

2023 Plea Bargain Task Force Report



AMERICAN **BAR** ASSOCIATION

Criminal Justice Section

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Disclaimer

Many of the recommendations included in this report were unanimously endorsed for publication by all current members of the American Bar Association's (ABA) Criminal Justice Section's Plea Bargain Task Force. Where a recommendation was not unanimously endorsed, it is noted.

The views expressed herein represent the opinions of the authors. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association or any of its entities.

The members of the Task Force participated in this project and the drafting of this Report in their personal capacities. Their participation and contributions to this Report should be considered as their personal views and not necessarily the views of their affiliated entities or institutions.

Introduction

The Plea Bargain Task Force formed in 2019 to address persistent criticisms of the plea bargain system in the United States.¹ Plea bargaining has become the primary way to resolve criminal cases. Indeed, some jurisdictions have not had a criminal trial in many years, resolving all their cases through negotiated resolutions.² For this reason, a critical examination of the modern plea system is necessary and important.

This Report comes after three years of work, during which the Task Force collected and reviewed testimony from experts in the field and those impacted by the plea system, scholarly and legal reports on plea bargaining, state and federal rules of criminal procedure, and other materials. What has become clear from this process is that plea bargaining is not one monolithic practice. It looks different depending on whether one is in state or federal court, a rural jurisdiction with few lawyers or an urban center with large prosecution and public defender offices. Even within the same courthouse, informal practices may differ between courtrooms and attorneys. Although these variations pose a challenge for the development of any one-size-fits-all set of recommendations to reform plea bargaining practices, this Report identifies and addresses numerous concerns with plea bargaining that are common to a wide variety of jurisdictions. The Report then provides guidance to jurisdictions on how to meet those challenges while also promoting justice, transparency, and fairness.

There are many purported benefits of plea bargaining in the current criminal justice system. Nearly all jurisdictions have limited resources and plea bargaining provides a mechanism to efficiently resolve cases. By preserving resources this way, jurisdictions are able to direct greater resources to investigations and cases that proceed to trial. Additionally, plea bargaining provides a mechanism to incentivize defendants to cooperate with the government or to accept responsibility for their criminal conduct. A plea also provides a clear and certain resolution to a case, which offers finality for the defendant, the victim, the courts, and the community. Furthermore, defendants use the plea process to avoid some of the most severe aspects of the criminal system.

In moderation, many of these benefits make sense. But as

the Task Force discovered, too often these benefits have become the driving force of criminal adjudication at the cost of more fundamental values. For instance, according to the testimony the Task Force collected, at times, efficiency and finality trump truth-seeking. Furthermore, many benefits of plea bargaining are, when viewed in a different light, a means to mitigate the excessive harshness of the modern American criminal system. In this sense, plea bargaining is not so much providing a benefit as it is a safety valve for quotidian injustice.

Moreover, the Task Force reviewed substantial evidence that defendants—including innocent defendants—are sometimes coerced into taking pleas and surrendering their right to trial. This happens for a number of reasons. For instance, mandatory sentencing laws often make the risks of taking a case to trial intolerable, and in some cases, prosecutors understand and exploit these fears to induce defendants to plead guilty in cases where they otherwise would prefer to exercise their constitutional right to have the case decided by a jury. Similarly, mandatory collateral consequences, including the threat of deportation, push defendants to accept pleas in cases they might otherwise fight at trial.

The Task Force also discovered that the integrity of the criminal system is negatively affected by the sheer number of cases resolved by pleas. For example, police and government misconduct often goes unchecked because so few defendants proceed to pre-trial hearings where such misconduct is litigated. The reality that so few pretrial matters are litigated leads prosecutors to be less critical of their witnesses and less willing to scrutinize the strength of their cases, knowing that they won't be held accountable at trial. Defense lawyers, similarly, are less likely to properly investigate cases, knowing their clients will almost certainly

take a plea. Plea bargaining creates perverse incentives across the system for lawyers and judges who focus on disposition rates and getting through cases quickly rather than resolving cases justly. Furthermore, the loss of trials in favor of plea bargains is a profound loss for civic engagement. Jury trials provide critical oversight to the criminal system, and juries remain one of the only ways for citizens to shape how prosecutors enforce laws. The voice of the community is almost entirely lost in a system dominated by pleas.

More troubling still, the Task Force heard many ways in which plea bargaining promotes and exacerbates existing racial inequality in the criminal system. The Task Force collected testimony from experts in the field who demonstrated that throughout the plea process similarly situated defendants of color fare worse than white defendants.³ Black defendants in drug cases, for instance, are less likely to receive favorable plea offers that avoid mandatory minimum sentences and, as a result, receive higher sentences for the same charges as white defendants.⁴ The same is true for gun cases, in which Black defendants are more often subjected to charge stacking—a technique that allows prosecutors to pile on many charges, increasing the likely sentence after trial and the government’s leverage during plea negotiations – than white defendants.⁵ In fact, across all charges the Task Force found evidence of significant racial disparities in prosecutorial decisions to drop or reduce charges. For example, white defendants who face initial felony charges are less likely than Black defendants to be convicted of a felony, and white defendants facing misdemeanor charges are more likely than Black defendants to have their cases dismissed or resolved without incarceration.⁶

In addition, since plea bargaining is affected by other areas of the criminal system that are themselves inflected with racial bias, plea practice is shaped by racism in ways often not reflected in data regarding initial charges and sentences. For instance, Black defendants are more likely to be held in pretrial detention, which in turn increases the likelihood that they will plead guilty.⁷ But the prevalence of guilty pleas has made it more unlikely that racial bias in policing will be discovered. After all, the primary ways a defendant might unearth a police officer’s bias—through pre-trial litigation or demands for impeachment information at a trial—have been nearly eliminated because of the ascendance of plea bargaining.⁸

The Plea Bargain Task Force was convened under the auspices of the American Bar Association's Criminal Justice Section and was made up of a wide and diverse group of lawyers, judges, academics, those serving as prosecutors and defenders, and representatives from a broad spectrum of advocacy groups. Its membership consisted of the following individuals:*

Lucian E. Dervan (Co-Chair), Professor of Law, Belmont University College of Law, and Founding Director of the Plea Bargaining Institute

Russell Covey (Co-Chair), Professor of Law, Georgia State University College of Law

Thea Johnson (Reporter), Associate Professor of Law, Rutgers Law School

Hon. Kimberly Esmond Adams, Judge, Superior Court of Fulton County, Georgia

Derwyn Bunton, Chief Legal Officer, Southern Poverty Law Center, (formerly Chief District Defender, Orleans Public Defenders)

Vanessa Edkins, Director of Quantitative Research, Gartner, Inc.; Professor Emeritus, Psychology, Florida Institute of Technology

A. J. Kramer, Federal Public Defender for the District of Columbia

Jenny Kim, Partner, The Gober Group

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Clark Neily, Senior Vice President for Legal Studies, CATO Institute

Norman L. Reimer, Former Global CEO, Fair Trials; Former Executive Director, National Association of Criminal Defense Lawyers

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Jonathan Wroblewski, Director of the Office of Policy and Legislation, Criminal Division, U.S. Department of Justice

*The Hon. Billy McDermott served on the task force as the representative from the National District Attorneys Association (NDAA) until March 2021. During that time, he was Deputy States Attorney, Wicomico County, MD. Hon. McDermott left the taskforce in March 2021 as a result of having been appointed to the federal bench. Though Mr. McDermott participated in many of the discussions that led up to the creation of the task force report, he neither reviewed nor approved this final report. We acknowledge here, however, his important contributions to the project and the task force's findings and recommendations.

The Principles

While the plea bargaining process in the United States is broad and varied, the Task Force determined that it was vitally important to craft a single set of principles to guide plea practices generally. Those principles, which guide the Report's more specific observations and recommendations, are listed below. These principles should be shared widely with members of the criminal justice community so that they might influence behavior and decision-making moving forward. These principles represent our conclusions about how plea bargaining should operate within our larger criminal justice system, a system based on the fundamental Constitutional right to trial.

Principle 1

A vibrant and active docket of criminal trials and pre- and post-trial litigation is essential to promote transparency, accountability, justice, and legitimacy in the criminal justice system.

Principle 2

Guilty pleas should not result from the use of impermissibly coercive incentives or incentives that overbear the will of the defendant.

Principle 3

In general, while some difference between the sentence offered prior to trial and the sentence received after trial is permissible, a substantial difference undermines the integrity of the criminal system and reflects a penalty for exercising one's right to trial. This differential, often referred to as the trial penalty, should be eliminated.

Principle 4

Charges should not be selected or amended with the purpose of creating a sentencing differential, sentencing enhancement, punishment or collateral consequence to induce a defendant to plead guilty or to punish defendants for exercising their rights, including the right to trial.

Principle 5

The criminal justice system should recognize that plea bargaining induces defendants to plead guilty for various reasons, some of which have little or nothing to do with factual and legal guilt. In the current system, innocent people sometimes plead guilty to crimes they did not commit.

Principle 6

A defendant should have a right to qualified counsel in any criminal adjudication before the defendant enters a guilty plea. Counsel should be afforded a meaningful opportunity to satisfy their duty to investigate the case without risk of penalty to their client.

Principle 7

There should be robust and transparent procedures at the plea phase to ensure that the defendant's plea is knowing and voluntary, free from impermissible coercion, and that the defendant understands the consequences of their decision to plead guilty.

Principle 8

The use of bail or pretrial detention to induce guilty pleas should be eliminated.

Principle 9

Defendants should receive all available discovery, including exculpatory materials, prior to entry of a guilty plea, and should have sufficient time to review such discovery before being required to accept or reject a plea offer.

Principle 10

Although guilty pleas necessarily involve the waiver of certain trial rights, there are rights that defendants should never be required to waive in a plea agreement.

Principle 11

An adequate understanding of the collateral consequences that may flow from a guilty plea is necessary to ensure the guilty plea is knowing and voluntary.

Principle 12

Law students, lawyers, and judges should receive training on the use and practice of plea bargaining consistent with the findings and recommendations of this Report.

Principle 13

Court systems, sentencing commissions, and other criminal justice stakeholders, including prosecutor offices and public defenders, should collect data about the plea process and each individual plea, including the history of plea offers in a case. Data collection should be used to assess and monitor racial and other biases in the plea process.

Principle 14

At every stage of the criminal process, there should be robust oversight by all actors in the criminal system to monitor the plea process for accuracy and integrity, to ensure the system operates consistent with the Principles in this Report, and to promote transparency, accountability, justice, and legitimacy in the criminal system.

THE REPORT

Terminology:

A few notes about terminology are important to understand this Report. A **plea bargain** is an agreement struck between the prosecutor and the defendant about the resolution of the defendant's criminal case. Often, plea agreements contain some promise as to both the charges of conviction and the final sentence that the defendant will face. Defendants commonly agree to plead to certain criminal charges with the understanding that a judge will make the final decision as to sentencing. In those situations, a prosecutor may agree to make a sentencing recommendation to the judge.

One of the most common forms of plea bargaining is known as **charge bargaining**. A defendant is presented with an initial set of charges at the time of arraignment. In charge bargaining, the prosecutor and defense counsel will negotiate over those charges, generally agreeing that the defendant will plead guilty to some lesser charge that often carries a lower maximum or presumptive sentence, or no mandatory minimum sentence when compared with the initial charges. In other instances, the prosecution will elect to bring additional charges, including charges that may carry a mandatory minimum sentence, if the defendant refuses to accept an initial plea offer. The parties might also engage in **sentencing bargaining**, where they agree that the prosecutor will recommend or the judge will impose a particular sentence or sentencing range that reflects a discount from the potential sentence faced by the defendant. In addition, the parties may also engage in **fact bargaining**, where they negotiate over the set of facts that will form the basis of the charge. For instance, it is common in drug cases for the parties to agree that the defendant will only plead guilty to a charge associated with a certain quantity of drugs, even though the prosecutor may have evidence indicating that a higher quantity of drugs was provable.

Guilty pleas are not always the product of plea bargains, but the exact terms of a guilty plea are typically negotiated through plea bargaining. The federal government has estimated that approximately seventy-five percent of guilty pleas in the federal system are induced by some negotiation between the parties.⁹ It is critical to note, however, that a defendant always has the option to plead guilty without negotiating a plea beforehand. Depending on the jurisdiction, defendants may plead to the entire indictment or to the top charge they are facing, leaving determination of sentence to the judge's discretion. In misdemeanor cases, it is common for a defendant to accept a guilty plea and the sentence of the judge without any plea bargaining with the government.

