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The Pros and Cons of Plea Bargaining

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THE PROS AND CONS OF PLEA BARGAINING

The following is a transcript of a 2018 Federalist Society panel entitled The Pros and Cons of Plea Bargaining. The panel originally occurred on November 15, 2018, during the National Lawyers Convention in Washington, D.C. The panelists were: Hon. Stephanos Bibas, United States Court of Appeals, Third Circuit; Gregory Brower, Shareholder, Brownstein Hyatt Farber Schreck, LLP; Carissa Byrne Hessick, Anne Shea Ransdell and William Garland "Buck" Ransdell, Jr. Distinguished Professor of Law, University of North Carolina School of Law; and Clark Neily, Vice President for Criminal Justice, Cato Institute. The moderator was the Honorable Lisa Branch of the United States Court of Appeals for the Eleventh Circuit.

[RECORDING BEGINS]

JOHN MALCOLM: So, very briefly, my name is John Malcolm. I am the Chairman of the Criminal Law Practice Group, and so this is my plug for the Practice Group. We have a very active executive committee. We put on programs and write articles on a whole variety of areas. And if you are interested in criminal law, and interested in learning more about the Practice Group, or possibly getting involved in the Practice Group, I would urge you all to catch me while I'm here during the Convention. I'm also at the Heritage Foundation. You can track me down there, and I would love to hear from you.

I'm going to turn this over, in just a moment, to my friend Judge Lisa Branch. Lisa and I have actually known each other for a number of years. We were in Atlanta together, and we came up to work in the Bush administration, and a whole contingency of us came up, and we referred to it at the time as the Atlanta Mafia. I'm, of course, here. She has gone back to Atlanta and on to greater things and is a brand-new judge on the Eleventh Circuit, Court of Appeals. So please join me in welcoming Judge Lisa Branch.

HON. LISA BRANCH: Thank you. And thank you for coming to our panel today our criminal law panel. We're going to be talking about the pros and cons of plea bargaining. Today, approximately ninety-five percent of criminal convictions are obtained through plea bargaining.[1] And our

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* The footnotes contained herein have been added by the University of Dayton Law Review for reference.

[1] Lindsey Devers, *Plea and Charge Bargaining*, BUREAU OF JUST. ASSISTANCE U.S. DEP'T OF JUST. (Jan. 24, 2011), https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf.

panelists today are going to talk about the tensions that are inherent in the increasing frequency of such a practice.

Are plea bargains a necessary part of the criminal justice system? In his dissent in *Lafler v. Cooper*, Justice Scalia noted that "[t]he ordinary criminal process has become too long, too expensive, and unpredictable."[2] But could the system function if this percentage decreases? Are plea bargains too coercive? And is there a solution that's needed? Or is there a solution that's even possible? Our panelists are going to shed light on these issues.

Greg Brower is a shareholder at Brownstein Hyatt Farber and Schreck, and he focuses on civil and criminal litigation. Most recently, he served as the Assistant Director for the Office of Congressional Affairs at the FBI. He's also served as the FBI's Deputy General Counsel, and he's had many other important roles. He was the U.S. Attorney for the District of Nevada. He served five terms in the Nevada legislature, and he's an adjunct professor of law at the University of Nevada. And before he attended law school, he served in the U.S. Navy as a surface warfare officer. Greg, as a former prosecutor, is going to be the most pro-plea bargain of the panel.

Clark Neily is the vice president for criminal justice at the Cato Institute. Before he joined Cato, he was a senior attorney and constitutional litigator at the Institute for Justice. And he's an adjunct professor at the University of Texas School of Law. He will be the most critical of plea bargains.

Professor Carissa Hessick is the Ransdell Distinguished Professor of Law at UNC Law. She clerked for Judge Barbara Jones on the Southern District of New York and Judge Randolph on the D.C. Circuit. She also has served in private practice in New York City. In her discussion today, she's going to talk about how plea bargains are not the cause of the dysfunction in the criminal justice system.

And last, but not least, Judge Stephanos Bibas. He is a judge on the U.S. Court of Appeals for the Third Circuit. He clerked for Justice Kennedy. He also served as an AUSA for the Southern District of New York, and he was a professor of law and criminology at the University of Pennsylvania Law School. He's going to focus on the balancing of these competing interests: how plea bargaining avoids democratic oversight, but also responds to problems for judges, like mandatory minimums.

And, so, with that, I will turn it over to Mr. Brower.

GREG BROWER: Well, thank you very much, Judge, and I'm sure everybody can hear me okay. And thanks, John, for kicking this off. It's great to see so many people here late in the day. I was reminded, as I walked

[2] 566 U.S. 156, 175 (2012).

in today, that this is my first time speaking on a panel at the Lawyer's Convention, but it's not my first Convention. I was able to recall that my first was the fall of 1989 when I was a 1L at GW Law here in town, and I was a volunteer here for the Convention. And so, it's been almost thirty years, and I guess that says a lot about The Federalist Society's staying power and something about me getting old as well. But it is very much a privilege for me to be here. So, thank you.

So, plea bargains. Controversial. Traditionally, law and order conservatives would like to criticize plea bargains as evincing a soft-on-crime approach by too many prosecuting offices.[3] More recently, those on the other side of the spectrum have been known to criticize plea bargains as being unfair to defendants.[4]

I would submit that neither is quite accurate. It is true, as the judge mentioned, that upwards of ninety-five percent of cases are resolved by way of plea bargains or some other type of plea.[5] It's rare to see defendants just do what we call a "straight-up" plea, but that happens from time to time. Most plea deals are done by way of a deal, a bargain.[6]

But I would submit that not only is that reality okay, but that it is actually a good thing. And in fact, I would submit that given the realities of our criminal justice system, it's more than a good thing, it's a necessary thing. The system simply could not survive, could not exist, could not be efficient without most cases being resolved by way of a plea deal.

