.

88. See, e.g., Peter Strauss, *Due Process*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/due\\_process](https://www.law.cornell.edu/wex/due_process) [<https://perma.cc/K7RK-VUEE>] (last visited Mar. 20, 2016).

89. See *generally Brown*, 297 U.S. at 278.

90. See *id.*

91. See *id.*

The opinion locates the due process violation in the convictions based on the coerced confessions:

The State may not permit an accused to be hurried to conviction under mob domination—where the whole proceeding is but a mask—without supplying corrective process. *Moore v. Dempsey*, 261 U.S. 86, 91. The State may not deny to the accused the aid of counsel. *Powell v. Alabama*, 287 U.S. 45. Nor may a State, through the action of its officers, contrive a conviction through the pretense of a trial which in truth is “but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured.” *Mooney v. Holohan*, 294 U.S. 103, 112. And the trial equally is a mere pretense where the state authorities have contrived a conviction resting solely upon confessions obtained by violence. The due process clause requires “that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.” *Hebert v. Louisiana*, 272 U.S. 312, 316. It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.<sup>92</sup>

Just as the mob-dominated show trials in *Moore v. Dempsey*, the constructive denial of counsel in *Powell v. Alabama*, and the deliberate introduction of perjury in *Mooney v. Holohan* tainted the trials so completely that the proceedings were nullities, just so the use of the confessions voided the convictions in *Brown*.<sup>93</sup>

But if *Brown* is clear about when the violation occurred, it equivocates about whether the violation involved the legality criterion or the fair hearing requirement. The analogies to mob-dominated trials and state-sanctioned perjury suggest the problem was the unreliability of the evidence—that due process instantiated the common law evidence rule. The references to “fundamental” principles

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92. *Id.* at 286.

93. *Id.*



invoke the substantive due process understanding of the legality criterion.<sup>94</sup>

The post-*Brown* coerced confessions cases made clear that the due process standard of voluntariness incorporated the common law's concern for trustworthy evidence. Justice Jackson wrote for the Court in *Stein v. New York* that:

Coerced confessions are not more stained with illegality than other evidence obtained in violation of law. But reliance on a coerced confession vitiates a conviction because such a confession combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive evidence. A forced confession is a false foundation for any conviction, while evidence obtained by illegal search and seizure, wire tapping, or larceny may be and often is of the utmost verity.<sup>95</sup>

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94. See *Washington v. Glucksberg*, 521 U.S. 702, 756-65 (1997) (Souter, J., concurring) (describing and defending substantive, as distinct from procedural, due process).

95. 346 U.S. 156, 192 (1953). In *Stein*, the state procedure relied on the jury to determine whether the confessions were voluntary. *Id.* at 159-60, 170. After holding that if there was even a chance that the jury might have credited a confession that was in fact unconstitutionally coerced, reversal was required, the Court held that the trial court did not err in refusing to instruct the jury that it must return a verdict of acquittal if it found the confessions to be coerced. *Id.* at 188, 192-93. If even a chance existed that the jury credited a confession that was in fact unconstitutionally coerced, reversal was required, but the Court found the confessions in the instant cases voluntary. *Id.* at 192-94. In a subsequent case, the Court held that due process required a judicial determination of the voluntariness of a confession by a body other than that which was trying the defendant. See *Jackson v. Denno*, 378 U.S. 368 (1964).

One clear indicator of the continuing role of the reliability rationale is a line of circuit court cases holding coerced confessions inadmissible against third parties, generally on the ground that the third party has a right to exclude unreliable evidence. See *United States v. Sorenson*, 2009 WL 118057, at \*1 (9th Cir. 2009) ("Generally, a defendant 'does not have standing to challenge a violation of [a third party's] rights; however, illegally obtained confessions may be less reliable than voluntary ones, and thus using a coerced confession at another's trial can violate due process.") (citation omitted); *United States v. Dowell*, 430 F.3d 1100, 1107 (10th Cir. 2005) ("It is clear that Dowell does have standing to challenge the voluntariness of a witness's confession. In doing so, however, Dowell is not seeking to vindicate the witness's Fifth Amendment right against self-incrimination, but instead is seeking to protect his own right to due process; that is, to a fair trial.") (citations omitted); *Clanton v. Cooper*, 129 F.3d 1147, 1157-58 (10th Cir. 1997) ("Consequently, because the evidence is unreliable and its use offends the Constitution, a person may challenge the government's use against him or her of a coerced confession given by another person."); *Buckley v. Fitzsimmons*, 20 F.3d 789, 795 (7th Cir. 1994) ("Confessions wrung out of their makers may be less reliable than voluntary confessions, so that using one person's coerced confession at another's trial violates his rights under the due process clause."); *LaFrance v. Bohlinger*, 499 F.2d 29, 34 (1st Cir. 1974) ("Since a statement coerced from an accused is neither less trustworthy than one from a witness nor

Other cases went further and held that coerced confessions must be excluded even if they are corroborated by independent evidence.<sup>96</sup> Reliability, however, was the irreducible core of the voluntariness standard, even though the standard swept more broadly.

The due process test incorporated the common law rule but went further, requiring confessions to be made voluntarily in the totality of the circumstances.<sup>97</sup> This fuzzy, substantive due process add on suffered the great defect of uncertainty. The Court has never articulated the necessary and sufficient conditions of a voluntary confession, nor has it ever prohibited specific tactics, as by setting time limits or banning good cop/bad cop questioning. Dissatisfaction with the voluntariness rubric led to *Miranda*.<sup>98</sup> Despite *Miranda*, however, the Court never abolished the voluntariness test but has instead applied the due process doctrine in post-*Miranda* cases.<sup>99</sup>

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more offensive to society's sense of fairness, it would seem illogical invariably to require a *Jackson* hearing in the first case but never in the second.") (footnote omitted); Bradford v. Johnson, 354 F. Supp. 1331, 1338 (E.D. Mich. 1972) ("[T]he use of knowingly coerced incrimination of another is so patently untrustworthy that it rivals the knowing use of perjured testimony."), *aff'd*, 476 F.2d 66 (6th Cir. 1974) (per curiam).

96. See Rochin v. California, 342 U.S. 165, 173 (1952) ("Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency."). As Professor Primus concluded in a recent study:

The first strand of voluntariness is concerned with police actions that are judged to be inherently bad, regardless of the effects that those actions have on suspects. The second concerns police actions that are bad because they tend to cause suspects to give unreliable confessions. In moral philosophers' terms, the first form is deontological and the second is consequentialist.... Properly understood, modern confession doctrine still houses both of these concerns.

Eve Brensike Primus, *The Future of Confession Law: Toward Rules for the Voluntariness Test*, 114 MICH. L. REV. 1, 23-24 (2015).

97. See Haynes v. Washington, 373 U.S. 503, 513-14 (1963) ("[W]hether the confession was obtained by coercion or improper inducement can be determined only by an examination of all of the attendant circumstances. Haynes' undisputed testimony as to the making and signing of the challenged confession used against him at trial permits no doubt that it was obtained under a totality of circumstances evidencing an involuntary written admission of guilt.") (footnote omitted) (citation omitted).

98. *Miranda v. Arizona*, 384 U.S. 436 (1966).