Typically, the defendant pleads guilty at a **plea hearing**

following a **plea colloquy** in which the judge asks the defendant a series of questions to determine whether the defendant's plea is **knowing and voluntary**, as required by the U.S. Constitution. The plea colloquy may also involve the development of a factual record to support the charges. At the colloquy, the judge may also ask the defendant if they understand any potential consequences of the conviction, including immigration consequences. Once a defendant has formally entered a plea, they may be sentenced.

How to Read this Report:

Although plea practices vary among jurisdictions, one common thread in every criminal courtroom across the country is the deep entrenchment of plea bargaining in the daily administration of criminal justice. Plea bargaining touches every element of criminal practice, including discovery, sentencing, collateral consequences, and procedural rights. This Report identifies general problems with the plea system and provides recommendations for reform and guidance to criminal justice stakeholders seeking to improve their plea-bargaining systems and practices.

However, because plea bargaining has become so engrained in the fabric of the criminal system, any attempt to reform plea bargaining will create ripple effects throughout the system. Throughout this Report the Task Force acknowledges those ripple effects. For instance, this Report identifies the problem of disparate plea outcomes for similarly situated defendants. Any effort to regulate plea outcomes to make them more uniform poses a risk that certain defendants will face harsher sentences than they do now. Many, including some members of this Task Force, would view as misguided a "correction" to disparate outcomes that increased all sentences. Yet, permitting such uneven outcomes of similarly situated defendants to continue or allowing defendants to be punished for exercising a constitutional right is also misguided, and, as this Report will document, the time for reform of the plea-bargaining system is now. As such, we provide here some guidance for how this Report should be read to avoid perverse outcomes that may stem from gradual implementation of reform.

First, the Task Force prepared this Report with an eye toward the criminal justice system we would like to see, rather than account for all potential ripples that might flow from our recommendations in the world that exists now. The Task Force acknowledges that increasing transparency, accountability, and fairness in the plea arena may negatively affect some defendants, victims, or other stakeholders. Nonetheless, these Principles reflect values too often ignored

in our current system, and this Report should be read with an understanding that its primary purpose is to promote transparency, accountability, justice, and legitimacy in the criminal justice system as a whole.

Second, the recommendations in this Report assume the good faith of prosecutors and other system actors who are acting in service of justice. The Report should not be read as suggesting that these actors be prevented from exercising their vision of justice. This Report was written with the hope and expectation that relevant stakeholders follow its recommendations in good faith and with a continued eye towards justice, but it was also written to provide parameters to guide and encourage good faith behavior by judges, lawyers, and legislators.

Third, we recognize that many problems addressed in this Report do not stem directly from the practice of plea bargaining itself, but rather are manifestations of problems in other parts of the criminal justice system, such as overly harsh sentencing rules or one-size-fits-all collateral consequences that impose unjust or intolerable conditions on individual defendants. Problems and imbalances in these other areas inevitably manifest in plea bargaining practice, and so this Report addresses facets of the criminal justice system beyond the plea process itself. In this same vein, we seek to address multiple audiences in this Report with the goal of educating legislators, judges, lawyers, law students, and the public about how to improve our plea-bargaining system. This means our recommendations may run along multiple paths. For instance, we recommend changes to the law for legislators to implement while also making recommendations to lawyers and judges on how to improve plea practice in the absence of any changes to the law.

Fourth, although many of these recommendations seemingly require a greater allocation of resources to the criminal system, we think a fairer and more legitimate criminal justice system is well worth the investment. For too long efficiency has been a driving factor behind the modern plea process. Efficiency has a role to play in criminal law policymaking, but it should not be the primary goal of that policy. Rather, the goal should be a criminal justice system where defendants are guaranteed due process, victims receive justice, and the rule of law can flourish.

Principle One

A vibrant and active docket of criminal trials and pre- and post-trial litigation is essential to promote transparency, accountability, justice, and legitimacy in the criminal justice system.

The public jury trial is among the greatest strengths of the American criminal justice system. The purpose of a trial by jury is to ensure the government proves its case beyond a reasonable doubt—the highest standard of proof available under the law—before members of the accused’s community. Trials provide developed factual and legal records for appellate review. They serve as a check on the system both through community participation and through the judicial review process. In other words, the public jury trial promotes fundamental values of transparency, accountability, justice, and legitimacy. Moreover, the right to a jury trial is a prominent feature of the U.S. Constitution. It is the only right acknowledged both in the body of the Constitution and in the Bill of Rights. For these reasons, this Report starts from the premise that **trials are essential to a healthy criminal justice system and central to our system of justice.**

Unfortunately, trials have become rare legal artifacts in most U.S. jurisdictions—and even nonexistent in others.¹⁰ Plea bargaining has replaced the public jury trial, and this is problematic for many reasons.

First, the Sixth Amendment guarantees a right to an open, public trial in criminal cases. Plea bargains provide no adequate constitutional substitute. Even though guilty pleas are taken publicly, the negotiation over the terms of those pleas happens in courtroom hallways or through phone calls between attorneys, without oversight from the judge, the public, or the media. There rarely is any community participation in this negotiation

process. Instead, it is left to the parties themselves to negotiate an outcome and present it to the judge. The judge may act as a check on the process by either accepting or rejecting the plea, but the negotiation of the plea happens entirely off the record. Furthermore, appellate review of plea bargaining is limited and as a result, countless potential legal issues present in the cases are never addressed or resolved by the courts on the merits. The state of the law atrophies when plea bargains replace trials, as do the trial skills and knowledge of attorneys who no longer try cases but rather negotiate resolutions. Further, civil engagement through jury service is weakened or lost as jury trials disappear.¹¹

By definition, defendants waive many constitutional rights when they plead guilty to a criminal offense. The act of pleading guilty necessarily means relinquishing the right to a jury trial and the right to confront adverse witnesses. It may also entail loss of the opportunity to challenge evidence that was procured in violation of the Constitution. And depending on the law of the jurisdiction, it may also relieve the prosecutor of the duty to turn over discovery in the case. There may be many sensible reasons for a defendant to forgo these rights in exchange for a negotiated resolution to the case, nonetheless, a guilty plea comes with far fewer protections—constitutional or otherwise—than a trial, and much is lost in a system that relies almost entirely on guilty pleas.

Finally, a common critique is that **a system of pleas hides police misconduct.** There are various

ways that police misconduct can be identified and investigated in the criminal and civil systems, but the primary remedy for police misconduct in the court system is the exclusionary rule, which prohibits the state from using evidence it obtained by violating the defendant’s constitutional rights. Challenges to police misconduct are typically resolved through pretrial litigation, but the death of the trial has also increasingly meant the death of pretrial litigation, including those hearings that would bring to light police misconduct. Trial and pretrial litigation are essential for holding police and other state actors accountable, and plea bargaining has eroded these systems of accountability.

Of course, the trial system is not perfect, but the procedural rules and safeguards attached to trial help to promote transparency, accountability, justice, and legitimacy in the criminal justice system. As such, The Task Force starts this Report by reaffirming the central role that trials—and the attendant rights that accompany them—play in a fair criminal justice system.

Although it is difficult – and beyond the Task Force’s mandate – to identify an “optimal” number of trials that should occur in a healthy criminal justice system, there is a strong consensus among members of the Task Force that the current trend toward ever fewer trials is deleterious to the ability of the criminal justice system to perform its basic functions and must be reversed. Every jurisdiction should devote thought to whether a sufficient number of trials are being conducted to ensure robust community participation and oversight through jury service, maintain the trial skills of prosecutors, defense attorneys, judges, law enforcement officers, and others so as to preserve the ability of any individual to exercise their right to trial, and to ensure that criminal charges are resolved in ways that are fair, consistent, and that reflect justice.

Principle Two

Guilty pleas should not result from the use of impermissibly coercive incentives or incentives that overbear the will of the defendant.

All too frequently, as evidence collected by the Task Force indicates, plea bargaining coerces people to plead guilty. Of course, some level of coercion is inherent in the plea system. Once the state arrests a person and charges them with a crime, the state has power over that person. Sometimes the state exercises that inherent power, however, in ways that impermissibly coerce defendants to plead guilty. For instance, the state may induce the defendant to plead guilty with incentives that make it irrational for even an innocent person to turn down the deal. Such offers are inherently coercive. Mandatory minimum sentencing laws in particular, which are available in all jurisdictions, give prosecutors tremendous power in plea bargaining. A prosecutor may choose to charge a defendant with an offense or set of offenses that carries a mandatory minimum sentence if the defendant refuses to accept the current plea offer on the table. Under certain circumstances, this behavior may coerce a defendant to plead guilty rather than pursue their right to trial and risk a mandatory minimum sentence as a result.

The Task Force collected other examples of impermissible coercion as well, like prosecutors threatening to indict a defendant's child to discourage the defendant from pursuing trial,¹² or "wiring" pleas in such a way that one defendant's fate rested in the hands of a co-defendant.¹³ In at least one jurisdiction, a prosecutor refused to make favorable plea deals with women in child abuse cases unless they agreed to sterilization.¹⁴ These are just some of the extreme examples we found of

coercive plea bargaining.

A primary purpose of this Report is to identify and discourage the use of these coercive tactics. Chief among them is the practice of imposing harsher sentences on those who are convicted after exercising their right to trial. Although **a modest reduction in sentence is justified in some cases resolved through guilty pleas because a defendant accepts responsibility, sentences should not be punitively inflated simply because a defendant exercised a fundamental right.** Defendants also should not be punished for exercising their pretrial rights, including the right to seek pretrial release, the right to discovery, the right to investigate the case, and the right to file pretrial motions.

1. Sentence reductions for acceptance of responsibility not limited to trial

To ensure defendants are not punished for exercising their trial rights, **where a defendant accepts responsibility after conviction at trial, the same or similar reductions should be available even when the defendant testified at trial, if the defendant satisfies the requirements for receiving such reduction. Mere denial of guilt should not be a basis for a sentence enhancement. The standards for receiving an acceptance of responsibility reduction of sentence should be transparent, available to the defendant, and applied consistently to all defendants.**

2. Abolition or avoidance of mandatory minimum sentence provisions

Mandatory minimum sentencing provisions pose an extremely high risk of misuse in plea bargaining practice, a point made repeatedly by witnesses testifying before the Task Force.¹⁵ When a defendant is charged with a crime carrying a mandatory minimum sentence, the promise of a greatly reduced sentence through plea bargaining often pressures defendants into abandoning their rights or even their legitimate claims of innocence. Many members of the Task Force believe that, because they risk overbearing the will of the defendant, **mandatory minimum sentences should be abolished.** This recommendation is consistent with ABA policy that calls for the elimination of mandatory minimum sentences in criminal cases.¹⁶ Other members of the Task Force, while concerned about some of the negative consequences associated with mandatory minimums, do not support a complete and total ban on such sentences.

While many members of the Task Force strongly encourage legislators to reduce or abandon mandatory minimums, all members agree that **where mandatory minimums remain in statutory form, they should not be used to induce pleas of guilt through the plea bargaining process.** This is especially true in cases or enforcement areas where prosecutors have been regularly willing to offer defendants plea bargains that do not trigger mandatory minimum sentences.

3. Establishment of safety-valve authority

Judges also have an important

role to play in safeguarding against coercion in plea bargaining. This Report encourages legislators to give power back to judges to regulate the boundaries of plea bargaining. Many members of the Task Force would encourage legislation that gives **judges the authority to depart from any existing mandatory minimums, and further would encourage them to do so in the interests of justice, including to avoid a substantial differential between the trial sentence and any lesser sentence offered as part of a plea bargain.** As we make clear below in subsection 5 of this Principle, this would require that plea negotiations be transparent and recorded, which would allow judges to compare post-trial sentencing recommendations from the government to pre-trial offers in the same case.

4. Prohibition on using threat of capital punishment to induce guilty pleas

In addition, **the threat of capital punishment or life without the possibility of parole should never be used to induce a plea of guilty. Such tactics are inherently coercive.** The National Registry of Exonerations includes individuals who pleaded guilty to avoid being sentenced to death, and were later exonerated.¹⁷ The Task Force calls on local bar associations and the ABA to provide formal ethical guidance to prosecutors that makes clear that threatening the imposition of the death penalty for the purpose of inducing a guilty plea is unethical.