Nevertheless, criticism persists from, as I said, the left and the right.[7] So what I thought I would do today is just tee-up a few of those critiques and try to offer my response. And then I look forward to, of course, other points of view and to questions if we have time.

So, let me talk about a few of the more popular criticisms of the system of plea bargaining. The first criticism that we hear is that the jury trial is the anchor of our criminal justice system and so the fact that there are so few jury trials means there must be something wrong with the system.[8]

Actually, I think it's more accurate to say that the *right* to a jury trial is the anchor of our criminal justice system. And that is the defendant's right,

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[3] H. Michael Steinberg, *Plea Bargaining II: A Comprehensive Look at Plea Bargaining*, COLO. CRIM. DEF. SPECIALIST, https://www.hmichaelsteinberg.com/plea-bargaining-ii-a-comprehensive-look-at-plea-bargaining.html (last visited June 15, 2020).

[4] *See* Jay Rappaport, *Plea Bargaining: An Unfair Deal*, ROOSEVELT REV., https://static1.squarespace.com/static/57689b0e197aeab794b8f733/t/57b3ec1d20099ef548475114/1471409182081/Equal+Justice_Jay+Rappaport.pdf (last visited June 15, 2020).

[5] *Id.*

[6] *See* Devers, *supra* note 1.

[7] Emily Yoffe, *The Presence of Justice: Innocence Is Irrelevant*, THE ATLANTIC (Sept. 2017), https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/.

[8] Douglas D. Guidorizzi, Comment, *Should We Really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753, 761 (1998).

as we all know.[9] The people have no right, I would submit, in seeing criminal cases tried. Of course, let me modify that. When criminal cases are tried, of course, the people have a right to see those trials.

But the people do not have a collective right that those cases be tried. It's the defendant's right.[10] And when the defendant, in agreement with the government, decides that accepting a plea deal is preferable to going to trial—again, when an agreement is reached—the right of the defendant has been satisfied.

Now, let me say that as a trial lawyer—and I've done my share of jury trials—and as a litigator, I think it's the most fun that one can have as a litigator, is to try a case. I would also observe that for each case one tries, one loses about a year of one's life on the back end.

But it's not about the prosecutors or the defense lawyers having fun. And it's really not even about, as some judges, although a minority, would suggest it's not about judges wanting to see more jury trials. It's really about the defendant's right to decide whether he or she wants to go to trial.

The second criticism we hear is that plea deals are done in the back room.[11] They're secretive, and there's no transparency.[12] For any of us who have been involved in the process, we know that that's not exactly how it works. There may be backroom negotiating, but there inevitably is, with every plea bargain, an on-the-record, in-open-court recitation of the deal; with very careful cross-examination by the judge of the defendant in terms of the voluntariness of the plea, and the details of the plea; and, at the end of the day, approval by the judge of the deal.[13] So at the end of the process, it is a very transparent, on-the-record, in-open-court, part-of-the-docket process.

Third, there is the criticism that plea deals are somehow coercive and, as a result, unfair as against the defendant.[14] And I just have to say, in my experience, I've not seen that. I've heard about it. It no doubt happens from time to time. Probably at the state level more than the federal level. But it is a rare, rare thing, I would submit, at the federal level.

The fundamental reasons why it's rare is because DOJ policy prohibits it and ethical rules also prohibit it.[15] So the AUSA who tries to

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[9] U.S. CONST. amend. VI.; *see also* Lewis v. United States, 518 U.S. 322, 327 (1996).

[10] U.S. CONST. amend. VI.

[11] *See* Daniel S. McConkie, *Judges as Framers of Plea Bargaining*, 26 STAN. L. & POL'Y REV. 61, 82 (2015).

[12] *Id.*

[13] *Id.* at 63, 67, 70.

[14] *Id.* at 76–78.

[15] *See generally Principles of Federal Prosecution*, U.S. DEP'T OF JUST., https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution#9-27.400 (last visited June 15, 2020); Richard Klein, *Due Process Denied: Judicial Coercion in the Plea Bargaining Process*, 32 HOFSTRA L. REV. 1349, 1361 (2004).

engage in coercive plea bargaining will likely be revealed to be engaged in such an improper practice, and won't get away with it, and won't be around long. And so, it's just not something, I think, that is a problem such that it suggests there's a problem with the system.

So, the bottom line, for me, is that the Constitution provides, in two ways, for the propriety of plea bargains. The first is that, given the Constitution's separation of powers, it is, as we all know, exclusively within the executive branch—the decisions with respect to how to prosecute, when to prosecute, and whom to prosecute are exclusively within the executive branch's power.

And secondly, the right to go to trial—the criminal defendant's right, the constitutional right—is exclusively with the defendant.[16] And so between those two constitutional realities, I would suggest that the right to plea bargain is something that is constitutionally sound and, moreover, it is something that common sense and the reality of our criminal justice system mandate be available to the parties in every criminal case.

Thank you very much.

HON. LISA BRANCH: Thank you, Greg. And now we will turn to Mr. Neily.