99. See *Arizona v. Fulminante*, 499 U.S. 279, 302 (1991) (holding that the confession was coerced and not harmless under harmless error analysis); *Mincey v. Arizona*, 437 U.S. 385, 398, 401-02 (1978) (holding that statements were coerced in violation of due process and could not be admitted to impeach subsequent trial testimony).

Even when the suspect has executed a valid *Miranda* waiver, the post-waiver interrogation is still subject to the due process test.<sup>100</sup>

*B. The Baseline Problem: Plea Deals as Coerced Confessions*

If we consult the philosophical literature on coercion, we may sympathize with the evasive nature of the jurisprudence.<sup>101</sup> The standard modern view emerged only with Alan Wertheimer's *Coercion* in 1987.<sup>102</sup> On that view, "coercion" refers to threats (in a technical sense) that would induce compliance from any reasonable person.<sup>103</sup> Wertheimer distinguishes threats from offers by whether the inducer's proposal makes the inducee worse off rather than better off.<sup>104</sup> Wertheimer then posits a moralized or normative baseline for determining worse or better off.<sup>105</sup> Only if the inducer acts wrongly does he threaten, rather than make an offer to, the inducee.<sup>106</sup> If the threat would overcome the will of a reasonable person, it is coercive.<sup>107</sup>

Wertheimer devoted a chapter to plea bargaining, concluding that plea bargaining is not coercive because the prosecutor has a right to bring either set of charges.<sup>108</sup> It follows that the prosecutor's proposal is an offer, not a threat. Abusive interrogation methods, by contrast, violate the legal and moral duties of the interrogators. Only threats can coerce, so plea bargaining is not coercive. The Supreme Court's plea bargaining cases, reviewed in the next Part, are not inconsistent with this view and are widely seen to support

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100. See *Miller v. Fenton*, 474 U.S. 104, 115-18 (1985) (holding that when the defendant challenged his post-*Miranda*-waiver admission as coerced, the voluntariness of the confession was a question of law on which the federal habeas court had a duty to decide without deferring to the state court conclusion).

101. For an overview of the philosophical literature, see Scott Anderson, *Coercion*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY ARCHIVE* (Edward N. Zalta ed., Summer 2015), <http://plato.stanford.edu/archives/sum2015/entries/coercion/> [https://perma.cc/96B6-JUMP].

102. ALAN WERTHEIMER, *COERCION* (1987).

103. *Id.* at 204.

104. See *id.* at 204, 222 ("[T]he coerciveness of proposals is all in the baseline. And relative to that baseline, only threats are coercive.").

105. *Id.* at 206-11.

106. See *id.* at 220-21.

107. See *id.* at 204.

108. *Id.* at 122-43.

it.<sup>109</sup> So this account of plea bargains as noncoercive offers is the standard view.

The standard view is plausible, but in my view mistaken, for two reasons. First, the standard view is, from a moral perspective, myopic. It focuses on the prosecutor's right to bring any charge supported by the evidence. What, however, about the rights of the defendant? Second, the standard view is circular. It rejects a constitutional challenge to prosecutorial discretion by stipulating the legality of prosecutorial discretion.

### 1. *The Standard View is Myopic*

The standard view is distinctly one-sided. Assuming the prosecutor has a legal right of plenary discretion, it then subordinates the defendant's rights to the tactical exercise of that discretion. It would be a mistake, however, to set the baseline of coercion as any set of charges the prosecutor has probable cause to prefer. In the first place, the prosecutorial office includes authority to decline to prosecute in some cases in which probable cause is manifest, as in an assault case supported by one side in a swearing contest. The ABA Standards for the Prosecution Function set out an illustrative list of seven different scenarios in which not prosecuting at all may be appropriate, despite the presence of probable cause.<sup>110</sup> Even when

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109. See *infra* Part III.C.

110. See ABA CRIMINAL JUSTICE SECTION STANDARDS, PROSECUTION FUNCTION 3-3.9, [http://www.americanbar.org/publications/criminal\\_justice\\_section\\_archive/crimjust\\_standards\\_pfunc\\_blk.html](http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfunc_blk.html) [<https://perma.cc/8RZ9-2ZMQ>] (last visited Mar. 20, 2016).

(b) The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his or her discretion are:

- (i) the prosecutor's reasonable doubt that the accused is in fact guilty;
- (ii) the extent of the harm caused by the offense;
- (iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;
- (iv) possible improper motives of a complainant;
- (v) reluctance of the victim to testify;
- (vi) cooperation of the accused in the apprehension or conviction of others; and
- (vii) availability and likelihood of prosecution by another jurisdiction.

*Id.*

the prosecutor decides to go forward, “[t]he prosecutor should not bring or seek charges greater in number or degree than can reasonably be supported with evidence at trial or than are necessary to fairly reflect the gravity of the offense.”<sup>111</sup>

Justice Powell’s dissent in *Bordenkircher v. Hayes* took an approach similar to the ABA Standards’ approach that charges ought to “fairly reflect the gravity of the offense.”<sup>112</sup> Justice Powell thought “that the question to be asked under the circumstances is whether the prosecutor reasonably might have charged respondent under the Habitual Criminal Act in the first place.”<sup>113</sup> Justice Powell, however, perhaps mindful of the difficulties in applying the totality of the circumstances test in the confessions cases, quickly added that deference to prosecutorial discretion would require treating tactically-motivated overcharging *ex ante* as “largely unreviewable.”<sup>114</sup> Powell’s fellow dissenters, Brennan and Marshall, who joined Blackmun’s dissent, saw the same problem.<sup>115</sup> The prospect of, in effect, applying the confession cases’ totality of the circumstances template to the enormous majority of cases disposed of by guilty pleas should rightly give us pause.

However, within the due process test is a narrower and more determinate baseline. The accused has no right to one set of charges or another, but he does have a right to a reliable adjudication of guilt. Wertheimer acknowledges that although plea bargaining may not be coercive on his account, it may be nevertheless “morally indefensible” because it “may convict too many innocent persons.”<sup>116</sup> Arguably, the innocent person should be the one to choose between the alternatives of plea and trial on terms set by the prosecutor. A defendant might say, however, in substance, “I’m innocent, and I want to stand trial but not at the risk of this Kafkaesque trial penalty.” The standard view is blind to the possibility of third options.

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111. *Id.* at 3-3.9(f).

112. 434 U.S. 357, 370-72 (1978) (Powell, J., dissenting).

113. *Id.* at 370.

114. *Id.* at 370, 371 n.2.

115. *See id.* at 368 (Blackmun, J., dissenting) (“The Court’s holding gives plea bargaining full sway despite vindictiveness. A contrary result, however, merely would prompt the aggressive prosecutor to bring the greater charge initially in every case, and only thereafter to bargain.”).

116. WERTHEIMER, *supra* note 102, at 142-43.

## 2. *The Standard View is Circular*

The standard view has another problem. From a legal perspective, the standard view is circular. Where is it written down that the prosecutor can bring any charge the evidence supports for the purpose of discouraging trials?<sup>117</sup> And even if there were a statutory authorization, the issue here is whether the trial penalty violates the Constitution's Due Process Clause. We cannot answer the issue under the higher law according to a baseline set by inferior law.