5. Plea offers must be in writing and filed with the court

To ensure that trial judges and reviewing courts have a full and accurate record of the plea negotiations, **all plea offers, whether accepted or not, should be in writing and filed with the court**

prior to sentencing or dismissal of the case. In Principle Thirteen, this Report further highlights the need for plea bargains to be memorialized. This practice promotes transparency, which is sorely lacking in the plea practice of many jurisdictions.

Principle Three

In general, while some difference between the sentence offered prior to trial and the sentence received after trial is permissible, a substantial difference undermines the integrity of the criminal system and constitutes a penalty for exercising one's right to trial. This differential, often referred to as the trial penalty, should be eliminated.

The trial penalty is the large differential between the pretrial plea offer and the sentence a defendant faces or receives after trial. A recent comprehensive report on the trial penalty by the National Association of Criminal Defense Lawyers (NACDL) reveals the scope of the problem.¹⁸ As the NACDL Trial Penalty report documents, in federal felony cases there is on average a seven-year difference between the sentence after trial and the sentence after a plea,¹⁹ meaning a defendant's sentence after a plea is on average seven years shorter than the sentence resulting from trial. In drug trafficking cases, the average difference between the trial sentence and the plea sentence is nine years. Evidence gathered by the Task Force points to this difference in sentencing as having a powerfully coercive impact on the defendant's decision to plead guilty or proceed to trial because going to trial involves the risk of a drastically longer sentence. Even innocent defendants may make the rational choice to avoid the risk of a large post-trial sentence when a much lower sentence is on the table.

1. Abolition of mandatory minimum sentences will help combat the trial penalty

Mandatory minimum sentences are a significant source of the trial penalty. As such, **we reiterate our call here for legislators to repeal**

mandatory minimum sentences and for prosecutors to avoid, where possible, using statutes that carry mandatory minimum sentences.

2. Strict limitations on sentencing differentials

Regardless of whether mandatory minimum sentences are repealed, states can implement procedural rules or policy changes that limit the trial penalty. The Task Force recommends that all jurisdictions adopt policies that limit the size of sentencing differentials to ensure that **the difference between the sentence offered prior to trial and the sentence received after trial is reasonable and non-coercive.** The Task Force has chosen not to recommend a specific point at which a sentencing differential becomes unreasonable and coercive. Rather, the Task Force believes that each jurisdiction should engage in a deliberative and considered analysis of this issue to determine what they believe constitutes a reasonable and non-coercive differential between the pretrial offer and the post-trial sentence. This analysis goes hand-in-hand with our suggestion in Principle One that jurisdictions aim to meaningfully increase their trial rates. Several scholars have identified potential fixed differentials.²⁰ Jurisdictions may differ in where they draw the line, but drawing a line in the first place provides guidance to lawyers and judges on

the appropriate boundaries for plea bargaining. **These policies should be in writing, easily accessible, and evenly applied to similarly situated defendants.** In addition, **the reasons why a defendant receives a plea offer that includes any reduction in sentencing outcome or exposure should be articulated, documented, and consistent with this Report.**

This Report seeks to empower the primary players in the plea bargaining process—judges, prosecutors, and defense attorneys—to shift the culture and norms around plea bargaining to ensure fair outcomes and processes. As such, **all stakeholders are responsible for monitoring the system and ensuring that defendants are not subject to a trial penalty.** In Principle Fourteen, we make several suggestions for how stakeholders can both monitor and audit the plea system to promote accurate and fair results. In Principle Thirteen, we encourage court systems to collect data on several aspects of plea bargaining, including sentence offers and final sentences within the same case. With this information, we encourage stakeholders to monitor how the trial penalty operates in their jurisdictions and to implement formal or informal policies that lessen its impact. We also make several suggestions in Principle Four for how stakeholders can better regulate the plea process to limit such differentials and other forms of coercion.

Principle Four

Charges should not be selected or amended with the purpose of creating a sentencing differential, sentencing enhancement, punishment or collateral consequence to induce a defendant to plead guilty or to punish defendants for exercising their rights, including the right to trial.

While prosecutorial discretion is a fundamental tenet of our criminal justice system, the legal system must find ways to regularize the charging process and closely monitor prosecutorial charging decisions. Perhaps no single decision has more of an impact on the scope and context of later plea negotiations than the selection of charges at the outset of the case.

1. Prosecutors have an ethical duty to refrain from charging for the purpose of obtaining tactical bargaining advantages.

Prosecutors have an ethical responsibility to select charges solely based on their duty to see that justice is done. **Charges should never be selected, amended, or enhanced solely or even partially for the purpose of enhancing leverage in plea bargaining, or for creating significant sentencing differentials between plea and trial outcomes.**

2. Charging oversight

Since the initial charging decision is so critical, to the extent practicable, **prosecutors' offices should centralize the initial charging decision with highly experienced prosecutors.** Many jurisdictions currently treat initial charging decisions as an opportunity for new prosecutors to learn the ropes. However, we encourage prosecutors to see the initial charging decisions as one of the most critical stages of the criminal process, one that should be

handled with great care and reflection.

3. Written charging policies

Charging prosecutors must make an early and careful assessment of each case, and demand that police and investigators provide complete information available at the time of the charging decision before the initial charge is filed. **Charging decisions should be based on written policies that are publicly accessible, evenly applied, and that include non-prosecution and diversionary options where appropriate.** Further, **prosecutorial screening must include sufficient training, oversight, and other internal enforcement mechanisms to ensure reasonable uniformity in charging.**

4. Charging in the interest of justice

The prosecutorial mindset should not focus on what the prosecutor can charge, but rather what the prosecutor should charge in light of the evidence and interests of justice. We understand the interests of justice is not a defined concept and that different prosecutors will have different conclusions about what qualifies as falling within it. But the Task Force believes that when prosecutors ask critical questions early in the charging process, it will result in fairer charging.

Further, consistent with Standard 3-4.3 (Minimum Requirements for Filing and Maintaining Criminal Charges) of the

ABA Standards for the Prosecution Function, **a prosecutor should seek or file criminal charges only if the prosecutor reasonably believes the charges are supported by probable cause, admissible evidence will sufficiently support conviction beyond a reasonable doubt, and the decision to charge is in the interests of justice.**

5. Substantial limitations on amending charges after commencement of plea bargaining

Based on the Task Force's fact-finding efforts, it appears that some prosecutors will threaten to amend charging documents by adding charges to induce the defendant to plead guilty. This practice is coercive. The Task Force makes this finding despite the fact that this practice has been held to be constitutional by the Supreme Court. In *Bordenkircher v. Hayes*, a 1978 Supreme Court case, a prosecutor made an initial offer of five years of incarceration to a defendant in a check forgery case.²¹ The prosecutor told the defendant that if he rejected the offer, the state would then seek additional charges that carried a mandatory life sentence. The defendant rejected the offer, the state amended the charges, and the defendant was sentenced to life after a trial. The Supreme Court upheld the prosecutor's action as constitutional, finding that as long as the amended charges are properly chargeable and the defendant has been advised by competent counsel, such behavior by the prosecutor does not violate

the Constitution.²² As the Court noted, it “has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor’s interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty,” even by adding much more serious charges than the prosecutor initially thought were warranted for the case.²³ We reject the logic of *Bordenkircher*. Our ethical understanding of plea bargaining has evolved substantially since the 1970s. Standards reflected in this Report are higher than those required by law. And we encourage litigation that would cause the Court to reexamine such precedents.

Further, to avoid such coercion, once an initial charging decision has been made after the careful process outlined above, **charges should be amended only based on material changes in the available proof or in the interests of justice.** The Task Force is not suggesting that charges cannot ever change at a later point in the case; the discovery of new evidence may make new charges appropriate. But prosecutors should only amend charges for a reason consistent with Standard 3-4.3, and such decisions should never seek to punish a defendant for refusing to accept an early offer.

To ensure that charge bargaining does not become a coercive tool, **oversight is especially critical whenever prosecutors seek to amend charges after formal or informal plea bargaining**

discussions have commenced.

Ideally, when a prosecutor seeks to amend the charges brought against a defendant, including as part of a plea offer, that decision should be approved by the supervisory prosecutor overseeing charging. In considering whether to approve the amended charges, the supervisory attorney must reexamine (1) whether the original charges were brought to induce a defendant to plead guilty by creating a sentencing differential between those charges and the plea offer, (2) whether the amended charges are being brought to punish a defendant for exercising their right to trial, and (3) whether the charges that will be brought at trial are consistent with Standard 3-4.3 (Minimum Requirements for Filing and Maintaining Criminal Charges) and Standard 3-4.4 (Discretion in Filing, Declining, Maintaining, and Dismissing Criminal Charges) of the ABA Standards for the Prosecution Function. Charges should only be amended if there is a substantial change in the available proof from the time of the initial charges or if a prohibited consideration contributed to the original charges. The supervisor’s determinations and reasons for the determinations should be placed in writing and maintained in official records of the office.

The Task Force hopes that such rigorous screening will also eliminate another common problem identified by critics of plea bargaining—namely, the use of plea bargaining

to resolve cases that ought to be dismissed. **Prosecutors should dismiss weak cases rather than seek to resolve them through plea bargaining.** Prosecutors should not fear dismissals, and the Task Force discourages any policies or practices within prosecutors’ offices that deter line prosecutors from dismissing weak cases.²⁴

6. Data collection

Finally, consistent with Principle Thirteen, **rigorous data collection should be part of the initial charging practice as well as any decisions to amend the initial charges. The data should be periodically analyzed and made available to the public.** This collection, analysis, and distribution of data will increase transparency and provide outside oversight to prosecutors’ charging decisions.

Principle Five

The criminal justice system should recognize that plea bargaining induces defendants to plead guilty for various reasons, some of which have little or nothing to do with factual and legal guilt. In the current system, innocent people sometimes plead guilty to crimes they did not commit.

It is an unfortunate but undeniable fact that in some cases innocent people plead guilty to crimes they did not commit.²⁵ A study of DNA exonerations conducted by the Innocence Project found that 11% of exonerated individuals had pleaded guilty.²⁶ While it is difficult for a variety of reasons to estimate the number of innocent people who have pleaded guilty, most studies likely undercount wrongful convictions.²⁷ **The Task Force recognizes the many compelling reasons an innocent person may plead guilty, but we also acknowledge that such a phenomenon is antithetical to a fair criminal justice system.** One primary purpose of this Report is to suggest and encourage reforms that decrease the pressure innocent defendants feel to plead guilty and increase the likelihood that their cases are dismissed or fully litigated through the trial and appellate process.

While other Principles address additional risk factors and solutions to the problem of innocent people pleading guilty, we note here three specific concerns about plea bargaining's innocence problem. First, **the Task Force is concerned about the particular pressure on innocent people to plead guilty in misdemeanor court**, where cases are processed quickly and innocent defendants are often presented with plea offers that are difficult to refuse. For instance, prosecutors in misdemeanor courts may make early "exploding offers," which are one-time deals that are very good compared

to the likely alternative, or they may offer a plea with a recommendation of time served but simultaneously seek the imposition of bail if the offer is rejected. In both scenarios, the innocent defendant must choose between continuing to fight the case (sometimes while being held pretrial) or pleading guilty to terminate the prosecution and potentially obtain release from custody. Further, misdemeanor defendants in many parts of the country are not provided counsel to assist with making these decisions.²⁸ For these reasons, to avoid as much as possible the risk that innocent people will plead guilty, all recommendations in this Report should be read to apply to misdemeanor courtrooms as much as felony ones.

Second, as jurisdictions work to make it less likely that innocent people plead guilty, the Task Force recommends ending barriers to post-conviction review and relief for innocence claims brought by individuals who pled guilty. Many states have rules that make it impossible for a defendant who accepted a guilty plea to challenge their conviction based on new evidence of their innocence. Other jurisdictions bar defendants from seeking DNA testing if they pleaded guilty. Because we know that innocent people plead guilty, **defendants should have access to all available mechanisms for post-conviction review of innocence claims, regardless of the method of conviction.** We do not believe this will open the floodgates of post-

conviction litigation. Defendants seeking review based on new evidence or other reasons must still satisfy any legal standard currently in place in the jurisdiction in which they bring the claim. But states should not bar defendants from making such claims in the first place. Furthermore, many defendants benefit from plea bargaining and therefore will be unlikely to risk forfeiting that benefit by having the full charges and potential sentence reinstated. Ultimately, we cannot tolerate a system where innocent people are convicted and incarcerated with no form of relief.