CLARK NEILY: Well, thank you. I really appreciate the opportunity to be here. I don't know if anybody remembers Joe Pesci's opening argument in *My Cousin Vinny*, but I want to assure you that that is not going to be my opening argument in this case. [Laughter]

The status of the jury trial in American law is somewhat unique. Article III, Section 2 provides that "[t]he trial of all crimes shall . . . be by jury."[17] The Bill of Rights spends more words on the subject of juries than any other topic. The right to a jury trial is the *only* right that is mentioned both in the body of the Constitution and in the Bill of Rights.[18]

It is literally impossible to overstate the Founders' commitment to the proposition that the administration of criminal justice should be one in which the public is intimately involved.[19] Intimately involved. It depends on public participation for legitimacy, for transparency, for accountability, and for people to have faith in the integrity of the system.

I want to read a quote from the Supreme Court in a case called *In Re*

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[16] U.S. CONST. amend. VI.; *see also* Lewis v. United States, 518 U.S. 322, 327 (1996).

[17] U.S. CONST. art. III, § 2.

[18] *Id.*; U.S. CONST. amend. VI.

[19] *See Sixth Amendment: Rights of the Accused in Criminal Prosecutions*, GOV'T PUB. OFF., https://www.govinfo.gov/content/pkg/GPO-CONAN-REV-2016/pdf/GPO-CONAN-REV-2016-10-7.pdf (last visited June 15, 2020).

Winship from 1970.[20] The Court said, "It is critical that the moral force of the criminal law not be diluted by a standard of proof [or a procedure for conviction] that leaves people in doubt [about] whether innocent men are being condemned."[21] And we know, to an absolute certainty, that innocent people routinely plead guilty to crimes in America. And I'll get to how we know that in a moment, but it is absolutely true, and that's problematic.

I want to read another quote. I was actually just chatting with Judge Elrod out in the hallway, and I had the great pleasure of being able to tell her that I had literally, this morning, copied out of a judicial opinion, a quote—not her opinion, another opinion—a quote from a 2011 law review article that she wrote responding to the assertion that the criminal justice system would essentially grind to a halt without plea bargaining. And here's what Judge Elrod said about that: "[W]hen the myth of backlogged courts is raised as a reason for forsaking the jury, we must correct them."[22] It is not the case that America's criminal justice system would come to a grinding halt without plea bargaining. It is simply the case that plea bargaining is more efficient than jury trials are.[23]

Well, there's no question about that. But the question is whether that is a feature or a bug. And I submit that the Founders would clearly have said that it is not a feature but that it is a bug. Let me say this, about plea bargaining: it was unknown at the founding era.[24] It is virtually alien to the entire history of the common law.[25] By the way, it was well known on the continent where judicially sanctioned torture was permitted through much of the middle ages.[26] They know a lot about plea bargaining on the continent, but not in Anglo-American law.

And I want to just quickly run through what some of the problems are. Let's talk about, just first, these numbers: ninety-seven percent of all federal criminal convictions are obtained through a plea bargain.[27] Is that not an incredibly suspicious number? Why on earth are so few people interested in exercising one of the most hallowed and hard-won rights in the entire Constitution?

I too got my start as a trial lawyer. I have tried cases to a jury. I understand that they can sometimes be unpredictable, and they are certainly

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[20] 397 U.S. 358 (1970).

[21] *Id.* at 364.

[22] Jennifer Walker Elrod, *W(h)ither the Jury? The Diminishing Role of the Jury Trial in Our Legal System*, 68 WASHINGTON & LEE L. REV. 3, 22 (2011).

[23] *Id.*

[24] Clark Neily, *Bring Back the Jury Trial*, GEO. L. (Sept. 17, 2018), https://www.law.georgetown.edu/public-policy-journal/blog/bring-back-the-jury-trial/.

[25] Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUMBIA L. REV. 1, 4 (Jan. 1979).

[26] Mirjan R. Damaska, *The Death of Legal Torture*, 87 YALE L.J. 860, 862 (1978).

[27] Innocence Staff, *Report: Guilty Pleas on the Rise, Criminal Trials on the Decline*, INNOCENCE PROJECT (Aug. 7, 2018), https://www.innocenceproject.org/guilty-pleas-on-the-rise-criminal-trials-on-the-decline/.

inefficient. But to the party that does not bear the burden of proof, a trial is extraordinarily beneficial. All kinds of things can happen that can cause your opponent to fail to carry their burden, especially when it's a burden of proof beyond a reasonable doubt. Witnesses can forget or not show up. The chain of custody can be broken. Juries can just take an unpredicted liking to one of the parties. So, there's lots of reasons why you would go to trial even if you were guilty.

So why do so few people in our system go to trial anymore? And there's one word—there's exactly one word—that explains why, and that is *coercion*. The lifeblood of American criminal justice today is coercion.

It is very difficult to define the difference between an appropriately attractive inducement on the one hand and an inappropriately coercive offer on the other. But let me give you one example.

There was a young man who was an internet genius named Aaron Swartz. He helped invent Reddit when he was nineteen years old.[28] He, as a graduate student at Harvard, had access to the JSTOR database, the academic database. He was only allowed to download three articles per day. He felt that the result was that a bunch of human knowledge was being held up behind this arbitrary dam. And so, he created a computer program to download, essentially, the entire body of articles from JSTOR.[29] He broke into a computer closet at MIT, hooked up a laptop, and began running the program.[30]

He was originally prosecuted by the Commonwealth of Massachusetts, but then the federal government took over.[31] By the time they got done charging Aaron Swartz, he was facing a thirteen-count-federal indictment that exposed him to thirty-five years in prison and a $1,000,000 fine.[32]

Does anybody know what his plea offer was? Six months.[33] Six months. Tell me that's not coercive. By the way, we don't know what his

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[28] Mari Marcel Thekaekara, *A Tribute to Aaron Swartz*, NEW INTERNATIONALIST (Jan. 18, 2013), https://newint.org/blog/majority/2013/01/18/aaron-swartz-tribute.