To be concrete, suppose in *Brown* that a state statute authorized police officers to flog suspects during interrogation.<sup>118</sup> If Mississippi law authorized the flogging of suspects, flogging suspects would not be coercive in Mississippi because, relative to a baseline that permits flogging, the suspects are not made worse off. To say that the prosecutor has a right to bring any charge supported by the evidence is to assert a parallel conclusion.

Nor would it help for the statute to provide a right to counsel during flogging. Suppose that, pursuant to such a statute, Deputy Dial is whipping suspect Ed Brown in the Kemper County jail—but in the presence of an appointed lawyer. The lawyer gives very professional advice: “Ed, everybody eventually breaks, so just tell them whatever they want, and we’ll move to suppress before trial.” Does the presence of counsel then mean that the suppression motion loses?

In the context of both plea bargains and interrogations, the baseline problem poses obvious problems. We cannot use subconstitutional positive law as the baseline because that would be circular. But what baseline should we use? The confessions cases were notoriously vague. Implicit in the coerced confession cases was a baseline

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117. On the contrary, “the decision to prosecute may not be ‘deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification,’” “including the exercise of protected statutory and constitutional rights.” *United States v. Wayte*, 470 U.S. 598, 608 (1985) (quoting *Bordenkircher*, 434 U.S. at 364 (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)) and citing *United States v. Goodwin*, 457 U.S. 368, 273 (1982)). If the prosecutor admits to bringing charges because the accused exercised “protected statutory and constitutional rights” the prosecution would be dismissed as unconstitutional, notwithstanding probable cause. The issue is just what constitutional limits ought to constrain prosecutorial discretion, not whether there should be no limits at all. It follows that plenary discretion should not set the legal baseline.

118. See *supra* Part II.A.

determination that an arrest followed by hours of secret questioning imposed a morally permissible degree of behavioral pressure but that any significant additional quantum of pressure— as by beatings, sleep deprivation, or involuntary drugging—crossed the line.<sup>119</sup> The narrowest understanding of the confessions test treated coerced confessions as unconstitutional because they are unreliable.<sup>120</sup> Perhaps we can transpose that version of the confessions test to the plea bargaining context.

### 3. *The Innocence Baseline*

The accused may have no legal or moral right against a charge on the high side of the range, but he does have a legal and moral right to a factually reliable adjudication of guilt. The *Brown* Court condemned the flogging as “revolting to the sense of justice” and a “clear denial of due process.”<sup>121</sup> But Chief Justice Hughes also pointedly analogized coerced confessions to mob-dominated kangaroo courts, knowing use of police perjury, and constructive denial of counsel—practices that are offensive primarily, if not solely, because they risk miscarriages of justice.<sup>122</sup> And the *Brown* opinion carefully condemned not flogging in the abstract but quite precisely condemned basing convictions on admissions so obtained.<sup>123</sup>

From the perspective of procedural rather than substantive due process, the issue is not whether the prosecutor has a right to seek a conviction on the higher charges. The issue is whether the gap between the plea and the trial outcomes is wide enough to undermine the reliability of any plea so induced. Procedural due process imposes no restraint on a prosecutor seeking a maximum sentence in a no-offer case other than the requirement of winning a conviction at a fair trial before the court imposes a sentence. A trial penalty great enough to induce a rational innocent person to plead guilty is quite different.

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119. See *supra* Part II.A.

120. See Blume & Helm, *supra* note 59, at 161-62 (describing the factors that may coerce innocent defendants to plead guilty).

121. *Brown v. Mississippi*, 297 U.S. 278, 286 (1936).

122. *Id.*

123. *Id.*

Reorienting our thinking about plea bargaining in terms of guilt and innocence raises further questions. When can particular plea deals be characterized as coercive in the technical sense suggested here? That in turn looks not only to the facial difference between the sentence likely on a plea and on a conviction after trial but also to the confidence we have in the trial acquitting the factually innocent, a matter on which we have a great deal of data from the DNA exonerations. Then, assuming we have a functional model of a coercive plea deal, how can the claim of coercion be raised when the evil to be remedied is precisely that the defendant (whether guilty or innocent) rationally wants the deal compared to the prosecutor's terms for a potential trial? Before we take up the complications posed by the proposed doctrinal turn, let us first consider the prevailing view that any such turn is blocked by precedent—to wit, *Brady v. United States* and *Bordenkircher v. Hayes*.

### III. BLOCKED BY PRECEDENT?

The Supreme Court did not consider cases raising issues about plea bargaining until the 1970s. These early cases are widely cited for the proposition that the prosecutor may add or subtract any charge supported by the evidence as an incentive to plead guilty. This Part closely examines those cases and finds that they stand for no such sweeping proposition.

#### A. *The No Jury, No Death Trilogy*: Brady, Parker, and Alford

In *Brady v. United States*, Brady and an alleged accomplice were indicted in 1959 for violating the Federal Kidnapping Act.<sup>124</sup> That Act, sometimes referred to as the Lindbergh Act, included 18 U.S.C. § 1201(a):

Whoever knowingly transports in interstate ... commerce, any person who has been unlawfully ... kidnaped ... and held for ransom ... or otherwise ... shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment

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124. 397 U.S. 742, 743 (1970).



for any term of years or for life, if the death penalty is not imposed.<sup>125</sup>

Since the kidnapping victim had been raped, and thus not released unharmed, the defendants potentially faced the capital penalty if they pleaded not guilty and elected jury trial.<sup>126</sup>

After his accomplice turned government witness, Brady pleaded guilty and received a sentence of fifty years imprisonment.<sup>127</sup> The fifty years was later reduced to thirty by executive clemency.<sup>128</sup> In January 1967, about eight years into Brady's thirty-year term, the Federal District Court of Connecticut dismissed a § 1201(a) count in an indictment against Charles Jackson on the ground that exposing only defendants who elect jury trial to the risk of execution was unconstitutional.<sup>129</sup>

Brady then sought habeas corpus relief as a federal prisoner under 28 U.S.C. § 2255, alleging that his guilty plea was involuntary.<sup>130</sup> Subsequently, the Supreme Court upheld the district court's constitutional ruling in *Jackson* but held that the death penalty clause was severable.<sup>131</sup> The district court denied Brady's § 2255 petition after an evidentiary hearing at which the accomplice and the lawyers for both Brady and the accomplice testified.<sup>132</sup> The district court denied the petition on the ground that Brady chose to plead guilty because of his accomplice's defection, not the risk of capital punishment, and the Tenth Circuit affirmed.<sup>133</sup>

In the companion case of *Parker v. North Carolina*, Parker was charged in 1964 with first-degree burglary as the alleged perpetrator of a home invasion and rape.<sup>134</sup> The North Carolina statute, like

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125. Text taken from *United States v. Jackson*, 390 U.S. 570, 570-71 (1968).

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

127. *Id.* at 743-44.

128. *Id.* at 744.

129. *United States v. Jackson*, 262 F. Supp. 716, 718 (D. Conn. 1967), *aff'd in part and rev'd in part*, 390 U.S. 570 (1968).

130. *Brady*, 397 U.S. at 744.

131. *Jackson*, 390 U.S. at 591.