Third, because the evidence in cases where the defendant is innocent is often weak or questionable, these types of cases also tend to garner the most significant sentencing differentials that create overwhelming incentives for these individuals to plead guilty to something they have not done. Consistent with Principle Three, all jurisdictions should adopt policies that limit the size of sentencing differentials to ensure that the difference between the sentence offered prior to trial and the sentence received after trial is reasonable and non-coercive. Such limitations will greatly reduce the risk that innocent defendants will falsely plead guilty

Finally, we note that when innocent people plead guilty to crimes they did not commit, it leaves the victim's interests unvindicated and may create a meaningful public safety risk. Once a suspect has agreed to falsely plead guilty, enforcement authorities typically close their investigation under the mistaken belief that the true perpetrator has been apprehended. With the investigation closed and the wrong person behind bars, the true perpetrator may reoffend. In addition to acknowledging that innocent people plead guilty, therefore, we should also acknowledge the detriments to and potential risks to victims and society when this happens.

Principle Six

A defendant should have a right to qualified counsel in any criminal adjudication before the defendant enters a guilty plea. Counsel should be afforded a meaningful opportunity to satisfy their duty to investigate the case without risk of penalty to their client.

As a constitutional matter, defendants are entitled to counsel in criminal cases whenever they are subjected to incarceration.²⁹ But that leaves many defendants without a clear right to counsel—particularly in misdemeanor cases. Across the country, but especially in rural areas, defendants make the decision to plead guilty without the benefit of counsel. Often these decisions carry grave consequences, such as the imposition of serious fines or fees, collateral consequences, or immigration consequences. For this reason, the Task Force recommends that **jurisdictions provide counsel to defendants in any criminal adjudications, including felonies, misdemeanors, and violations that carry potential criminal sanctions, regardless of whether the defendant is subjected to incarceration.** At the very least, **defendants should not accept a plea offer without consulting counsel or formally waiving their right to counsel.**

In line with Principle Eleven, **defense attorneys have a duty to ascertain reasonably identifiable collateral consequences, including immigration consequences, that apply to their clients, and to notify and discuss such consequences with their clients prior to the entry of any guilty plea.** This consultation should go beyond the strictures of *Padilla v. Kentucky*, which require defense attorneys to advise clients about the clear deportation consequences of their conviction.

Defense counsel should have access to immigration and civil attorneys to assist them in understanding which non-criminal consequences apply and how those consequences will apply to an individual client.

The Task Force understands these recommendations may require significant resource allocations for jurisdictions, many of which are already under-resourced. However, if jurisdictions adopt our recommendations in Principle Eleven, including limiting the number and type of collateral consequences, and our recommendations in Principle Four that encourage prosecutors to engage in more early screening of cases to lead to a greater number of dismissals, there should be fewer cases to contend with overall. Of course, the Task Force understands that some of these recommendations will come up against resource constraints in the current system. As such, it is important to note that compliance with these recommendations should not prevent defendants who wish to plead guilty from resolving their cases through guilty pleas. This Report aims to identify practical policy changes that will improve the overall functioning of our criminal justice system, but nothing in this Report should be read as preventing defendants from resolving their cases by plea bargain if they want to, even if they do so without counsel.

Principle Seven

There should be robust and transparent procedures at the plea phase to ensure that the defendant’s plea is knowing and voluntary, free from impermissible coercion, and that the defendant understands the consequences of their decision to plead guilty.

As a constitutional matter, a plea may only be accepted if it is entered knowingly and voluntarily. Unfortunately, in the current system guilty pleas are often entered quickly and with little appreciation by the judge or lawyers for whether the defendant did indeed understand the nature and consequences of pleading guilty. Current practices also often fail to identify or root out actual sources of coercion. As such, this Principle seeks to enhance procedures as they stand now. As with much of this Report, these recommendations are as much about changing legal culture as they are about changing policy.

Federal Rule of Criminal Procedure 11, and similar state rules, should require a searching inquiry by the judge to ensure the defendant is knowingly and voluntarily pleading guilty. The federal rules of criminal procedure, and most state procedural rules, require that prior to accepting a guilty plea, the Court must engage in a colloquy with the defendant to ensure that the defendant understands the legal rights they will waive upon entry of a guilty plea and the consequences of so doing. Courts are also typically required to establish that there is a factual basis for the plea. As numerous practitioners report, however, these plea colloquies almost always are treated as tightly scripted and largely ceremonial events, often consisting entirely of leading, yes-no questions asked by the judge. Although yes-no questions may sometimes be appropriate for ensuring the plea is voluntary, deeper questioning may at times be required. For instance,

during the colloquy, if the defendant evinces confusion when the judge asks whether the defendant understands that she could be deported as a result of the crime, it is up to the judge as much as the defense attorney to determine whether the defendant truly understands that deportation consequences may result from her plea. Furthermore, it may be appropriate for the judge to ask more searching questions of the government as well to determine that the government’s actions are not coercive. In the current system, nearly all scrutiny at the plea colloquy is on the defendant, but the Task Force encourages judges to scrutinize the actions of the prosecutor as well before accepting a plea.³⁰

Indeed, **all participants in a plea proceeding—judge, defense attorney, and prosecutor—are responsible for ensuring the plea is knowing and voluntary, and that there is a sufficient factual basis to establish it.** For instance, prosecutors can contribute to this effort by slowing down their recitation of the charges and facts. Both judges and attorneys should avoid using complicated language that may confuse a lay audience, and they should encourage the defendant to ask questions. We understand that this will slow the pace of court, but it is a constitutional requirement that defendants waive their rights knowingly and voluntarily, and all parties have a responsibility to ensure that when defendants decide to waive their constitutional rights, they do so in line with constitutional standards.

Promoting transparent and open

procedures also benefits the victims of crime. Victims should not feel excluded from or confused by the adversarial process; rather, they should understand the plea process and how the parties reached the agreement. It is critical to the integrity of the system that victims feel that they have access to the justice system, including a meaningful understanding of the plea process

We acknowledge that people plead guilty for many reasons beyond guilt.³¹ For instance, defendants denied pretrial release might decide to plead guilty in exchange for a sentence of time-served or probation rather than remain incarcerated, unable to work or take care of children. Defendants may also plead guilty to avoid a mandatory minimum sentence after trial or to escape immigration or collateral consequences.³² Defendants have pleaded guilty to avoid their children and other family members being prosecuted for crimes.³³ The Task Force heard from practitioners that judges in certain jurisdictions ask defendants whether they are pleading guilty because they are guilty and for no other reason. Some members of the Task Force are concerned that such a question perpetuates the self-validating nature of the current system and ignores that people plead guilty for reasons other than guilt. Because of the myriad of reasons that people plead guilty, some members of the Task Force would discourage judges from asking this question.

Furthermore, the Task Force believes that a full factual record is an important component of the plea colloquy

to ensure a factual basis supports the charges and defendants have notice of the state's evidence against them. At the same time, the Task Force understands that sometimes defendants plead guilty to crimes they did not commit or to crimes that may not even exist. For instance, the Task Force found examples of defendants pleading guilty to attempted reckless crimes—which are legal impossibilities in most jurisdictions—to secure the benefits of the plea. The Task Force also found examples of defendants pleading guilty to crimes that both the defendant and the prosecutor agree that they did not commit to avoid a mandatory minimum sentence or collateral consequence associated with the charge that accurately matched their behavior.³⁴ Although most states technically ban baseless pleas by

statute,³⁵ there is good evidence that lawyers in many local jurisdictions engaged in some form of bargaining that involves baseless or fictional pleas. In an ideal world, such factually and legally baseless pleas would not exist. But the Task Force recognizes that these sorts of pleas are often the only way for a defendant to avoid unusually harsh consequences, such as deportation from the country, which neither the defense attorney nor prosecutor believe serve as appropriate punishment or the interests of justice. Because of this, the Task Force hesitates to suggest that jurisdictions limit or ban such pleas. Some members of the Task Force, however, believe that factually or legally baseless pleas should be eliminated.

The issue of factually and legally

baseless pleas is a symptom of broader problems with the criminal justice system. These pleas are usually motivated by the wish to avoid mandatory minimum sentences or mandatory collateral consequences that attach to a particular charge. As noted elsewhere in this Report, many though not all members of the Task Force call upon legislatures to eliminate both mandatory minimum sentences and collateral consequences that are not specifically tailored to the offense of conviction. Among the many benefits of this reform would be a reduced need for false pleas. But until those fixes are made, the Task Force does not suggest that courts limit the ability of the parties to negotiate “creatively,”³⁶ even while the Task Force acknowledges its deep discomfort with factually and legally baseless pleas.

Principle Eight

The use of bail or pretrial detention to induce guilty pleas should be eliminated.

The threat or imposition of pretrial detention may coerce a defendant, including an innocent one, into pleading guilty. Defendants in pretrial detention are more likely to plead guilty and to do so earlier in their case than those awaiting trial from home.³⁷ Further, defendants in pretrial detention have other significant barriers to fighting their cases effectively, including less access to counsel. Pretrial detention also poses a risk to a defendant's physical and psychological health—a reality made clear during the COVID-19 pandemic as jails and prisons became viral hotspots. Incarcerated people got sick from or were killed by COVID-19 at much higher rates than the general population.³⁸ Furthermore, like so many aspects of the criminal system, pretrial detention is disproportionately imposed on non-white defendants compared to white defendants.

As a primary matter, **prosecutors**

should never use pretrial detention to induce guilty pleas. Every jurisdiction has its own procedural rules regarding pretrial detention and bail. We do not make formal suggestions about what standards any particular jurisdiction should adopt. Instead, we encourage prosecutors in their recommendations and judges in their bail decisions to hew closely to the rules of procedure in their jurisdiction and only impose pretrial detention when absolutely necessary under the rules. For the most part, defendants should be released on their own recognizance without onerous restrictions to continue to fight their cases from home. In rare cases where release on recognizance is not appropriate, all parties—defense counsel, prosecutor, and judge—should seek the least restrictive pretrial conditions for the defendant.

In addition, **prosecutors should not**

request bail in cases where they would otherwise recommend time served or its equivalent. There should be a formal presumption of release when a plea offer has been made that includes a time served offer or its equivalent. Such presumptions avoid the risk that prosecutors or judges will punish defendants for refusing to accept offers early in the case. Whether someone enters a plea or not should play no role in the decision to detain them pretrial.

We note that these recommendations align with formal American Bar Association policy. In Resolution 112C, the House of Delegates of the ABA urged both local and state governments to favor the release of defendants upon their own recognizance or unsecured bond and to make bail and release determinations “based upon individualized, evidence-based assessments that use objective verifiable release criteria that do not have a discriminatory or disparate impact based on race, ethnicity, religion, socio-economic status, disability, sexual orientation, or gender identification.”³⁹

Principle Nine

Defendants should receive all available discovery, including exculpatory materials, prior to entry of a guilty plea, and should have sufficient time to review such discovery before being required to accept or reject a plea offer.

The Constitution requires that a guilty plea be made voluntarily and knowingly. To ensure defendants take pleas knowingly, they should be allowed to review the evidence against them in the state's possession. In addition, the Supreme Court made clear in *Brady v. United States* that before trial defendants should receive any evidence in the state's possession that tends to exculpate them.⁴⁰ Unfortunately, defendants are often denied discovery, including exculpatory evidence, before they make the decision to plead guilty. Pleading without discovery is particularly common in misdemeanor cases, but even in serious felony cases, defendants often make life-altering decisions without any sense of the evidence against them. In addition, there are examples of prosecutors withholding evidence of actual innocence from defendants who pleaded guilty.⁴¹

To promote the integrity of guilty pleas and ensure that such pleas are constitutionally sound, defendants should receive and have time to review all available discovery, including both inculpatory and exculpatory information. This includes all legally available materials in the prosecutor's possession and control. Admittedly, legal limitations prevent what a prosecutor can share with the defendant. For instance, grand jury minutes may be sealed before an indictment, or a prosecutor may move to keep witness names under seal for safety reasons. But any legally available discovery in the prosecutor's possession *at the time*

of the plea offer should be provided to defendants before they decide to plead guilty.

The Task Force understands that there exists a broad universe of potential evidence in any case, some of which may not be in the state's possession before trial. This is particularly true for early-stage criminal cases in which the prosecutors themselves may have a limited understanding of the evidence. Still, even in these instances, evidence in the prosecutor's possession or readily available to them should be provided to the defendant before the court accepts a plea. Furthermore, if prosecutor offices only charge after careful screening, as recommended in Principle Four, prosecutors will be well-positioned to understand the universe of evidence that exists early in the case, even while others may require significant investigation.