[29] Walter Pavlo, *Remembering Aaron Swartz and His Influence on Reforming Criminal Justice*, FORBES (Jan. 11, 2019), https://www.forbes.com/sites/walterpavlo/2019/01/11/remembering-aaron-swartz-and-his-influence-on-reforming-criminal-justice/#1b4e29fb144c.

[30] Noam Scheiber, *The Inside Story of Why Aaron Swartz Broke into MIT and JSTOR*, TNR (Feb. 13, 2013), https://newrepublic.com/article/112418/aaron-swartz-suicide-why-he-broke-jstor-and-mit.

[31] Declan McCullagh, *Swartz Didn't Face Prison Until Feds Took Over Case, Report Says*, CNET (Jan. 25, 2013, 1:14 PM), https://www.cnet.com/news/swartz-didnt-face-prison-until-feds-took-over-case-report-says/.

[32] Press Release, U.S. Attorney's Off., Dist. of Mass., Alleged Hacker Charged with Stealing Over Four Million Documents from MIT Network (July 19, 2011), https://web.archive.org/web/20120526080523/http:/www.justice.gov/usao/ma/news/2011/July/SwartzAaronPR.html; Kevin Cullen & John R. Ellement, *MIT Hacking Case Lawyer Says Aaron Swartz Was Offered Plea Deal of Six Months Behind Bars*, BOS. GLOBE (Jan. 14, 2013), https://www.boston.com/uncategorized/noprimarytagmatch/2013/01/14/mit-hacking-case-lawyer-says-aaron-swartz-was-offered-plea-deal-of-six-months-behind-bars.

[33] Cullen & Ellement, *supra* note 32.

sentence was because he killed himself during plea negotiations.[34]

What makes plea bargaining coercive? Well, there's a number of factors that come together. I don't have time to go through all of them. But the three major factors are these. First, pre-trial detention. If you are sitting in Riker's Island, which is hell on earth, having a very difficult time connecting with your defense counsel, helping to participate in your defense, finding documents, identifying witnesses, sharing phone numbers, etc., just getting a face-to-face meeting is very difficult. It's hard to participate in a vigorous defense. It's also a very, very unpleasant place to be.

Second, we have woefully inadequate defense counsel in most jurisdictions. Eighty percent of people who are prosecuted in America have a public defender, and in many jurisdictions, they are wildly under-resourced.[35] And here's a secret—conflicted. Why? Because they have to maintain a good relationship with the prosecutors in that jurisdiction. Why? To ensure they get favorable plea offers for all of their clients. So, it can be dangerous for a public defender to dig in hard, or too hard in some cases.

And finally, we have the infamous trial penalty, which is the difference between the sentence that you are offered if you take the plea, and the sentence that will be imposed if you go to trial and lose.[36] And the National Association of Criminal Defense Lawyers just came out with a study this year called *The Trial Penalty*.[37] Look it up. Read it. You should know about it. If you are an American citizen, you should know about the trial penalty. It is horrifying.

Alright. So what problems are there with coercive plea bargaining? Well, first, there's the innocence problem I alluded to before. What percentage of people who plead guilty to crimes are, in fact, innocent? The answer, of course, is we have no idea.

The innocence project has exonerated about 300 people using DNA evidence.[38] That's not perfect, but it's as close as we can get in our system. Fully, twenty-eight percent of those 300 exonerees confessed to crimes that

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[34] Verena Dobnik, *Reddit Co-founder Dies in N.Y. Weeks Before Trial*, USA TODAY, https://www.usatoday.com/story/tech/2013/01/13/swartz-reddit-new-york-trial/1830037/ (last updated Jan. 14, 2019, 2:56 AM).

[35] Alexa Van Brunt, *Poor People Rely on Public Defenders Who Are Too Overworked to Defend Them*, THE GUARDIAN (June 17, 2015), https://www.theguardian.com/commentisfree/2015/jun/17/poor-rely-public-defenders-too-overworked.

[36] *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, NAT'L ASSOC. OF CRIM. DEF. L. (2018), https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf.

[37] *See generally id.*

[38] *DNA Exonerations in the United States*, INNOCENCE PROJECT, https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited June 15, 2020).

they did not commit.[39] A deeply, deeply troubling number.

Another problem is a supra-optimal amount of prosecution. As I suggested earlier, the inefficiency of jury trials is not a bug, it is a feature of the system. It imposes discipline, or is meant to impose discipline, on the prosecution about what cases they bring, and only bring the most serious cases against the people who really shouldn't be out on the street. There, also, are problems with accountability and transparency that we can get into in a moment.

And finally, legitimacy: a system in which we cannot have faith in the integrity of any particular conviction. And I would say that a conviction that is obtained through plea negotiations that take place behind closed doors, and where the government is not required to put its evidence out in public for all of us to see, is a process in which we cannot have faith in the integrity of any particular conviction, and that is a huge problem for the legitimacy of the system. Thank you.

HON. LISA BRANCH: Thank you, Clark. I feel certain that, at the end, we're going to want to turn back to Mr. Brower. I feel certain you may have some things you want to say.

GREG BROWER: I took some notes.

HON. LISA BRANCH: [Laughter] Great. We're going to turn it over to Professor Hessick now.