132. *Brady v. United States*, 404 F.2d 601, 602 (10th Cir. 1968), *aff'd*, 397 U.S. 742 (1970).

133. *Id.* It is clear that Brady filed his habeas petition after the district court decision in *Jackson*, and that the Tenth Circuit affirmed the denial of Brady's petition after the Supreme Court decision in *Jackson*. It is not clear from the reports whether the district court decision in *Brady* preceded or followed the Supreme Court's decision in *Jackson*.

134. 397 U.S. 790, 791-92 (1970).

the Federal Kidnapping Act, authorized the death penalty for first-degree burglary but only at the discretion of a trial jury; a guilty plea led to an automatic sentence of life imprisonment.<sup>135</sup> Parker pleaded guilty but three years later challenged his conviction in the state courts, which rejected his plea for postconviction relief.<sup>136</sup>

The Supreme Court affirmed the lower courts in both *Brady* and *Parker*.<sup>137</sup> Despite the factual finding below that Brady was not motivated by fear of the death penalty when he entered his plea, the Court took the occasion to announce a broad approval of plea bargaining in general:

[W]e cannot 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 and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.<sup>138</sup>

Parker's plea was pretty clearly motivated by fear of the death sentence, but given the breadth of the opinion in *Brady*, the Court rejected Parker's coercion claim with little more than a reference to *Brady*.<sup>139</sup>

The *Brady* Court acknowledged both the analogy to police interrogation and plea bargaining's potential risk to the innocent.<sup>140</sup> With respect to the former, the *Brady* opinion distinguished police interrogation from plea bargaining by invoking *Miranda*.<sup>141</sup> If the

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135. *Id.* at 795 n.6 ("The statute authorizing guilty pleas to capital charges was repealed, effective March 25, 1969. As a result of the repeal, a person who is charged with a capital offense and who is not allowed to plead to a lesser charge must apparently face a jury trial and a death penalty upon a verdict of guilty unless the jury recommends life imprisonment.") (citations omitted).

136. *Id.* at 793-94.

137. *See Brady*, 397 U.S. at 742; *Parker*, 397 U.S. at 790.

138. *Brady*, 397 U.S. at 753.

139. *See Parker*, 397 U.S. at 795 ("[W]e determined in *Brady v. United States* that an otherwise valid plea is not involuntary because induced by the defendant's desire to limit the possible maximum penalty to less than that authorized if there is a jury trial. In this respect we see nothing to distinguish Parker's case from Brady's.") (citation omitted).

140. *See Brady*, 397 U.S. at 754, 757-58.

141. The Court rejected Brady's reliance on *Bram v. United States*, 168 U.S. 532, 542, 565 (1897) (holding an admission made during police interrogation inadmissible under both the

presence of counsel dispels coercion, Brady was in fact represented by competent counsel.<sup>142</sup> So too with the innocence problem; the Court declared its trust in the advice of counsel, the skepticism of trial judges receiving pleas, and the option of trial with all its safeguards.<sup>143</sup>

Justices Brennan, Marshall, and Douglas dissented in *Parker* but concurred in *Brady*.<sup>144</sup> Justice Brennan concluded that the North Carolina capital punishment scheme was unconstitutional under *Jackson* (indeed, worse, inasmuch as under the Federal Kidnapping Act a defendant could preclude the death penalty by waiving jury but not trial).<sup>145</sup> It followed that Parker's case should be remanded and the conviction set aside "if he can demonstrate that the unconstitutional capital punishment scheme was a significant factor in his decision to plead guilty."<sup>146</sup> Because the lower courts previously determined that the risk of capital punishment had not been a

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involuntary confession doctrine and the Fifth Amendment self-incrimination privilege) by citing *Miranda*. See *Brady*, 397 U.S. at 754 ("But *Bram* and its progeny did not hold that the possibly coercive impact of a promise of leniency could not be dissipated by the presence and advice of counsel, any more than *Miranda v. Arizona*, 384 U.S. 436 (1966), held that the possibly coercive atmosphere of the police station could not be counteracted by the presence of counsel or other safeguards.").

142. See *Brady*, 397 U.S. at 754-55 ("Brady's situation bears no resemblance to *Bram*'s. Brady first pleaded not guilty; prior to changing his plea to guilty he was subjected to no threats or promises in face-to-face encounters with the authorities. He had competent counsel and full opportunity to assess the advantages and disadvantages of a trial as compared with those attending a plea of guilty; there was no hazard of an impulsive and improvident response to a seeming but unreal advantage. His plea of guilty was entered in open court and before a judge obviously sensitive to the requirements of the law with respect to guilty pleas. Brady's plea, unlike *Bram*'s confession, was voluntary.").

143. See *id.* at 757-58 ("This is not to say that guilty plea convictions hold no hazards for the innocent or that the methods of taking guilty pleas presently employed in this country are necessarily valid in all respects. This mode of conviction is no more foolproof than full trials to the court or to the jury. Accordingly, we take great precautions against unsound results, and we should continue to do so, whether conviction is by plea or by trial. We would have serious doubts about this case if the encouragement of guilty pleas by offers of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves. But our view is to the contrary and is based on our expectations that courts will satisfy themselves that pleas of guilty are voluntarily and intelligently made by competent defendants with adequate advice of counsel and that there is nothing to question the accuracy and reliability of the defendants' admissions that they committed the crimes with which they are charged. In the case before us, nothing in the record impeaches Brady's plea or suggests that his admissions in open court were anything but the truth.").

144. See *Parker*, 397 U.S. at 790, 799 (Brennan, J., concurring and dissenting).

145. See *id.* at 812-13.

146. *Id.* at 813.

significant factor in Brady's decision to plead guilty, the *Parker* dissenters concurred in the judgment in *Brady*.<sup>147</sup>

Neither Brady nor Parker had maintained innocence while evincing a willingness to plead guilty. In *North Carolina v. Alford*, Alford was charged with first-degree murder under the same statutory scheme in *Parker*: a guilty plea precluded the death penalty.<sup>148</sup> Before accepting Alford's guilty plea to second-degree murder and imposing a sentence of thirty years, the trial court judge held a hearing.<sup>149</sup> A police officer and two other witnesses testified that, in sum, Alford had declared his intention to kill the victim, gone to fetch his gun, and later announced that he had killed the deceased.<sup>150</sup>

Unlike Parker or Brady, at the plea colloquy Alford gave testimony maintaining his innocence and stating that he was pleading guilty only to avoid the gas chamber.<sup>151</sup> Alford challenged his conviction through postconviction petitions, which were denied until the Supreme Court's 1968 decision in *Jackson* impugned the constitutionality of North Carolina's no trial, no death penalty arrangement.<sup>152</sup> After *Jackson*, the Fourth Circuit Court of Appeals found the plea involuntary because it was substantially motivated by the threat of the death penalty.<sup>153</sup> The Supreme Court reversed.<sup>154</sup>

Justice White's majority opinion focused on Alford's protestation of innocence, a fact that distinguished his case from Parker's, but this did not persuade the Court of a constitutional distinction:

Here the State had a strong case of first-degree murder against Alford. Whether he realized or disbelieved his guilt, he insisted on his plea because in his view he had absolutely nothing to gain by a trial and much to gain by pleading. Because of the overwhelming evidence against him, a trial was precisely what

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147. *See id.* at 815-16.