We make a special note here to reaffirm that defendants should receive any and all *Brady* material in the prosecutor's possession. **Prosecutors have a legal and ethical duty to consistently review their files for *Brady* material and provide it to defendants as soon as possible—both before and after a defendant agrees to enter a guilty plea.** The prosecutor's duty to turn over *Brady* information is a continuous and sacred obligation. As the Supreme Court noted in *Berger v. United States*, "A prosecutor has a duty to refrain from improper methods calculated to produce a wrongful conviction . . . [While he] may strike hard blows, he is not at liberty to strike

foul ones."⁴² Prosecutors strike foul blows when they hide exculpatory material.

Defendants must also have sufficient time to review discovery materials with counsel. A defendant may choose to waive the right to review discovery and plead guilty without such review, but **the right to receive *Brady* material should never be waivable.** Any waiver of other discovery rights must be done knowingly and voluntarily—meaning, the judge must determine that defendants freely chose to waive their right to review discovery material and were not influenced by prosecutorial pressure to plead guilty. If defendants request time to review the discovery materials, they should not be punished for that choice by, for instance, the withdrawal of plea offers. No plea offer should be contingent on the defendant's waiver of the right to review discovery. The Task Force does not attempt to specify a particular amount of time that a defendant should be entitled to review discovery materials, but various states, like New York, have successfully established discovery schedules that seek to ensure that defendants retain the opportunity to review discovery prior to making critical plea decisions.⁴³

Principle Ten

Although guilty pleas necessarily involve the waiver of certain trial rights, there are rights that defendants should never be required to waive in a plea agreement.

To plead guilty a defendant must necessarily waive some essential trial rights. Such waivers include the right to a jury, right to cross-examine witnesses at trial, and the right to testify in one's own defense. The nature of a guilty plea is that the defendant agrees to forgo trial and the rights that necessarily accompany it.

But, as the Task Force heard from numerous witnesses, prosecutors across jurisdictions often demand waivers that go well beyond these basic trial rights. For instance, prosecutors in some cases have demanded that defendants, as part of a guilty plea, waive ineffective assistance of counsel claims, future requests for compassionate release, the right to appeal, the right to request future sealing of their criminal conviction, and the right to *Brady* material, among others.⁴⁴ These waivers have nothing to do with trial, and they can and do lead to injustices. For instance, if a defendant pleaded guilty because of their lawyer's incompetence but waived the right to make future ineffective assistance of counsel claims, they cannot challenge their lawyer's poor performance, even if that poor performance is what led to the faulty plea in the first place.⁴⁵ Defendants forced to give up compassionate release claims to secure a plea bargain might be kept in prison even if they are gravely ill and would otherwise be eligible for such relief. The Task Force cannot see how these waivers are an appropriate part of the choice of process – plea or trial – that a defendant accepts.

All waivers, beyond those trial rights

which must be waived as part of the guilty plea, should be presumptively disfavored. Furthermore, certain rights are so fundamental to the integrity of the criminal system that they should never be waived pursuant to a plea agreement. For that reason, **the Task Force concludes that the following rights should never be waived as part of a guilty plea: ineffective assistance of counsel, *Brady* compliance, innocence claims, Freedom of Information Act (FOIA) claims, compassionate release, the right to challenge sentencing errors, challenges to the constitutionality of the statute of conviction, and the right to appeal or seek post-conviction review related to the above.**

In addition, we make a special note that **defendants should not be required to waive the right to challenge governmental misconduct to receive the benefit of a plea.** The Task Force is particularly concerned with the use of such waivers to hide police misconduct such as illegal searches, Miranda violations, or coercive interrogation practices. Motions to suppress evidence under the Fourth and Fifth Amendments do not merely serve an evidentiary purpose; they also serve a broader societal purpose. Like a trial, public pre-trial hearings on police and government conduct promotes the integrity of the criminal justice system. Bad behavior is brought to light and addressed through the courts or other means, while the discovery that police or government actors acted appropriately strengthens public trust

in the system. If a defendant proceeds to a pre-trial hearing and loses, the prosecutor's offer to the defendant should not increase merely because the defendant exercised their right to a pre-trial hearing. Plea offers should only get worse, if at all, because of the unanticipated discovery of new evidence that suggests additional criminal conduct occurred or that puts the defendant's conduct in substantially more culpable light.

Principle Eleven

An adequate understanding of the collateral consequences that may flow from a guilty plea is necessary to ensure the guilty plea is knowing and voluntary.

A current look at the National Inventory of Collateral Consequences reveals over 40,000 possible collateral consequences that may result from criminal convictions.⁴⁶ These consequences range from mandatory sex offender registration to the inability to obtain certain professional licenses. In addition, immigration consequences for noncitizens frequently flow from criminal convictions. For instance, nearly every drug conviction, with only a few exceptions, requires deportation.⁴⁷

The Task Force is particularly concerned about the frequent disconnect between the nature of collateral consequences and the type of crime for which the defendant is convicted. In many states, conviction of *any* felony will prohibit a person from ever working at a variety of jobs, such as in funeral services or as a dietician, among other professional fields.⁴⁸ Additionally, the state imposes many collateral consequences that have no connection to crime at all—most profoundly, exclusion from all jury service and denial of the right to vote. Because of the number and scope of collateral consequences, it is nearly impossible for a defendant to be fully informed of all potential collateral consequences that may flow from a conviction.

As a primary matter, then, **collateral consequence reform should be a legislative priority.** Collateral consequences—particularly those that are mandatory—have a corrupting influence on the criminal system, encouraging false pleas and other manipulations of the plea process. As such, **there should be meaningful legislative efforts to reduce the**

number of collateral consequences. In addition, legislators should ensure that when collateral consequences apply, they are both substantively and temporally related to the offense. In other words, it should make sense for the collateral consequence to apply given the nature of the conviction, and that the collateral consequence, like most punishments, follows the conviction and has a set end point.

Further, many non-legislative bodies, like licensing boards and employers, are responsible for the imposition of collateral consequences. We encourage those bodies to reconsider any mandatory collateral consequences that are not necessary for keeping the public safe. For example, while the Task Force understands why state licensing boards responsible for teachers and childcare workers would exclude defendants convicted of crimes against children, it is less clear why a defendant with any felony conviction cannot, as noted above, be a dietician or funeral director.

While legislators and other relevant groups work to undo the current regime of collateral consequences, **other criminal justice actors, like defense lawyers, prosecutors, and judges, should share responsibility for informing defendants of relevant collateral consequences.** Defense attorneys, at minimum, should review potential collateral consequences with a client before the client accepts a plea. The Task Force also encourages prosecutors and judges to see themselves as playing a role in ensuring a defendant understands collateral consequences—particularly immigration consequences—before accepting

a plea. Judges, for instance, should perform a more searching inquiry as part of the plea colloquy, including into any immigration consequences. Judges often rely on defense attorneys to explain the consequences of a plea to a defendant, but when a defendant expresses confusion and asks for clarification, judges should see it as their role to describe the potential consequences a defendant might face.

Similarly, prosecutors should be mindful of which collateral consequences attach to a particular charge and consider collateral consequences in charging decisions to determine if the decision to charge is in the interests of justice, as required by the ABA Standards for the Prosecution Function. Further, in the many jurisdictions where defendants do not have access to a lawyer in misdemeanor cases, prosecutors should be aware of the relevant collateral consequences for each charge and inform defendants of such consequences when presenting a plea offer.

The Task Force recognizes that this training of defense attorneys, prosecutors, and judges will require a significant allocation of resources, but dedicating resources to making these stakeholders knowledgeable about collateral consequences is a worthy effort. That said, our ultimate hope is that legislatures and licensing boards decrease the number and scope of such consequences, which lead to unjust results and manipulations of the plea process.

Principle Twelve

Law students, lawyers, and judges should receive training on the practice and use of plea bargaining consistent with the findings and recommendations of this Report.

The Task Force heard from many stakeholders who wanted more guidance and training on ethical plea practices. The American Bar Association provides Criminal Justice Standards for Pleas of Guilty, but those standards mostly focus on establishing the basis for the guilty plea and the lawyers' responsibilities at the time of a guilty plea. These standards are valuable, but they do not address the broader context in which plea bargaining takes place. As such, we encourage law students, lawyers, and judges to receive training on the use of plea bargaining consistent with the findings and recommendations of this Report.

Although this Report speaks to many audiences, judges and lawyers carry out the day-to-day work of plea bargaining. We hope that training in line with this Report will encourage judges and lawyers to think more deeply about their obligations at plea bargaining and consider where they should challenge current practices and norms.

Further, we hope that if jurisdictions commit to this training, particularly for judges, it will translate into clearer guidelines for plea practice and a decrease in disparate outcomes for similarly situated defendants. As the Task Force heard while gathering evidence, even judges within the same courthouse may handle plea practice very differently, with each judge creating rules for how and why a plea may proceed. As one judge described it to the Task Force, there are widely divergent judicial philosophies operating behind the scenes, and attorneys and defendants must navigate

a system with no clear dictate on plea bargaining.⁴⁹ This means that similarly situated defendants in the same county, arrested on the same day, may have dissimilar experiences when taking a plea for no other reason than the identity of the judge on the bench that day. Although the Task Force does not believe that plea practice must be uniform among courtrooms, some consistency is important to ensure that similarly situated defendants are treated fairly.

Finally, the Task Force believes that training law students is critical to creating the cultural change these Principles intend to inspire. With few exceptions, law school curricula for future criminal attorneys focuses heavily on trials, trial advocacy, and the rules of criminal procedure, which have little to do with plea practice. We hope law schools will take seriously the need to educate their students—especially those intending to practice criminal law—about the role of plea bargaining in the criminal system. Many law schools are currently engaged in thinking about how to incorporate criminal justice reform into their criminal law curriculum and this Report is an important contribution to that project. The American Bar Association, in collaboration with law schools, advocacy organizations, local bar associations and others, should seek out platforms and mechanisms for this training. The members of this Task Force are committed to participating in future training efforts.

Principle Thirteen

Court systems, sentencing commissions, and other criminal justice stakeholders, including prosecutor offices and public defenders, should collect data about the plea process and each individual plea, including the history of plea offers in a case. Data collection should be used to assess and monitor racial and other biases in the plea process.

A common critique of the modern plea bargain system is how little we know about it. The Task Force collected evidence about the shrouded nature of the plea process.⁵⁰ Sometimes the system is not even transparent to the very defendants whose fate is being negotiated.⁵¹ Indeed, defendants rarely participate in the negotiation process. Rather, defendants rely on their attorneys to accurately interpret and/or anticipate the nature of the charges, possible sentence, potential collateral consequences, offers made by the state, and the particular rules (and temperament) of the judge presiding over their case. We rely on defense counsel to explain all of this to defendants in terms they can understand so they can make informed plea decisions. When a defendant has an ineffective defense attorney, much of what is hidden from the public is also hidden from the defendant. This, of course, is true for victims as well, who are often excluded from the plea process and have no idea how and why a plea was negotiated and decided on.⁵² Greater transparency would help defendants and crime victims alike better understand what is happening in their cases, and help lawyers provide more accurate advice about the merits of particular plea offers and relevant court or jurisdiction-specific tendencies that may inform the merits of the offer.

This pronounced lack of data about the plea system also means that it

is difficult for scholars and policy makers to study and improve the system. Besides the final sentence and charges, very little about the process is ever formally recorded. Data regarding any prior offers—and whether and why they got better or worse—are rarely collected outside of the lawyers' files (if even there). Sometimes even the final charge and sentence will not make its way into any database that would allow for the collection and comparison of this basic data. Further, as the Task Force heard during expert testimony, sometimes deals or promises are made off-the-record that then may be forgotten or not honored once the parties are on the record.⁵³ This lack of data makes it difficult to measure the full impact of plea bargaining, or many of its features, such as the prevalence of the false pleas discussed in Principle Seven.