CARISSA HESSICK: Great. Thank you very much, Judge Branch, and thank you all very much for being here today. I'm working on a big project about plea bargaining, and I've just been annoying my friends and family talking to them, and now you can all share in that, and maybe I can talk about something else at dinner.

So, I agree with a lot of what Clark had to say. I consider myself to be a critic of the plea-bargaining system that we have in this country. But I think that I view it through a slightly different lens than he does.

So, for example, I don't think that the problem is simply defendants who are facing incredibly, incredibly long sentences who are offered incredibly, incredibly short sentences. Like the example that he gave of the young man who had downloaded all of the documents from JSTOR.[40]

For this book project I'm working on, I was speaking to a public defender in the Bronx, and he told me that he has never been able to convince a client to reject a plea deal, no matter how bad that plea deal was, if it included immediate release from detention.

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[39] *Id.*

[40] *See generally* Pavlo, *supra* note 29.

He told me specifically about one client, who, because he was on probation, if he pleaded guilty without trying to negotiate further and get the charge dropped down from a misdemeanor to a—I forget what it's called. Like a sanction. Essentially to a ticket. Something that the defense attorney thought that he'd be able to do, but he needed two more days. He wouldn't stay in jail for two more days knowing he would be revoked on probation for another case that he was on. He ended up spending an additional year in prison.

I give that example because I think when most people talk about plea bargaining, they want to think about plea bargaining in terms of the rational actor. They want to say we should only have plea bargains where a rational innocent person wouldn't take them. I'm just not so sure that we can use the frame of rationality when we're talking about these sorts of things.

I think that we have to be worried about the idea that defendants are acting irrationally. And we should be especially concerned about that because the idea of plea bargaining is premised on the idea of negotiation and contract.[41] And if we know—if we have very good evidence—that one side in that negotiation is not looking out for their own interests, then maybe we should stop thinking of it as a negotiation and a contract.

I also think about plea bargaining, not just as something that's problematic in individual cases, but I think about it in terms of a culture. We have a system of plea bargaining not just because of the statistics that have been mentioned, but because the default assumption in our system is that a case will be negotiated, that a defendant will take a guilty plea, and that a trial will not occur.

So another story from the book. There's a young man: relatively recent graduate from law school, went to go work for a public defender's office. As he was negotiating with the prosecutor, if he didn't get a good enough deal for his client, he would set the case for trial. Pandemonium ensued. The prosecutor's office was very upset, but so was the public defender's office.

His supervisors came to him, and said, "What are you doing?" He's like, "I'm setting these cases for trial." They're like, "Why are you doing that?" He's like, "Well, I can't get a good plea offer from the prosecutors." They're like, "Right, but you're setting them for trial," and he's like, "Right. Isn't that what we're supposed to do if we can't get a good enough plea bargain?" And they said, "No. That's not what we're supposed to do. Our office can't do that. The prosecutors will be angry with us. The *judges* will be angry with us. That's not what you do." And so, he got moved to appeals,

[41] *See generally* Robert R. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 8 YALE L.J. 1909 (1992).

and now he's very happy. [Laughter]

But I do want to be clear, the problem with plea bargaining isn't new.[42] The assumption that cases will plead isn't new. It's gotten worse. The percentages that Clark mentioned have gone up. But the assumption that cases would plead has been around for quite some time.

So, Albert Alschuler, he's a law professor. He did this big study of plea bargaining in the '70s and the '80s.[43] And he'd go around the courtrooms—and he tells this story of multiple judges telling defendants, "Look, the prosecutor's given you an offer." This wasn't mandatory minimums. This wasn't sentencing guidelines. This was before all of that. "And so, the prosecutor's giving you an offer. If you plead guilty, I will give you this sentence. If you go to trial, and the jury convicts you, I will give you this sentence."

And the only reason, I think, that judges could do that—because I think most judges are good people and don't think of themselves as sitting around violating people's rights—is that we actually assume that most cases will plead guilty. We assume that that's what's going to happen in particular cases. And the sentences that we give out to people for pleading guilty are actually the sentences that we think are appropriate.

Now, here's where I do disagree with Clark. I think that Clark thinks what we need to do is we need to get rid of plea bargaining, or we need to just take steps that will discourage plea bargaining. Okay. He and I will fight about this later at the reception if you guys want to come find us. [Laughter]

Here's my concern. Look, I think plea bargaining is a big problem. I'm writing a whole book about it. But I don't think that it's our only problem, and if we were to get rid of plea bargaining, I don't think that it would really fix the criminal justice system. In fact, it could very well make things worse. The really harsh sentences that we have enacted, the mandatory minimums, they'd apply to a whole bunch of people and not just the people who decided to go to trial.

The defense attorneys, who don't have the time and resources to plea bargain cases, certainly aren't going to have the time and resources to bring those cases to trial. I'm actually just not sure that trials are a panacea.

So last story from the book, I promise. A couple of weeks ago I was out in Western North Carolina interviewing a man who pleaded guilty to a crime he didn't commit. A murder. He pleaded guilty to a murder that he didn't commit. And we go through the whole interview, and at the very end,

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[42] *See* Jon'a F. Meyer, *Plea Bargaining*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/plea-bargaining (last updated Oct. 17, 2019).

[43] *See generally* Alschuler, *supra* note 25, at 1.

I think to myself, "Oh, I forgot to ask the golden question. I've got to get the sound bite." And I say to him "Do you regret pleading guilty?" And he said, "No." And I was shocked. And I was like, "I don't understand. Why do you not regret pleading guilty? You didn't commit this crime."