148. 400 U.S. 25 (1970).

149. *Id.* at 28.

150. *Id.*

151. *Id.* at 28 n.2 ("I pleaded guilty on second degree murder because they said there is too much evidence, but I ain't shot no man, but I take the fault for the other man. We never had an argument in our life and I just pleaded guilty because they said if I didn't they would gas me for it, and that is all.")

152. *Id.* at 30.

153. *Id.*

154. *Id.* at 31.

neither Alford nor his attorney desired. Confronted with the choice between a trial for first-degree murder, on the one hand, and a plea of guilty to second-degree murder, on the other, Alford quite reasonably chose the latter and thereby limited the maximum penalty to a 30-year term.<sup>155</sup>

In other words, even if Alford's assertion of innocence were *true*, he should still be allowed to accept a deal to his advantage.

This result has strong practical support. If the announced rule was that a claim of innocence precluded entry of the advantageous plea, defendants desiring the deal would not assert innocence. Against the background assumption that the only two choices are the proposed guilty plea or trial of the prosecutor's higher charges according to the general rules of evidence and procedure, the result in *Alford* makes sense. What does not make sense, and what *Alford* says nothing about, is the background assumption.

Brady and Parker pleaded guilty and then sought to undo their pleas after the substantive law had changed in their favor.<sup>156</sup> Alford pleaded guilty under protest but did not offer the trial court any third option other than a capital trial on the first-degree charge or a guilty plea to the second-degree charge.<sup>157</sup> None of them proposed to stand trial on lesser charges or even on the capital charge provided that special procedural safeguards were followed at that trial. Alford's sentence after the plea was thirty years,<sup>158</sup> what if, for example, he had offered to stand trial at risk of a life sentence on conviction? Or if he offered to stand trial on the capital charge, provided his criminal history could not be put in evidence, whether for purposes of proving intent or of impeaching his testimony? The cases do not resolve these issues because the defendants did not raise them.

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155. *Id.* at 37.

156. *See supra* notes 127-39 and accompanying text.

157. *See supra* notes 148-51 and accompanying text.

158. *Alford*, 400 U.S. at 29.

*B. Bordenkircher v. Hayes*

A Kentucky grand jury indicted Paul Lewis Hayes for uttering a forged instrument for \$88.30.<sup>159</sup> The alleged offense was a felony carrying a two- to ten-year prison term on conviction.<sup>160</sup> Hayes, however, had twice before been found guilty of felony offenses.<sup>161</sup> The prosecutor offered to recommend a five-year sentence if Hayes pleaded guilty but coupled this proposal with another, more menacing, one.<sup>162</sup> If Hayes refused to plead out, the State would file a superseding indictment adding a recidivism charge carrying mandatory life sentence on conviction.<sup>163</sup>

Hayes nonetheless elected to face trial, lost at trial, and then challenged the conviction on the Habitual Criminal Act as a violation of due process.<sup>164</sup> Hayes relied heavily on *North Carolina v. Pearce*<sup>165</sup> and *Blackledge v. Perry*.<sup>166</sup> In *Pearce*, defendants who succeeded in postconviction challenges to their convictions were remanded for new trials that resulted in convictions.<sup>167</sup> The trial courts on remand imposed substantially more severe sentences than those imposed after the initial convictions.<sup>168</sup> The Supreme Court held that the higher sentences violated due process if their purpose was to punish the defendants for successfully pursuing their legal postconviction remedies and that a presumption of vindictiveness attached to the higher sentences.<sup>169</sup> A good explanation, unrelated to the successful postconviction proceedings, was required to dispel the presumption.<sup>170</sup>

In *Perry*, the defendant was a prisoner involved in a fight with another inmate.<sup>171</sup> *Perry*, the defendant, was initially charged with a misdemeanor in state district court, convicted, and sentenced to

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159. *Bordenkircher v. Hayes*, 434 U.S. 357, 358 (1978).

160. *Id.*

161. *Id.* at 359.

162. *See id.* at 358-59.

163. *Id.*

164. *Id.* at 359-60.

165. 395 U.S. 711 (1969).

166. 417 U.S. 21 (1974).

167. *Pearce*, 395 U.S. at 713-14.

168. *Id.* at 713-14, 713 n.1.

169. *Id.* at 725.

170. *Id.* at 726.

171. *Perry*, 417 U.S. at 22.

six months to be served consecutively with his ongoing sentence.<sup>172</sup> Under North Carolina law, a defendant convicted in the district court had an unqualified right to a trial de novo in the superior court.<sup>173</sup> Perry appealed to the superior court, and the prosecution responded by filing a felony charge in that court.<sup>174</sup> Perry took the hint, pleaded guilty, and was sentenced to seven years, this time concurrent with his ongoing sentence but still resulting in an extension of his period of incarceration relative to the misdemeanor conviction.<sup>175</sup> The Supreme Court held that the more serious charge brought by the prosecutor at the trial de novo stage effectively punished Perry for a lawful appeal and, absent some explanation such as newly discovered evidence, violated due process.<sup>176</sup>

Justice Stewart, writing for the five-Justice majority in *Bordenkircher*, rejected the analogy to post-reversal-of-conviction enhancements that were at issue in *Pearce* and *Perry*: “[I]n the ‘give-and-take’ of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution’s offer.”<sup>177</sup> The majority saw no way to set a baseline to distinguish threats from promises:

Indeed, acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process. By hypothesis, the plea may have been induced by promises of a recommendation of a lenient sentence or a reduction of charges, and thus by fear of the possibility of a greater penalty upon conviction after a trial.<sup>178</sup>

As for the innocent, “[d]efendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false self-condemnation.”<sup>179</sup>

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172. *Id.*

173. *Id.*

174. *Id.* at 22-23.

175. *Id.* at 23.

176. *Id.* at 28-29, 29 n.7.

177. *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978).

178. *Id.* (citations omitted).

179. *Id.*

*Bordenkircher v. Hayes* does not stand for the proposition that a plea entered to avoid a catastrophic increase in the charges the prosecutor proposes to file if the accused refuses to plead guilty is not coerced. *Bordenkircher* is not a coercion case; it is a vindictiveness case. Hayes did not claim that he was forced to plead guilty for the (blindingly) obvious reason that he did not plead guilty. He could not represent that any reasonable person in his position would have pleaded guilty, having not pleaded guilty himself. He chose to run the risk of trial, on the terms set by the prosecutor, and then, having lost his gamble, sought to reduce the trial penalty to zero by having the recidivism conviction set aside as retaliatory.

Hayes' vindictiveness claim prevailed in the Sixth Circuit and fell one vote short in the Supreme Court.<sup>180</sup> But had it succeeded, it would have altered plea bargaining very little. As all three of the opinions in the Supreme Court decision admitted, prosecutors would have responded by overcharging first, thereby converting the threat into an offer.<sup>181</sup> Neither of the two dissenting opinions proposed to regulate that practice judicially.