The Task Force notes that the evidence collected about plea bargaining paints a particularly troubling picture about how defendants of color fare compared to white defendants. The Task Force took testimony from experts that demonstrated that Black defendants are more likely to receive harsh plea outcomes than similarly situated white defendants. As Juval Scott, the Federal Defender for the Western District of Virginia, noted in her testimony, at least part of the problem with studying and understanding the full extent of racial disparities during the plea process is that we often only

understand the final sentence in a case, but not how that sentence *came to be* in the first place.⁵⁴

The criminal justice system, including the plea process, should be transparent and accessible to the public. As such, it is critical that plea bargaining be brought out of the shadows. One way to achieve this is for stakeholders to put more information about each individual plea on the record.⁵⁵ **Plea agreements should be in writing and placed on the record.** There may be cases where a plea should be kept confidential, but the general rule should require recording pleas. This information should include, at a minimum, prior plea offers, but may also include the reasons an offer got better or worse. Information on individual cases should be used to create broader databases of information to help researchers and policy makers study and improve plea bargaining. To this end, **plea offers, charging decisions, and sentencing outcomes should be recorded in a digital database that is searchable and available to prosecutors, defense counsel, and judges. It should also be made publicly available so that academics can survey and summarize the data,** which will have salutary effects for the criminal justice system. For instance, better data collection and analysis gives sentencing judges a more complete record of the plea negotiations to make sure that the final plea or trial sentence are not

the result of the defendant being punished for exercising certain pre-trial or trial rights. As this Report notes in Principle Three, better data can help judges stay alert to any possible trial penalties.

Many of these suggestions echo a recent resolution by the American Bar Association that urges all prosecutors to “regularly collect, analyze, and produce timely reports that include the crimes charged; the defendant’s [] race, gender and zip code; prosecutorial recommendations as to pretrial release and the court’s decision on pretrial release; the disposition of each charge including

plea offers and sentence[, and to] make data publicly available and easily accessible[.]”⁵⁶ We would extend this obligation to other criminal justice stakeholders, like court systems and public defender offices, consistent with attorney-client privilege.

As with many of the proposals in this Report, the Task Force understands that the recommendations require additional work for already overworked lawyers, judges and clerks in our criminal courts. Despite these realities, the Task Force sees data collection about plea bargains as a particularly worthy effort, given

that plea bargaining remains, in many ways, a black box. The Task Force is encouraged to see that many local jurisdictions have already begun collecting this data. For instance, the Ohio court system began requiring judges to collect this data for study.⁵⁷ The Wilson Center at Duke Law School partnered with North Carolina district attorneys to collect and study data about the plea process.⁵⁸ These experiments show that data collection is feasible and that models exist for court systems, public defenders, and prosecutor offices to start their own data collection and analysis efforts.

Principle Fourteen

At every stage of the criminal process, there should be robust oversight by all actors in the criminal system to monitor the plea process for accuracy and integrity, to ensure the system operates consistent with the Principles in this Report, and to promote transparency, accountability, justice, and legitimacy in the criminal system.

This Report has detailed several broad Principles and targeted suggestions that we hope individual stakeholders, court systems, and state legislatures will adopt. But we also encourage these groups to go beyond merely adopting the Principles and to think more broadly about mechanisms that can ensure the Principles are used in practice. To this end, **jurisdictions should establish mechanisms to monitor the plea process from charging decision to disposition, as well as implement an audit process to test the validity and integrity of guilty pleas.** In other fields, like medicine, it is considered essential to have regular forms of oversight in place to protect the public. The criminal justice system, whether at the federal or state level, is a public institution meant to serve

a public good, including promoting and maintaining public safety and imposing punishment on wrongdoers. Unfortunately, the system sometimes falls short of this ideal. To understand how and why it does, mechanisms for monitoring and oversight must be created and implemented.

Many of the suggestions throughout this Report should provide some initial guidance for establishing such monitoring systems, but the Task Force encourages courts, public defenders, and prosecutor offices to create organization-specific checks on existing structures and policies. In addition, these stakeholders should implement a system of audits to select and test the accuracy and integrity of guilty pleas.⁵⁹ Such audits would seek to determine, in a select set of cases, if

coercive methods, like the threat of a large trial penalty, were used to secure a guilty plea, or whether the defense attorney adequately investigated the case, or if the judge confirmed that the plea was knowing and voluntary. By auditing a set of cases post-conviction to ensure these probative questions are answered, stakeholders might better promote integrity and fairness in all cases.

ACTION ITEMS

The primary job of the Task Force was to identify and explain the critiques of the modern plea system. As such, although we offer broad suggestions throughout the Report for ways to reform the plea system, we have not made proposals for specific reforms. In addition, we have hesitated to make specific policy or legal proposals because, as noted in the Introduction, the plea system in this country differs widely depending on the jurisdiction. Certain reforms may make sense in one place, but not another. Having said that, we offer here some possible suggestions for broad areas of reform that interested stakeholders, spurred by this Report, might pursue.

Many of the problems identified in this Report require changes to laws, rules of procedure or regulations. We have recommended the elimination of mandatory minimums and mandatory collateral consequences, but lawmakers might also consider ways to protect defendants from coercive plea practices, as by limiting the trial penalty through statute. Further, states could modify their rules of procedure to ensure a more robust plea colloquy. In addition, regardless of whether the Supreme Court revisits its precedent on plea bargaining practices, state courts are welcome to interpret the state constitutions as providing greater protections to defendants during plea bargaining than the federal Constitution.

Other problems we have identified could be resolved through the adoption of ethical rules that provide guidance and boundaries for the behavior of judges and lawyers. Many of our entreaties to legal stakeholders in the pages of this Report could be easily translated into ethical rules or advice handed down by the American Bar Association, local state bar associations or state judges.

We also encourage court systems, prosecutors and public defender offices to adopt formal policies that put into writing the recommendations of this Report. Formal policies will provide guidance, but also encourage the culture change we hope this Report will inspire.

APPENDIX A: TASK FORCE MEMBERS

Lucian E. Dervan (Co-Chair), Professor of Law, Belmont University College of Law

Lucian E. Dervan is a Professor of Law and Director of Criminal Justice Studies at Belmont University College of Law in Nashville, Tennessee. He is also the Founding Director of the Plea Bargaining Institute, an entity he created in partnership with Fair Trials. His research and writing focus on plea bargaining, white collar crime, and international criminal law. In addition to his books and articles, he is the founder and author of *The Plea Bargaining Blog*. Dervan currently serves on the ABA Board of Governors. He is also the founder and Chair of the ABA Global White Collar Crime Institute and is a member of the American Bar Foundation. Dervan previously served as Chair of the ABA Commission on the American Jury and Chair of the ABA Criminal Justice Section. Prior to joining the academy, Dervan served as a law clerk to the Honorable Phyllis A. Kravitch of the United States Court of Appeals for the Eleventh Circuit. He also practiced law with King & Spalding LLP and Ford & Harrison LLP.

Russell Covey (Co-Chair), Professor of Law, Georgia State University College of Law

Russell Covey is a Professor of Law at Georgia State University College of Law, teaching criminal law and procedure. In addition to publishing many book chapters and articles in his field, Covey is the co-editor of *The Wrongful Convictions Reader* (Carolina Press 2018). He has filed amicus briefs on behalf of the National Association of Criminal Defense Lawyers. Covey's recent work study police misconduct and the effects of jailhouse informants as causes of wrongful convictions.

Thea Johnson (Reporter), Association Professor of Law, Rutgers Law School

Thea Johnson is an Associate Professor of Law at Rutgers Law School. Her scholarship focuses on the ways that stakeholders manipulate the plea process and stretch ethical boundaries to achieve particular outcomes. She has won several awards for her scholarship, including the 2022 Greg Lastowka Award for scholarly excellence at Rutgers. Prior to joining Rutgers Law, Johnson was an Associate Professor of Law at the University of Maine School of Law, a Thomas C. Grey Fellow at Stanford Law School, and a public defender in New York City.

Hon. Kimberly Esmond Adams, Superior Court of Fulton County

Hon. Kimberly Esmond Adams began her service as a

judge on the Superior Court of Fulton County in the Atlanta Judicial Circuit in 2009 and has been re-elected without opposition for three successive terms. Prior to her election, Adams served as Chief Senior Assistant District Attorney in the Office of the Fulton County District Attorney following an employment defense practice with a national labor and employment boutique. A highly-regarded bar leader and community servant, Judge Adams has held numerous leadership positions and received various notable awards and accolades. She currently serves as Chair of the Judicial Council of the National Bar Association and previously served as President of the Georgia Association of Black Women Attorneys (GABWA), Chair of the Judicial Section of the Gate City Bar Association, and Board Chair for *Forever Family*, an organization that provides support and services to children with incarcerated parents. She also was invited to the White House in 2012 to participate in a summit on parental incarceration. Judge Adams holds membership in the American Judges Association and the National Association of Women Judges as well as diverse community and civic groups.

Derwyn Bunton, Chief Legal Officer, Southern Poverty Law Center (formerly, Chief District Defender, Orleans Public Defenders)

Derwyn Bunton is the Chief Legal Officer for the Southern Poverty Law Center. He was formerly the Chief District Defender for Orleans Parish (New Orleans) Louisiana leading the Orleans Public Defender's Office. Before his role at OPD, Bunton was the Executive Director of Juvenile Regional Services and an Associate Director of the Juvenile Justice Project of Louisiana. Bunton is the Board's President of the Fair Fight Initiative, which works to end mass incarceration and support victims of systemic injustice.

Vanessa Edkins, Director of Quantitative Research, Gartner Inc.; Professor Emeritus of Psychology, Florida Institute of Technology

Vanessa Edkins is the Director of Quantitative Research at Gartner, Inc. She is also Professor Emeritus of Psychology at Florida Institute of Technology, where she previously served as the Department Head of the School of Psychology. She has published many works, including the book, *A System of Pleas: Social Science's Contribution to the Real Legal System*. Her work has been cited in the *Wall Street Journal*, *The Economist* and in congressional testimony. In addition to her publications, Edkins has been a part of the Steering Committee on an NSF Research Coordination Network grant which examines plea bargaining from multiple fields of study.

A. J. Kramer, Federal Public Defender for the District of Columbia

A. J. Kramer has been the Federal Public Defender for the District of Columbia since 1990. Prior to his position in DC, he was the Chief Assistant Public Defender in Sacramento, California and an Assistant Federal Public Defender in San Francisco, California. He is a permanent faculty member of the National Criminal Defense College in Macon, Georgia. Kramer is Fellow of the American College of Trial Lawyers and a member of the Department of Defense Advisory Committee on the Investigation, Prosecution, and Defense of Sexual Assault Cases in the military.

Jenny Kim, Partner, The Gober Group

Jenny Kim is a partner at The Gober Group. Prior to this position, she served as Vice President of Operations and General Counsel for the Philanthropy Roundtable and also as Deputy General Counsel and Vice President, Public Policy for Koch Companies Public Sector, LLC. She is also a board member of the Due Process Institute and The Just Trust for Action.

Marc Levin, Chief Policy Counsel, Council on Criminal Justice

Marc Levin is the Chief Policy Counsel for the Council on Criminal Justice. He began the Texas Public Policy Foundation's criminal justice program in 2005. Levin serves as Senior Advisor for the Right on Crime initiative which he developed the concept for in 2010. He has testified on criminal justice policy before Congress as well as state legislatures. Levin has published policy papers, articles, book chapters and op-eds. He also presented at the national Criminal Justice Association 2020 Virtual Forum on Criminal Justice.

Clark Neily, Senior Vice President for Legal Studies, CATO Institute

Clark Neily is Senior Vice President for Legal Studies at the CATO Institute. Neily was a senior attorney and constitutional litigator at the Institute for Justice and Director of the Institute's Center for Judicial Engagement. He is an adjunct professor at George Mason's Antonin Scalia School of Law. He is also the author of *Terms of Engagement: How Our Courts Should Enforce the Constitution's Promise of Limited Government*.

Norman L. Reimer, Former Global CEO, Fair Trials; Former Executive Director, National Association of Criminal Defense

Lawyers

Norman Reimer was the global Chief Executive Officer of Fair Trials. Prior to that Reimer served as the Executive Director of the National Association of Criminal Defense Lawyers for 15 years. During his tenure there he established the John Adams Project with the American Civil Liberties Union to represent the accused at Guantanamo and led a collaboration to establish Clemency Project 2014, which procured 894 presidential commutations. During his career as a defense attorney, Reimer was involved in many landmark decisions in search and seizure, habeas corpus and international extradition law. He has also had a hand in amicus briefs before both state courts and the United States Supreme Court.