And he really didn't commit the crime. He's subsequently been exonerated. They found DNA evidence. His conviction was vacated. The actual murderer has been found. He did not do it. And I was just flummoxed. How on earth could he not regret pleading guilty to a crime he didn't commit?

He said he expected that he would've been convicted. He—to this day—thinks that he would have been convicted had he gone to trial. His only regret was that he didn't get a better plea bargain from the prosecutors. He didn't trust the system to sort the innocent from the guilty, and you know what? I'm not so sure he's wrong. He's a poor kid in Western North Carolina with a court-appointed attorney who told him he'd taken three cases like that to trial before and lost.

I don't think that plea bargaining is very good, but I don't think that we should kid ourselves that trials are magic and that they necessarily allow us to figure out who's innocent and who's guilty. Guilty people get acquitted and innocent people get convicted. The ninety percent of other people on the Innocence Project's website, they went to trial, and they didn't do it, and they got convicted.

So, I guess my point is—I'll end on a very happy note by saying plea bargaining is bad; other things are also very bad. [Laughter]

HON. LISA BRANCH: Thank you, Carissa. Clark may have a response to you later. But we'll get to that in a second. Let me turn, last but not least, to Judge Bibas.

HON. STEPHANOS BIBAS: Thank you. How many of you have seen those black-and-white drawings or illusions where you look at it one way, it's a rabbit, the other way, it's a duck? Plea bargaining is like that.

People in The Federalist Society tend to be pretty supportive of free-market logic. It seems pretty intuitive. But we also get the idea of separation of powers, checks and balances, and the rule of law for individual liberty. And so, I think a lot of you in this room can see both sides of why I think Mr. Brower and Mr. Neily are both right. But it depends on how you look at it. And we should not be so troubled from one point of view and pretty troubled from another point of view.

So first, the private-market perspective: Plea bargaining makes all the people in the courtroom better off. The defendant gets a lower sentence. He gets his case over with. He gets predictability. The prosecutor gets to pursue more cases, ensure more public safety. The judge clears his or her docket.

What's there not to like? In terms of coercion, private-market transactions make parties better off. It's Economics 101, right? Well, how could anyone argue with that?

Well, here's the other thing. We're not selling a sack of potatoes. We're selling justice. So, from the private-market perspective, it can't be coercive if people agree to it. From a public-governance perspective, and from the point of view of the outsiders, the victims, the citizens who are wondering what's going on here, it looks pretty different.

So, you heard there was a discussion about whether or not this is consistent with the Constitution. Well, the Sixth Amendment says the defendant has a right.[44] Mr. Brower says it's waivable. But Article III, Section 2 doesn't say the defendant shall have the right. It says: "[t]he trial of all [criminal cases] . . . *shall* be by jury."[45] The wording is non-waivable in the body of the Constitution.

Then you look at secrecy. Well, to the people inside the process—I was a prosecutor. The prosecutors understand. The defense lawyers understand. The judges understand. I'm not so sure the defendants always understand what's going on. But the victims and the public wonder "Why has my case been bartered away? Did I have any say? Did I understand what's going on?" So it depends on who's looking at it.

Take this issue of what's coercive. Again, to market participants inside the system, from a lawyer's point of view, it's not coercive, better off. But what about a different definition of coercion? What about taking Professor Hessick's point? Who's setting the baseline here? Well, when prosecutors persuade legislatures to stack up more sentences, they stack up more plea-bargaining chips.

If your baseline were a retributively proportional sentence, yeah, you'd just look at it as a discount that makes people better off. But when the person who's bargaining has influence over what the baseline sentence is, suddenly you're in a world where, as Professor Hessick said, the default sentence is not "What was the right sentence for someone who went to trial?" but "What's the right sentence for someone who pleads guilty?" And then we're going to over-punish the few people who are obstinate enough to go to trial.

And I think that the fact that it is rational for a number of innocent people to plead guilty should be a canary in the coal mine. I probably wouldn't have a lot of problems with plea bargaining if the discount were really proportional to the chance of acquittal and the time saved. A modest discount—ten percent, twenty percent—is probably not going to tempt

[44] U.S. CONST. amend. VI.
[45] U.S. CONST. art. III, § 2.

innocent people to plead guilty.

But there are plenty of cases out there, like the case of Weldon Angelos out in Utah.[46] The prosecutors were happy to take a plea to fifteen years.[47] But the defendant refused to play ball, and suddenly it was a fifty-five-year sentence he was looking at after trial because of stacking mandatory minima, and enhancements, and things like that.[48] So the power over the baseline should give us pause. Is the baseline retributive or is the baseline purely being used to stack up plea-bargaining chips?

And what's troubling about this is: the way that the Constitution sets up its criminal justice system creates a popular check on all three branches of government. The legislature can criminalize something, but the jury has to make sure it fits. The prosecutor can push it ahead for this defendant, but the jury can say no. And the judge doesn't get to direct a verdict of guilty. So, all three branches, still, are subject to a communal check. Someone who's not professionalized; someone who's not jaded.

And that has some public benefits. The quotation from *Winship*, I thought, was apposite.[49] But there's the benefit of seeing justice done, of having one's day in court. And there's the benefit of making sure there are adversarial checks on what actually happened so the truth wins out.

Prosecutors understand this. To non-lawyers, to victims, to members of the public, to a fair number of defendants and their families, the system looks hidden; it looks insular.