The distinction between vindictiveness and coercion is initially hard to see because at first glance throwing out retaliatory charges after trial convictions seems like the only way to remedy coercive pretrial threats. Those who really are coerced into pleading guilty want to plead guilty rather than stand trial on terms set by the prosecutor. A true coercion claim could arise only pretrial, before the state has gone to the expense of trial and before the defendant has actually gone through the dispositive allocution.

We will explore how this might be done procedurally in the next Section. Here, let it be said that a defendant who accepted a bargain rather than risk a catastrophic trial penalty, but then asked the court to set the case for trial at the hazard of a lesser but substantial trial penalty, would be raising a very different—and potentially more momentous—constitutional claim than the vindictiveness claim the Court rejected in *Bordenkircher*.

The second point to be made about *Bordenkircher* is just how much prosecutorial power has grown in the last forty years. The life sentence imposed on Hayes left him eligible for parole after fifteen

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180. See *id.* at 357, 365.

181. See *id.* at 360-61, 368, 371-72.



years.<sup>182</sup> Presumably, the prosecutor's proposed plea sentence of five years would have been subject to a parallel parole discount, but allowing for that, the practical trial penalty looked to be significantly less than fifteen years. In stark contrast, the additional § 924(c) charges in *Angelos* added a mandatory trial penalty of fifty-five years to be served consecutively.<sup>183</sup>

Finally, a central premise of the majority opinion in *Bordenkircher* was that a rational innocent defendant, advised by counsel and aware of the procedural safeguards of the trial process, would likely not "be driven to false self-condemnation."<sup>184</sup> Today we have strong evidence that modern plea incentives do indeed drive defendants to "false self-condemnation."<sup>185</sup> Whatever the statistics on innocent guilty pleas may be, an individual defendant who claims innocence yet wants to plead guilty only if the court refuses to set the case for trial, risking a lesser trial penalty than the prosecution offers, expressly asserts rational preference for "false self-condemnation." *Bordenkircher* has no application to such a case.

### C. Summary of the Legal Argument

A long line of Supreme Court precedents condemns coerced confessions as violations of due process. If catastrophic trial penalties are distinguishable, it is not because of the degree of behavioral pressure. Instead, it must be that trial penalties, unlike beatings, sleep deprivation, and truth serums, comport with the moral and legal baselines for assessing coercion.

Yet this cannot be because the prosecutor has statutory discretion to bring both the low and the high charges. Statutory authorization would not make beatings, sleep deprivation, or truth serums constitutional methods of interrogation. Nor can it be that the accused consults counsel before pleading guilty, any more than the presence of counsel during beatings, sleep deprivation, or drugging would make those methods of interrogation constitutional.

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182. *Id.* at 370 n.1 (Powell, J., dissenting) ("It is suggested that respondent will be eligible for parole consideration after serving 15 years.")

183. *United States v. Angelos*, 345 F. Supp. 2d. 1227, 1232 (D. Utah 2004).

184. *Bordenkircher*, 434 U.S. at 363.

185. *See supra* Part I.C.2.

The narrowest version of the due process voluntariness test for confessions is the strand incorporating the common-law evidence rule against threats or promises. The due process confessions doctrine is more capacious, but that is its irreducible core. It follows that while the prosecutor has a statutory right to bring the low or the high charge, her statutory right ends when the gap between the plea charges and the trial charges would induce an innocent person to plead guilty. The accused, guilty or innocent, has a constitutional right to a reliable determination of guilt and innocence. Catastrophic trial penalties violate that right.

None of the Supreme Court's plea bargaining cases hold otherwise. Each of them recognizes the applicability of the confessions cases; each of them emphasizes the reliability of the guilty pleas at issue. None of them arose after a defendant challenged a plea deal as potentially coercive of the innocent.

The obvious problem in *Alford* is remedial. If a defendant really is coerced into pleading guilty, the defendant is better off taking the deal than standing trial on the prosecutor's terms. So long as those terms are the only ones available, defendants will take the deal even if it requires false admissions of guilt. We turn now to consider what sort of alternative remedial structure might preclude trial penalties that are coercive by the innocence baseline criterion.

#### IV. DEFENSE TRIAL OFFERS

If the legal theory set out in Part III is sound, the trial penalty is unconstitutional when it would drive a rational innocent person to plead guilty. This calculation involves: (1) the difference between the likely sentence on the plea and the likely sentence on a conviction after trial; and (2) the risk that the trial would result in an erroneous conviction. Devising an appropriate remedial scheme is challenging but not impossible.

The Supreme Court cases show an interesting pattern. Brady and Parker pleaded guilty without claiming innocence when their pleas were entered.<sup>186</sup> Hayes did not plead guilty, stood trial on the

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186. *Brady v. United States*, 397 U.S. 742, 754-55 (1970); *Parker v. North Carolina*, 397 U.S. 790, 792-93 (1970).

prosecutor's terms, and lost.<sup>187</sup> Alford claimed innocence but pleaded out rather than stand trial.<sup>188</sup> None of the defendants claimed at the plea hearing to be faced with a coercive trial penalty and to be willing to stand trial on terms other than those set by the prosecution.

On terms other than those set by the prosecution? What other terms could there be? But if the court accepted the defense claim that the trial penalty is unconstitutional as judged by the rational innocence baseline, some combination of lower charges or special trial procedures likely exists that is not coercive by the rational innocence standard. The issue is: What is the maximum constitutional trial penalty?

Because the answer to that question is a function of the sentencing differential and the risk of erroneous trial conviction, the court could remedy an unconstitutional trial penalty by dismissing some of the trial charges, and/or ordering special, this-case-only trial procedures, then setting the case for trial. To see what such an order might look like, we need to be more specific about the showing required before finding the trial penalty coercive by the rational innocence standard.

#### *A. The Initial Showing of Coercion*

We can begin our search for an appropriate remedy for coercive plea offers by returning to the analogy between guilty pleas and confessions. A suspect who confesses to the police under third-degree pressures does not waive the right to complain of subsequent coercion. He can move to suppress his confession before trial. By parallel reasoning, a defendant may not validly waive the right to complain about coercive plea pressures.

A procedural parallel to the motion to suppress a confession would be a trial offer motion. An accused confronted by a coercive prosecutorial charge differential should do what a suspect being beaten by the police should do—acquiesce until a complaint can be made in court. In the plea context, this means memorializing the prosecution's last, best offer and then moving the court either to enter the agreed-upon plea (minus any acceptance of responsibility

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187. See *Bordenkircher*, 434 U.S. at 359-60.

188. See *North Carolina v. Alford*, 400 U.S. 25, 28 n.2 (1970).

discount) or to set the case for trial on lesser charges than those threatened by the prosecutor if the defense insists on trial.

Appropriating the narrowest version of the coerced-confession standard, the defense would need to show that a rational innocent person would be likely to plead guilty given the choice presented by the prosecution. A rational innocent defendant would weigh the costs of the trial process, plus the expected trial sentence, discounted by the probability that the trial would end in an acquittal, against the expected plea sentence. This calculation turns out to be complicated and imprecise; many key variables can be estimated only by informed guesswork.