Rebecca Shaeffer, Legal Director (Americas), Fair Trials

Rebecca Shaeffer serves as Legal Director (Americas) for Fair Trials. She is a member of the Steering Committee for an International Protocol on Non-Coercive Investigative Interviewing, which developed the Mendez Principles. Shaeffer also leads advocacy on the development and enforcement of criminal procedural safeguards. Shaeffer is the lead author of recent reports on areas such as global plea bargaining and pre-trial decision making.

Adnan Sultan, Senior Staff Attorney, The Innocence Project

Adnan Sultan is a staff attorney at The Innocence Project, where he works nationwide to litigate post-conviction cases. Part of his work at the Innocence Project is instructing law students at the Innocence Project clinic at Cardozo School of Law in New York City. Prior to his position at the Innocence project, Sultan worked as a staff attorney at the Bronx Defenders and was a member of the Bronx Defenders' Forensic Practice Group.

Jonathan Wroblewski, Director of the Office of Policy and Legislation, U.S. Department of Justice

Jonathan Wroblewski has served as the Principal Deputy Assistant Attorney General, head of the Office of Legal Policy and the Criminal Division's Director of the Office of Policy and Legislation during his time at the US Department of Justice. In his position for the criminal division, Wroblewski has served as a member of the United States Sentencing Commission, on the Federal Judicial Conference's Advisory Committee on the Criminal Rules and on the American Bar Association's Criminal Justice Council. He is also the Director of Harvard Law School's Semester in Washington Program.

APPENDIX B: TESTIMONY

The Task Force invited experts and relevant stakeholders to present oral testimony to the task force on two separate dates in 2019 and 2021. In addition, the Task Force issued a call for additional written commentary on plea bargaining. Those who gave oral testimony or submitted written testimony for the Task Force are included in this Appendix.

ORAL TESTIMONY:

Professor Zamir Ben-Dan, Assistant Professor of Law at Temple Law School, September 26, 2021

Professor Carlos Berdejó, Professor of Law at Loyola Law School, November 15, 2019

Justin Brooks, Director & Co-Founder of the California Innocence Project, November 15, 2019

Patricia Cummings, Supervisor of the Conviction Integrity and Special Investigations Unit of the Philadelphia District Attorney's Office, November 15, 2019

Hon. Michael P. Donnelly, Justice of the Supreme Court of Ohio, November 15, 2019

Professor Vida Johnson, Associate Professor of Law at Georgetown University Law Center, September 26, 2021

Martín A. Sabelli, Former President of the National Association of Criminal Defense Lawyers, November 15, 2019

Juval Scott, Federal Public Defender for the Western District of Virginia, September 26, 2021

Somil Trivedi, Senior Staff Attorney in the Criminal Law Reform Project at the American Civil Liberties Union, November 15, 2019

Professor Jenia I. Turner, Professor of Law at SMU Dedman School of Law, November 15, 2019

WRITTEN TESTIMONY:

Scott E. Leemon, Criminal Defense Attorney, New York, March 31, 2021

William Otis, Adjunct Professor of Law at Georgetown University Law Center, March 24, 2021

William Ring, County Attorney for the Coconino County Attorney's Office, April 8, 2021

Anna Roberts, Professor of Law at Brooklyn Law School, April 15, 2021

Dr. Nancy Lynn Rogers, Neurosurgeon, July 15, 2021

David W. Shapiro, Partner at The Norton Law Firm, April 5, 2021

Christopher Slobogin, Professor of Law at Vanderbilt Law School, March 24, 2021

Kenneth Wine, Attorney at Law, President of the Criminal Trial Lawyers Association of Northern California, April 5, 2021

ENDNOTES

1 The Plea Bargaining Task Force was created by then ABA Criminal Justice Section Chair Lucian E. Dervan. Professor Dervan created three task forces in his role as Chair – the Plea Bargaining Task Force, the Women in Criminal Justice Task Force, and the Corporate Criminal Liability Task Force.

2 Studies by the Pew Research Center show of nearly 80,000 defendants who faced charges in the federal system in fiscal year 2018, fewer than 2% went to trial and only 320 of those that did win an acquittal. Eight percent of the cases were dismissed, and the other 90% were resolved through guilty pleas. This trial rate represents a significant decline from even recent precedent. For instance, in 1998, 7% of cases went to trial. The number of trials has decreased, even while the number of cases charged in federal courts has “increased substantially.” John Gramlich, *Only 2% Of Federal Criminal Defendants Go To Trial, And Most Who Do Are Found Guilty*. THE PEW RESEARCH CENTER, June 11, 2019. Trials are vanishingly rare in state criminal systems as well. In the last decade, states like New York, Pennsylvania and Texas have all had trial rates of less than 3%. Some jurisdictions in the country report not having had a criminal trial in years. Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, But Not Quite Gone: Trials Continue to Decline in the Federal and State Courts. Does It Matter?*, 101 JUDICATURE 4, 32-34 (2017); See also The National Association of Criminal Defense Lawyers, *Vanishing Trials*, <https://www.nacdl.org/Landing/Vanishing-Trials> (showing that in fiscal year 2018, 90% of federal criminal cases ended in guilty pleas, 8% of cases were dismissed, and only 2% went to trial); Benjamin Weiser, *Trial by Jury, a Hallowed American Right, Is Vanishing*, N.Y. TIMES, Aug. 7, 2016. In addition, there were no criminal trials in Santa Cruz County in Arizona from 2010 until at least 2012. Marisa Gerber, *No Criminal Trials Held in Santa Cruz County Since 2010*, NOGALES INT’L, Nov. 21, 2012.

3 The Task Force has decided to capitalize Black, but not white when referring to racial groups. In making this decision, we follow the lead of several organizations and publications which argue that the two terms carry different meanings when used to describe racial or ethnic groups. Mike Lewis, *Why We Capitalize “Black” (and not “white”)*, COLUMBIA JOURNALISM REV., June 16, 2020; Nancy Coleman, *Why We’re Capitalizing Black*, N.Y. TIMES, July 5, 2022.

4 Testimony of Juval Scott; Samuel R. Gross, Maurice Possley, & Klara Stephens, *Race and Wrongful Convictions in the United States*, NAT’L REG. OF EXONERATIONS 1, 16 (2017), https://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf (finding that Black people are five times more likely to go to prison for drug possession than white people, and Black people are twelve times more likely to be wrongly convicted of drug crimes); *One War. Two Races. Bias Reigns in Florida’s War on Drugs.*, HERALD TRIBUNE, Dec. 12, 2016 (finding that Black people make up 46% of felony drug convictions in Florida since 2004, despite only making up 17% of the population of the state); Elizabeth Hilton, *An Unjust Burden: The Disparate Treatment of Black American in the Criminal Justice System*, VERA INST. OF JUST. 6 (May 2018) (“the risk of incarceration in the federal system for someone who uses drugs monthly and is [B]lack is more than seven times that of his or her white counterpart.”). For a comprehensive list of the studies on racial disparities in the criminal system, see also, Radley Balko, *There’s Overwhelming Evidence That the Criminal Justice System Is Racist. Here’s The Proof*, THE WASH. POST, Jun. 10, 2020.

5 Testimony of Juval Scott; See also, Josh Salman, Emily Le Coz & Elizabeth Johnson, *Florida’s Broken Sentencing System: Designed For Fairness, It Fails To Account For Prejudice*, HERALD TRIBUNE, Dec. 12, 2016 (discussing that, on average, Black defendants received longer sentences in Florida than white defendants for the same or similar crimes).

6 Testimony of Carlos Berdejó; Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea Bargaining*, 59 B.C. L. REV. 1187, 1191 (2018); See also, Gene Demby, *Study Reveals Worse Outcomes For Black And Latino Defendants*, NPR, July 17, 2014 (discussing a 2014 study in Manhattan which found that Black defendants were 19% more likely to be offered plea deals that included jail time than other defendants); Sonja B. Starr & M. Marit Rehani, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L. J. 1, 7 (2013) (discussing a 2013 study that showed that federal prosecutors are almost twice as likely to bring charges carrying mandatory minimums against Black defendants compared to white defendants charged with similar crimes).

7 Testimony of Professor Zamir Ben-Dan.

8 Testimony of Professor Vida Johnson.

9 During oral arguments in *Class v. United States*, the assistant solicitor general, arguing for the government, noted that approximately 25% of pleas in the federal system are “open pleas” that do not involve any promises from the government in exchange for the defendant’s guilty plea. As such, the remaining 75% of plea agreements involve favorable treatment or an exchange. Transcript of Oral Arg. at 61–62, *Class v. United States*, 138 S. Ct. 798 (2018) (No. 16-424).

10 See *supra* note 2.

11 Fewer trials also mean fewer citizen jurors. Americans are much less likely to be called for jury service than a decade ago, even while most Americans believe it is a critical part of being a good citizen. In 2006, over 71,000 people were selected to serve as jurors in federal trials compared with 43,000 in 2016. The last available statistics for state courts shows that about 15% of adults are summoned for jury service each year, with only about 5% of those who are called actually serving on a jury. John Gramlich, *Jury Duty is Rare, but Most Americans See it as Part of Good Citizenship*, THE PEW RESEARCH CENTER, August 24, 2017. The right to a jury is enshrined in the Constitution. As the Supreme Court wrote in 2019, “[o]ther than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process.” *Flowers v. Mississippi*, 139 S. Ct. 2228, 2238 (2019). And yet, fewer and fewer Americans will ever experience jury service.

12 In *U.S. v. Seng Cheng Yong*, federal prosecutors in Las Vegas offered to drop charges against a defendant’s son if he agreed to plead guilty rather than pursuing his right to trial. At the time of the plea, the prosecutors were aware of pervasive law enforcement misconduct during the investigation. They did not disclose this misconduct to the defendant, who decided to take the plea. On appeal, the Ninth Circuit conceded that “the Government does not deny using the charges against [defendant’s son] as a bargaining chip in its plea negotiations with Yong.” The Ninth Circuit upheld defendant’s guilty plea because the government had probable cause to charge the defendant’s son. Charges against other defendants in the case, who proceeded to trial, were eventually dismissed because of the law enforcement misconduct. *U.S. v. Seng Cheng Yong*, 926 F.3d 582 (9th Cir. 2019). Throughout the United States there are examples of prosecutors using family members as bargaining chips during the negotiation of a plea. The Second Circuit upheld a plea where the government told the defendant that it would only agree to a favorable plea bargain for his wife if he agreed to plead guilty. *United States v. Marquez*, 909 F.2d 738 (2d Cir. 1990). In another case, the government agreed to forgo the death penalty for a defendant if his brother, who was also a co-defendant, promised to plead guilty. To put it another way, one brother was able to save another brother from the death penalty, but only by giving up his right to trial. *United States v. Vest*, 125 F.3d 676 (8th Cir. 1997).

13 Federal prosecutors in United States District Court for the District of Columbia offered two co-defendants what is known as a “wired” plea. The plea, which came with a likely sentence of between two and six years, required both defendants to accept the terms of the offer. One defendant readily agreed to the plea; the other defendant, as a result of ineffective assistance of counsel, did not. The prosecutors took the plea off the table and proceeded to trial, where both defendants were given sentences of over twenty years. The Court of Appeals overturned the sentence of the defendant with the ineffective lawyer, allowing him to get the benefit of the initial plea deal. The sentence of the defendant who was willing to take the initial “wired” plea deal had his sentence upheld, even though it was, at least, fifteen years longer than the initial deal that the prosecutors believed was a just resolution to the case. *United States v. Knight*, No. 19-3016, (D.C. Cir. 2020).

14 In Tennessee, a prosecutor would only offer a favorable plea to mothers in certain abuse and neglect cases who agreed to sterilization. Although the chief prosecutor later disavowed the policy, a Nashville prosecutor made sterilization and required use of birth control part of the negotiation process in at least four cases. Shelia Burke, *Tennessee Prosecutor Fired Over Plea Bargains Involving Female Sterilization*, ASSOCIATED PRESS, April 1, 2015.

15 Testimony of Somil Trivedi, Martín Sabelli, and Justin Brooks; Written testimony of David Shapiro and Kenneth Wine.

16 ABA Resolution 10B passed the American Bar Association House of Delegates on August 15, 2017. The measure “opposes mandatory minimum sentences in any criminal case, and urges Congress and state legislatures to repeal existing criminal laws requiring minimum sentences.” *ABA Opposes Mandatory Minimum Sentences*, Aug. 15, 2017, available at https://www.americanbar.org/news/abanews/aba-news-archives/2017/08/aba_opposes_mandator/.