And there's a lot of discretion. I'm not so troubled by discretion per se. What troubles me is idiosyncratic, unchecked discretion. If the discretion is reviewable, if it's tethered to common-sense notions of blame and culpability that are verified through a fact-finding process, I'm not so troubled. We historically did that through the adversarial process. But we've bypassed that in most cases. It's kind of a bastardized inquisitorial process, some scholars argue. But it doesn't really have the checks of continental inquisitorial system either because it doesn't really involve a neutral adjudicator.

Again, I'm less troubled in some categories of cases than others. I was a little surprised that Mr. Brower and I both served in the federal system. Mr. Brower thought the problems were fewer in the federal. I'm going to suggest some reasons why I think the problems are worse in the federal system than the state system. First of all, the sentences are higher, a lot higher, in the

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[46] *Weldon Angelos*, FAMM, https://famm.org/stories/weldon-angelos/ (last visited June 15, 2020).

[47] *See* Letter from Lawrence J. Leiser Woodbridge, Vice President of the Nat'l Ass'n of Assistant U.S. Attorneys, to Editor of The Washington Post, https://www.washingtonpost.com/opinions/mr-angelos-is-responsible-for-his-sentence/2015/12/28/001ca872-acb7-11e5-b281-43c0b56f61fa_story.html.

[48] *Id.*

[49] In re Winship, 397 U.S. 358, 354 (1970).

federal system.[50] And there are more mandatory minima, which I'm going to come back to, and recidivism enhancements and the like.[51]

Second, more importantly, the bread and butter of what state courts deal with are *mala in se*, inherently wrongful actions. There's an intuitive sense of justice the individual prosecutor has, that the prosecutor's supervisor has, that the victim has, that the judge has, that they constrain the prosecutor from giving away the store in a murder case, for example, right?

In federal court, a lot of what we're dealing with are *mala prohibita*. There's widely, much more widely, varying perceptions of how wrongful the acts are. So, there's not the same kind of intuitive, shared baseline—that Paul Robinson and psychologists and people have documented—that we all share our sense of how much punishment this should get.[52] And that probably has some tempering effect in a state system with *mala in se*, without a lot of sentencing rules.

The other reason that there are more checks in the state systems is the states, some of them, don't have sentencing guidelines.[53] And those that do, don't tend to have ones that are as rigid as the federal ones are. Even post-*Booker*, the federal guidelines still pack a lot of punch.[54] More than in most states, as I understand it.

So, the moral of the story is, I don't think we're getting rid of plea bargaining. And I'm too realistic to suggest otherwise. I also don't think all pleas are bad, but I think the amount of leverage that goes way out of proportion or retributive culpability is the kind of thing we ought to check and balance.

So, judges are one possible check. Judges at sentencing do much more in state systems than federal systems do. And other possible checks are how could we have some jury-like input into the system? I don't think we're re-creating jury trials for ninety-five percent of cases. And I do think there's something to the critique that we've made jury trials so long, and so cumbersome, and so ornate that we can't afford to give them to people. But I also seriously doubt, with the precedents and all, that we're ever going to the streamlined jury trials of the 18th century.

So, could we think about sentencing juries? Could we think about

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[50] Stephen F. Smith, *Federalization's Folly*, 56 SAN DIEGO L. REV. 31, 40 (2019).

[51] *Id.* at 40–41.

[52] *See, e.g.*, Paul H. Robinson & Robert Kurzban, *Concordance & Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829 (2007).

[53] *Assessing Consistency and Fairness in Sentencing: A Comparative Study in Three States*, NAT'L CTR. FOR STATE COURTS, https://www.ncsc.org/~/media/Microsites/Files/CSI/Assessing%20Consistency.ashx (last visited Mar. 17, 2020).

[54] *See* Robert J. Annello & Richard F. Albert, *Life After 'Booker': Insights from Federal Sentencing Data*, N.Y. L.J. (Aug. 14, 2018, 3:16 PM), https://www.law.com/newyorklawjournal/2018/08/14/life-after-booker-insights-from-federal-sentencing-data/?slreturn=20190828140853.

sentencing juries for sentences over a certain level? Are there ways in which we could husband our criminal justice punishment and stigma for the more serious cases and triage more of them out of the criminal system? Or could we at least use pre-trial probation to hold it over people's heads such that they're not going to get the book thrown at them unless they persist in crime? In the state system, if you've had a minor crime, that might be enough of a deterrent to going and committing a more serious crime. I don't have the answers here.

The point is the Framers had their eye on the dangers of royal oppression, and they're not exactly the same.[55] History doesn't repeat itself, but sometimes it rhymes. And I understand why some people fear that this hidden, low-visibility discretion that's largely unchecked without a lot of rules and standards is something to be feared and something that occasionally results in abuse or even the conviction of the innocent.

HON. LISA BRANCH: Thank you, Judge. And because you had to go first, Mr. Brower, why don't we offer you a rebuttal?

GREG BROWER: Sure. Sure. Thank you very much, Judge. And thank you for those perspectives. Let me try to just hit on a few points that were mentioned, and then we'll do some Q & A.

With respect to the public participation issue that has been raised, as I mentioned at the outset, it is nice, in theory, that we would have more trials, that the populous would be more engaged in serving on juries and watching trials, etc. And that was a big point as many of you I'm sure know in—that Judge Goodwin from West Virginia has made in a couple of decisions in which he's rejected plea deals in drug cases.[56]

But again, there is no constitutional right that belongs to the people to watch jury trials or to have them happen in cases where the parties don't want to have them happen.[57] And let's face it—and this may sound a little cynical—but those of us who have made our livings in and around the courthouses know this to be true: if we were all of a sudden to have ninety percent jury trials as opposed to ninety percent guilty pleas, no one would show up to watch those trials.