Even estimating the actual difference between the plea sentence and the potential trial sentence can be difficult. Consider *Bordenkircher*, in which the five-year plea sentence offered was only half the statutory maximum for the charged crime,<sup>189</sup> and the life sentence imposed at trial was subject to eligibility for parole after fifteen years.<sup>190</sup> Mandatory minimum sentences and sentencing guidelines have made expected sentences more determinate. Moreover, just as with determining the voluntariness of a plea today, the question would be whether the accused understands any uncertainties about the potential sentence. If, given those uncertainties, a rational innocent person would plead guilty, the proposed test would be satisfied.

Factoring in the characteristics of the particular defendant is more problematic. Consider one defendant who is sixty and another who is sixteen. The older defendant may see little difference between a twenty-year and a forty-year sentence, while the sixteen-year-old would take a different view. However, the teenager might rationally expect to be raped in prison. A defendant who already has a criminal record may stand to lose little from collateral consequences and care only about the expected time served. Another defendant might face the permanent loss of a good career from a felony conviction, even if no prison time is imposed. Even a misdemeanor charge that might trigger classification as a registered sex offender threatens potentially catastrophic consequences.

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189. *Bordenkircher*, 434 U.S. at 358 (explaining that Hayes's crime was punishable by a maximum prison term of ten years, but the guilty plea offered a sentence of five years).

190. *Id.* at 370 n.1 (Powell, J., dissenting).

Estimating the risk that the trial process will end in an erroneous conviction is also difficult. In a sophisticated statistical study, Bruce Spencer estimated the probability that juries would erroneously convict as 0.25 (for judges the figure was an eye-opening 0.37), whereas the corresponding probabilities for erroneous acquittals were 0.14 for juries and 0.02 for judges.<sup>191</sup> These estimates are subject to significant methodological reservations.<sup>192</sup> After reviewing Spencer's work and the work of others, Samuel Gross gives a sensible but unsatisfying assessment: "[J]udging from these studies (and a wealth of anecdotal evidence), an innocent defendant who goes to trial facing the most extreme penalties available—death, life imprisonment, or decades of incarceration—stands an unknown but substantial risk of a false conviction."<sup>193</sup>

If quantifying the risk of false conviction remains elusive, the types of cases running the greatest risk are now well known. Just as the confession cases developed so-called hallmarks of coercion, the exoneration cases have revealed hallmarks of potential miscarriages.<sup>194</sup> Some of these should be apparent without either a mini-trial or any invasion of attorney-client privilege. If the prosecution's case turns on eyewitness identification, testimony by a compensated informant, or a confession by a juvenile or mentally handicapped person, the exoneration cases suggest that the risk of trial error is higher than normal.<sup>195</sup> The empirical evidence also indicates that when the accused has a felony record, juries are prone to draw irrational inferences of guilt from either the defendant's failure to testify or the admission of the prior conviction to impeach his testimony if he elects to testify.<sup>196</sup>

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191. Bruce D. Spencer, *Estimating the Accuracy of Jury Verdicts*, 4 J. EMPIRICAL LEGAL STUD. 305, 327 (2007).

192. See Paula Hannaford-Agor, *On Second Guessing Jury Verdicts*, VOIR DIRE, Fall/Winter 2007, at 5.

193. Samuel R. Gross, *Pretrial Incentives, Post-Conviction Review, and Sorting Criminal Prosecutions by Guilt or Innocence*, 56 N.Y.L. SCH. L. REV. 1009, 1015 (2012).

194. For example, the Innocence Project analyzed the first 325 DNA exonerations and found that misidentifications contributed to 72 percent, faulty forensic science to 47 percent, false confessions to 27 percent, and informants to 15 percent. *The Causes of Wrongful Conviction*, INNOCENCE PROJECT, <http://www.innocenceproject.org/causes-wrongful-conviction> [<https://perma.cc/ADT5-KBUG>] (last visited Mar. 20, 2016).

195. See *id.*

196. See generally John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL LEGAL STUD. 477 (2008).

Adapting the confessions test to the plea process yields the following standard: if the defense can show that in the totality of the circumstances the potential trial sentence threatens catastrophic consequences, such that the risk of conviction at trial might induce a reasonable, innocent person to plead guilty, the plea has been coerced in violation of due process.

Absent from the test is any showing that the particular accused is factually innocent, beyond an assertion incompatible with any acceptance of responsibility benefit at sentencing. Leaving the presumption of innocence aside, the practical problems with holding mini-trials to determine whether to have actual trials are dispositive. To the extent that special hallmarks of potential jury error, such as reliance on eye witnesses, are obvious from the charge itself, their presence should be considered as increasing the risk that an innocent person would plead guilty. Further inquiry into the facts of the case would be costly and potentially in conflict with both discovery rules and evidentiary privileges.

The proposed test is certainly a standard rather than a rule. It leaves considerable room for judicial discretion. In principle, however, it is a demanding standard. Consider *Bordenkircher*, in which the expected trial penalty was ten years to life.<sup>197</sup> Accepting arguendo Spencer's 0.25 probability of false conviction estimate, the fifteen-year sentence discounted by the probability of acquittal at trial is 3.75 years—less than the five year maximum on the plea charge. At the high end of the spectrum things change. If the real meaning of "life" was forty years, then the expected outcome of standing trial would be ten years—double the five-year maximum on the plea charge.

### *B. Trial Offers*

Remedying coercion poses a difficult challenge. The coerced party will deny the coercion so long as the coercive pressure is still in effect. In the plea context, even the factually innocent defendant wants the deal when confronted with the prospect of catastrophic penalties after an unpromising trial. Moreover, because the plea/trial gap exerts the pressure to plead guilty when innocent, coercion

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197. *Bordenkircher v. Hayes*, 434 U.S. 357, 358-59 (1978).

can be eliminated by raising the floor rather than lowering the ceiling. If the prosecution responds to a complaint of coercion by increasing the severity of the charges in the plea offer, the defendant will likely be worse off than if no complaint was made.

These obstacles are serious, and the problem of rational innocents pleading guilty may only be redressed by systemic reforms of sentencing severity and trial penalties. However, a legal procedure could be devised that permits an accused who claims innocence to raise a claim of coercion without any broader reform. A tentative proposal follows.

Substantively, a trial offer motion would have two components. The first is a showing that the trial/plea sentencing differential is coercive from the baseline of the rational innocent person. The second is a request to the court to set the case for trial on different terms than those threatened by the prosecution. Therefore, the motion cannot be made until the plea/trial differential is known with reasonable certainty.

Procedurally, the most direct approach would be to enter the plea but then move to withdraw it, provided that the court accepts the defense proposal for trial. Unconstitutional coercion surely counts as a “fair and just” reason for withdrawing a plea.<sup>198</sup> If the court rejects the coercion claim the case would simply proceed to sentencing, with the defense having lost the acceptance of responsibility benefit. If the court agrees that the plea/trial differential was coercive, it would then proceed to determine terms of trial.

The range of alternatives is rich because the defense is wielding a constitutional sword but is free to waive all rights other than the right against coercion itself. The most obvious alternative is a trial on charges less serious than those threatened by the prosecution. For example, in the *Angelos* case the defense might have asked the court to set the case for trial on the drug charges plus one, and only one, § 924(c) count.