17 Almost three-quarters of homicide exonerees who pled guilty were convicted of murder (44/61). It appears that the great majority did so to avoid the risk of execution. All but two were prosecuted in death penalty states, and 70% had falsely confessed (31/44), which greatly increases the risk of conviction. They all avoided the death penalty, but the sentences they did receive were stiff: fourteen were sentenced to life or life without parole, the rest got sentences that averaged twenty-two years. National Registry of Exonerations, *Innocents Who Plead Guilty*, November 2015, available at <https://www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article1.pdf>.

18 National Association of Criminal Defense Lawyers, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction*

and How to Save It, July 10, 2018, available at <https://www.nacdl.org/DocumentTrialPenaltySixthAmendmentRighttoTrialNearExtinct>. 19 *Id.*

20 The idea of fixing the plea to trial sentencing differential is not new. The Editors of the Yale Law Journal proposed a “specific discount rate” as early as 1972. Note, *Restructuring the Plea Bargaining*, 82 YALE L. J. 286 (1972). See also, James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1560-61 (1980) (proposing “a relatively modest, prescribed sentencing concession of ten to twenty percent of the sentence received for a guilty plea.”); Mirko Bagaric et. al., *Plea Bargaining: From Patent Unfairness to Transparent Justice*, 84 MO. L. REV. 1 (2019) (“The size of the discount should be up to thirty percent.”); Darryl Brown, *Free Market Criminal Justice* (2016), at 108 (reporting that the “Criminal Justice Act of 2003 ... authorized sentence discounts” that were limited to “a one-third reduction from the post-trial sentence”); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2488 (2004) (explaining that the Guidelines initially prescribed “a three-level discount (on average, 35%) for guilty pleas in serious federal cases regardless of the chance of acquittal,” which was subsequently modified to an automatic two-level reduction with the possibility of a third upon motion by the government). In his article, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, Russell D. Covey offers several suggestions for how fixed discounts can work in practice to achieve fairer results in the criminal system. 82 TUL. L. REV. 1237 (2008).

21 *Bordenkircher v. Hayes*, 434 U.S. 357, 363-65 (1978).

22 *Id.*

23 *Id.*, at 364.

24 This suggestion is in line with the ABA Criminal Justice Standards for the Prosecution Function, which encourages prosecutors not to file or to dismiss charges for a variety of reasons, including a lack of evidence for the charges or a prosecutor’s doubt about the guilt of the accused. *Minimum Requirements for Filing and Maintain Criminal Charges*, STANDARD § 3-4.3 (2017).

25 See Andrew Pardieck, Lucian E. Dervan, and Vanessa Edkins, *The Global Rise of False Testimony for False Pleas*, 44 FORDHAM INT’L L. J. 469 (2020) (discussing false pleas of guilty and false testimony in support of such pleas); Lucian E. Dervan, and Vanessa Edkins, *The Innocent Defendant’s Dilemma: An Innovative Empirical Study of Plea Bargaining’s Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1 (2013) (discussing the phenomenon of false pleas of guilty by the innocent).

26 Glinda S. Cooper, Vanessa Meterok & Prahelika Gadtaula, *Innocents Who Plead Guilty: An Analysis of Patterns in DNA Exoneration Cases*, 31 FED. SENT. R. 215, 234 (2019).

27 Written Testimony of Professor Anna Roberts (pointing to her work, *Convictions as Guilt*, 88 FORDHAM L. REV. 2501, 2533 (2020)), which persuasively argues that estimates of the proportion of people “with convictions who are ‘wrongfully convicted’ or ‘innocent’ undercount in a variety of ways,” as by “excluding those who lacked representation, incentive, written record, knowledge, or the correct procedural vehicle to get recognition that their conviction was wrongful.”).

28 See, e.g., National Association of Criminal Defense Lawyers, *Three-Minute Justice: Haste and Waste in Florida’s Misdemeanor Courts*, at 15, July 2011, available at <https://www.nacdl.org/Document/ThreeMinuteJusticeFloridasBrokenMisdemeanorCourts> (finding in a study of Florida misdemeanor courts that 66% of defendants appeared at arraignment without counsel).

29 *Argersinger v. Hamlin*, 407 U.S. 25, 38 (1971).

30 Testimony of Somil Trivedi.

31 See Lucian E. Dervan, *Class v. United States: Bargained Justice and a System of Efficiencies*, 2017-2018 CATO SUPREME COURT REV. 113 (2018) (discussing the various “determinative issues” that lead a defendant to plead guilty).

32 *Padilla v. Kentucky*, 559 U.S. 356, 368 (2010) (acknowledging that defendants plead guilty to avoid immigration consequences).

33 See *supra* note 12.

34 Thea Johnson, *Fictional Pleas*, IND. L. J. 855, 861 (2019) (finding that defendants plead guilty to crimes that both the defendant and the prosecutor agree that they did not commit to avoid a mandatory minimum sentence).

35 Tina M. Zottoli, Tarika Daftary-Kapur, Vanessa A. Edkins, Allison D. Redlick, Christian M. King, Lucian E. Dervan, Elizabeth Tahan, *State of the States: A Survey of Statutory Law, Regulations and Court Rules Pertaining to Guilty Pleas Across the United States*, 37 BEHAV. SCI. & LAW 388, 414 (2019) (“The majority of states (42), Washington, DC, and the federal government explicitly disallow baseless pleas. Commonly, the language dictates that that the courts must establish or find a factual basis for any guilty plea. Three states are explicit about a factual basis requirement only for specific cases, such as pleas of guilty to charges that may result in incarceration (Montana) or pleas of not guilty by reason of insanity (New York and Louisiana); Louisiana otherwise requires only that the attorney be satisfied that there is a factual or strategic basis for the plea. Idaho mentions baseless pleas only insofar as to restrict their use in juvenile proceedings, with no mention of adult proceedings. Some states, however, do not expressly require a factual basis, and two states (Colorado and South Dakota) expressly allow baseless pleas, with certain restrictions. For example, in Colorado, as long as the defendant understands the plea agreement, he or she can waive the establishment of a factual basis for the guilty plea; South Dakota allows the same for defendants who plead nolo contendere. We screened 335 cases for this topic. Most of the relevant cases dealt with adequate sources of proof for establishing the factual basis for the plea . . . , and whether the circumstances rose to the level of an injustice that would require[.]”)

36 *Padilla*, 559 U.S. at 373.

37 Vanessa A. Edkins and Lucian E. Dervan, *Freedom Now or a Future Later: Pitting the Lasting Implications of Collateral Consequences against Pretrial Detention in Decisions to Plead Guilty*, 24 PSYCH, PUB POL’Y, & LAW 204 (2018) (revealing that the rate of innocent individuals who pleaded guilty in a psychological study tripled where defendants were held pretrial).

38 Neal Marquez, Julia A. Ward, Kalind Parish, *COVID-19 Incidence and Mortality in Federal and State Prisons Compared with the US Population, April 5, 2020, to April 3, 2021*, JAMA 326(18) (2021).

39 AMERICAN BAR ASSOCIATION, Resolution 112C (2017), available at <https://www.americanbar.org/content/dam/aba/directories/policy/annual-2017/2017-am-112c.pdf>.

40 *Brady v. Maryland*, 373 U.S. 83 (1963)

41 Susan R. Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73, 76 (2015) (outlining the many typical waivers at plea bargaining, including the waiver of *Brady* material, FOIA and DNA); Carrie Johnson, *Justice Department Ends Limiting Compassionate Release in Plea Deals After NPR Story*, NPR, March 11, 2022.

42 *Berger v. United States*, 295 U.S. 78, 88 (1935).

43 The Center for Court Innovation, *Discovery Reform in New York: Major Legislative Provisions*, at 3 (May 2019), https://www.courtinnovation.org/sites/default/files/media/document/2019/Discovery-NYS_Full.pdf (“Defendants will no longer be required to consider a plea offer without knowledge of the evidence against them.”)

44 Klein, *Waiving the Criminal Justice System*, *supra* note 41, at 76 (“As we transformed from an adversary process where guilt was determined by trial to an administrative process where guilt and penalties are determined by negotiation, many prosecutors began demanding waiver of all constitutional criminal procedure rights, not just the trial and investigative-related ones inherent in replacing the trial with the plea.”).

45 Some state bar associations have held that it is unethical for a prosecutor to require a waiver of ineffective assistance of counsel at the guilty plea. *Kansas Bar: Unethical to Negotiate IAC Waiver in Plea Deal*, BLOOMBERG LAW, April 19, 2017 (noting that nineteen states have addressed the issue with all but two saying the practice is unethical).

46 CSG Justice Center, *The National Inventory of Collateral Consequences of Conviction*, available at <https://csgjusticecenter.org>.

47 Immigration and Nationality Act (INA) § 237(a)(2)(B)(i), [8 U.S.C. § 1227\(a\)\(2\)\(B\)\(i\) \(2012\)](#), gives the general grounds for drug deportability. Essentially, if a noncitizen after admission is convicted of a violation or conspiracy or attempt to violate a law related to a controlled substance, he is deportable. Controlled substance is defined under [21 U.S.C. § 802\(5\)-\(6\) \(2012\)](#) as “a drug or other substance, or immediate precursor,” included in schedule I, II, III, IV, or V of the Federal Controlled Substances Act. These laws essentially mean that possession-only offenses, including marijuana possession (under thirty grams), are considered deportable.

48 See *supra* note 46.

49 Testimony of Hon. Michael P. Donnelly.

50 Testimony of Professor Jenia I. Turner; *See also*, Jenia I. Turner, *Transparency at Plea Bargaining*, NOTRE DAME L. REV. 972 (2021).

51 Testimony of Hon. Michael P. Donnelly.

52 *Id.*

53 Hon. Michael P. Donnelly, *Sentencing by Ambush: An Insider's Perspective on Plea Bargaining Reform*, 54 AKRON L. REV. 222, 229 (2021).

54 Testimony of Juval Scott.

55 Many of these suggestions come from the testimony and research of Professor Jenia I. Turner.

56 American Bar Association, Resolution 504 and Report, available at <https://www.americanbar.org/content/dam/aba/administrative/news/2021/08/annual-meeting-resolutions/504.pdf>

57 Laura A. Bischoff, *Ohio Court Data Project Promises to Bring Transparency, Improve Justice in Felony Cases*, THE COLUMBUS DISPATCH (Oct. 4, 2021), <https://www.dispatch.com/story/news/2021/10/04/ohio-sentencing-data-platform-tested-improve-court-transparency/5992267001/>.

58 The Wilson Center for Science and Justice at Duke Law has been working with prosecutors to create plea tracking checklists and models that allow for the collection of data about the negotiation of pleas. *Wilson Center Project Takes Unprecedented Look into Plea Negotiations*, July 15, 2021, available at <https://wcsj.law.duke.edu/2021/07/wilson-center-project-takes-unprecedented-look-into-plea-negotiations/>. In Ohio, there is a judge-led effort to create uniform codes for sentencing that will allow judges to collect data on sentencing and enter it in a state-wide database. Ohio Sentencing Data Platform, available at <https://www.ohiosentencingdata.info>. Both efforts are meant to increase the transparency and fairness of the plea and sentencing process.

59 Although it is beyond the scope of the Report, we encourage stakeholders with an interest in reform and auditing structures to explore many bold ideas in this area. For instance, some scholars have suggested implementing a "trial lottery," which randomly subjects certain cases that were resolved by plea to a jury trial. Kiel Brennan-Marquez, Darryl K. Brown, & Stephen E. Henderson, *The Trial Lottery*, 56 WAKE FOREST L. REV. 1 (2021); Other scholars and advocates recommend a "second look" policy or law that would allow judges, after a reasonable time, to look at a defendant's sentence and determine whether it was fair or should be adjusted. Particularly in cases where defendants went to trial and received a harsher sentence than the plea offer, such "second look" policies could provide a remedy to a prior injustice. Nazgol Ghandnoosh, *A Second Look at Injustice*, The Sentencing Project, May 12, 2021, available at <https://www.sentencingproject.org/publications/a-second-look-at-injustice/>. Clark Neily, a member of the Task Force, has suggested several fixes for the modern plea system, including independent Plea Integrity Units, which would be responsible for reviewing and monitoring plea systems; a trial audit that would include potential professional consequences for prosecutors; and informing juries of their right to nullify as a way to reinvigorate the jury system. Clark Neily, *A Distant Mirror: American-Style Plea Bargaining Through the Eyes of a Foreign Tribunal*, 27 GEO. MASON L. REV. 719, 741-47 (2020).