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198. See FED. R. CRIM. P. 11(d):

Withdrawing a Guilty or Nolo Contendere Plea. A defendant may withdraw a plea of guilty or nolo contendere:

- (1) before the court accepts the plea, for any reason or no reason; or
- (2) after the court accepts the plea, but before it imposes sentence if:
  - (A) the court rejects a plea agreement under Rule 11(c)(5); or
  - (B) the defendant can show a fair and just reason for requesting the withdrawal.

The range of options is not confined to modifications of the charges to be tried or the consequences attached to those charges. As recent and interesting work by Greg Gilchrist and by John Rappaport points out, the defense might agree to make trial less costly by waiving particular rights attached to traditional trials.<sup>199</sup> If the prosecution's concern is the cost of jury selection or witness time or safety, the defense might offer to try the case to the court and/or to waive the hearsay rule and the Confrontation Clause.<sup>200</sup>

Moreover, the defense might claim that the trial threat is coercive because of procedures that raise the risk of false conviction in the particular case. A defendant with a felony record facing a vulnerable prosecution case might reasonably apprehend that whether he chooses to testify and be impeached with his record, or stand silent and have the jury judge accordingly, his chances at trial are too slim to risk conviction on the trial charges. Here, the defense might claim coercion and propose trial, even on the prosecution's trial charges, subject to a constitutional ruling excluding the prior convictions.

### *C. Prosecution Responses*

The prosecution understandably would argue that the constitutional standard of coercion proposed here is precluded by precedent, and in due course that claim would be heard on appeal. I have addressed the precedents earlier,<sup>201</sup> and if my case for the legal equivalence of coerced confessions and trial penalties that threaten innocence is well-taken, the appellate courts would approve the basic procedure. The prosecution would need to fall back on other positions.

The troubling prospect is that the anti-coercion principle applies to the gap between the plea and the trial charges, which can be narrowed by reducing the trial charges or by increasing the plea charges. If the prosecution were permitted to close the gap in this

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199. Gregory M. Gilchrist, *Trial Bargaining*, 101 IOWA L. REV. 609, 614 (2016) (advocating “[t]rial bargaining ... where the defendant waives only limited trial rights, thus preserving a trial that is shorter, cheaper, less uncertain, or some combination thereof, in exchange for limited leniency”); John Rappaport, *Unbundling Criminal Trial Rights*, 82 U. CHI. L. REV. 181, 182 (2015) (challenging the assumption that “plea bargaining occurs within an all-or-nothing framework”).

200. See Gilchrist, *supra* note 199, at 623.

201. See *supra* Part III.



way, by revoking or modifying the plea offer, the present system would be little changed. Defense counsel contemplating a trial offer would know that it would be the functional equivalent of electing the very trial option deemed catastrophic in the first place. The system that now pressures rational innocent people to plead guilty would go on undisturbed.

To remedy unconstitutional coercion, the trial offer needs to be immune from retaliatory charging. This can be done in different ways. If the offer is made as part of a motion to withdraw a plea, the proposed order itself would bar the prosecution from filing additional charges, other than those contemplated by the trial order itself, in the instant matter. The defense should have the benefit of the original agreement; otherwise, the prospect of renewed overcharging would practically defeat the constitutional right against coercion.

Alternatively, retaliatory charging could be barred by vindictiveness doctrine rather than by coercion doctrine. In *United States v. Goodwin*, a case following *Bordenkircher*, the Court considered whether the Due Process Clause prohibited a prosecutor from bringing more serious charges after a defendant invoked his right to a jury trial rather than electing to plead guilty.<sup>202</sup> *Goodwin* distinguished *Blackledge* and *Pearce* by drawing a distinction between pretrial charging increases and those that follow reversal on appeal.<sup>203</sup> In the latter, but not the former, context, vindictiveness is presumed.<sup>204</sup> Adding charges pretrial, however, is indistinguishable from charging high in the first place and then subtracting later. Both are equally part of the “give and take” of plea bargaining.

The *Goodwin* line of cases dealing with prosecutorial vindictiveness might be better understood as a preplea bargaining/postplea bargaining line rather than as a pretrial/posttrial line. *Goodwin* is rightly indifferent to the precise time at which the charges constituting the trial penalty are formally filed. However, a trial penalty is categorically different from a coercion-challenge penalty. If we accept the existence of a constitutional coercion limit on plea offers, any practical remedy requires freezing the floor of the prosecution’s offer and reducing the gap by bringing down the

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202. *United States v. Goodwin*, 457 U.S. 368, 372, 382-83 (1982).

203. *See id.* at 383.

204. *See id.*

ceiling. The advantage of raising the coercion claim by motion to withdraw a plea is that we can say with certainty that plea bargaining at that point has ended.

The parties would be free to settle the case without trial if they reach an agreement framed by the baseline of presumed innocence. If the court rejects the defendant's trial offer, the defendant would follow through on the plea but forfeit acceptance-of-responsibility sentencing reductions and appeal the denial of the trial offer. If the court grants the defense motion, the prosecution could either try the case or make an offer that comes down from the baseline set by the trial order. If trial offers became granted regularly, we might see the procedure become a vehicle for reducing the overpunishment problem.

Would the prospect of defense trial offers induce an across-the-board decrease in trial penalties by increases in the plea floor rather by decreases in the trial ceiling? The anti-coercion principle would not be offended by such a dynamic. Closing the gap by a general ex ante increase in the severity of plea charges, however, seems unlikely given that few defendants are likely to make trial offer motions. Those who do are certain to lose the acceptance-of-responsibility discount, and they do not know whether the trial court will grant the motion or, if the motion is granted, what terms will be set for a trial. In any event, narrowing the gap across the board would encourage trials across the board. It seems improbable that prosecutors, let alone judges or legislators, would find that attractive.

#### CONCLUSION

Ultimately, the law needs to break the prosecutor's functional monopoly on both the right to plead guilty and the right to stand trial. The two projects require different legal reforms, and at least initially there may be some tension between them. In a prior paper I suggested a procedure for offering spontaneous guilty pleas, without the consent of the prosecution, as a remedy for overcharging.<sup>205</sup> The

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205. Donald A. Dripps, *Reinventing Plea Bargaining*, in *THE FUTURE OF CRIMINAL LAW* 55, 71 (Robina Inst. of Criminal L. & Criminal Justice, 2014), [http://www.robinainstitute.org/wp-content/uploads/Future-of-Criminal-Law\\_Working-PapersFULL-TEXT.pdf](http://www.robinainstitute.org/wp-content/uploads/Future-of-Criminal-Law_Working-PapersFULL-TEXT.pdf) [<https://perma.cc/PQM6-RW3P>].

argument presented here addresses plea bargaining's innocence problem.

If we must pick one place or the other to start, it seems reasonable to favor those who claim innocence at the risk of a substantial trial penalty over those who admit guilt and seek only to reduce its consequences. If charging decisions became generally more punitive in response, this would add to the urgency for reforms directed at enabling the entry of guilty pleas over the objection of the prosecution.

I propose specific reforms largely to stimulate further thought on how to regulate prosecutorial charge selection. Of course, any movement in that direction depends on the exercise of political will from either the legislative or the judicial branch. On that front, I can only hope to encourage new thinking by exposing the moral equivalence between the interrogation tactics our law condemns as odious and the plea bargaining tactics it tolerates as commonplace.