The typical trial includes in the audience, maybe, one of the lawyer's mothers, and a couple of interested people who may have wandered by, and maybe a couple of high school students who were there to get extra credit for their civics class. But there's not a clamor, I would respectfully submit, on

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[55] RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 98 (Harv. Univ. Press, 1973).

[56] Lacie Pierson, *Federal Judge Rejects Plea Deal in Second Drug Trafficking Case*, GAZETTE-MAIL (Oct. 11, 2017), https://www.wvgazettemail.com/news/legal_affairs/federal-judge-rejects-plea-deal-in-second-drug-trafficking-case/article_4cb0cc96-8f9b-5d1b-82da-f2bd362d9369.html.

[57] U.S. CONST. amend. VI; U.S. CONST. art. III, § 2.

the part of the public to be able to watch more jury trials.

In fact, if you've ever encountered a friend or a neighbor who received a jury summons to serve on a jury, what's the first thing you hear? A complaint about having to serve on the jury. Forget about them going to watch one voluntarily. So, I just think again, though, all snarkiness aside, it's a matter of a defendant's right, not the public's right, that we're talking about here.

The innocent defendant's "problem"—I'll put that in quotes—is troubling, to say the least, to the extent it occurs, and we know it does occur, but in very, very isolated situations. It's a one-off. It's an anomaly. It's not, by any stretch, the norm. Certainly not in the federal system. And I would submit in the state system it's far from the norm as well. That doesn't mean it's not a problem when it does exist, but it's not a problem that, in my view, results from the proliferation of plea bargaining.

With respect to the coercive argument, what makes some deals seem coercive—because of the great disparity between the sentence agreed to, or the charge agreed to, and the potential charges, and the potential sentence—is simply a function of what the statute—the relevant statute provides, combined with what the sentencing guidelines suggest. You put those two things together, and if you have multiple counts, that's a big number.

The fact that the prosecution is oftentimes—most oftentimes—willing to accept a smaller number for the certainty of a plea, in my mind, doesn't constitute a defect in the system. In fact, that's a very good thing for most defendants to have the ability to not face the maximum possible sentence and instead agree to something that's much, much more reasonable and less onerous.

The public defenders' issue is interesting to me because I can tell you and I'm sure Judge Bibas had a similar experience with public defenders in the Southern District. They are, for the most part, very good, very aggressive lawyers for whom I have the utmost respect. They weren't afraid of me when I was U.S. Attorney. They weren't afraid of my AUSAs. And they were not afraid of the judges. If they thought a case had to be tried, they tried it. Even if they thought the case couldn't be tried or shouldn't be tried, but their client wouldn't agree to a plea, they tried it. They did their best.

The last case I tried personally as U.S. Attorney was a bank robbery case. The defendant, long story short, had robbed, I think, three banks, a credit union, two 7-Elevens, and a casino cage—this was in Las Vegas—in the span of about a week. Most of those robberies were captured on surveillance video. Public defender couldn't get his guy to plea, and it went to trial. Judge wasn't unhappy. He just saw it as part of the job. It's probably a slam-dunk winner for the government, but if the defendant wants to try it,

let's try it.

So, I just don't think there's this built-in resentment or reluctance on the part of the system participants—the judge, the government, the public defender's office—to take cases to trial when the defendant wants to exercise that right.

The trial penalty issue is interesting as well. So as much as there arguably is a trial penalty, there's also a trial bonus. And we've eluded to that. If the defendant feels as though he or she is innocent and wants to go to trial—yeah, the odds are stacked against the defendant in most criminal cases.

But there's a case right now somewhere in this country where a jury's deliberating, and it looked like it was probably going to be a slam-dunk for the government, and that defendant's going to be acquitted today. It happens all the time. And so, that's the trial bonus, I would submit, that exists when a defendant exercises his or her right to go to trial.

I would also point out that what we haven't talked about here—and I know there's a difference here, so I want to acknowledge that right up front. In the civil system, the civil litigation system, mandatory settlement conferences, and mediations, and everything that can be done to try to get the parties to settle their disputes is just part of the system now.[58]

And if someone were to suggest, "Well, too many civil cases are settling,"—and it's also ninety percent plus—I think that would be laughable, right? We all like the idea that civil cases typically settle. It's more efficient. And some would say, "Well, in the criminal system, the difference is, of course, we're talking about somebody's liberty." But again, I get back to that *someone* is the defendant, and it is his or her right to decide whether to roll the dice or to work out a deal.

And so, finally, I would—let me just look at my notes here. I don't want to go on too long. The Sixth Amendment issue. So the Sixth Amendment provides for a trial by jury, but case law, of course, as we all know, has over time really explained that to mean that in serious felonies there's a jury-trial right.[59] And even then, the defendant can waive their right to a jury trial and choose a bench trial.[60] But even then, the defendant can simply accept a deal and avoid trial altogether.[61]

So, the Sixth Amendment, I think it's clear, does not mandate that criminal cases be tried against the wishes of the defendant. So again, I would just finally submit that the bottom line is that with no constitutional defect

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[58] *Civil Cases*, U.S. COURTS, https://www.uscourts.gov/about-federal-courts/types-cases/civil-cases (last visited June 15, 2020).

[59] Lewis v. United States, 518 U.S. 322, 327 (1996).

[60] Schick v. United States, 195 U.S. 65, 71 (1904).

[61] *See* Devers, *supra* note 1.

undermining the plea-bargaining system, that common sense and the simple realities of our system dictate that it has to be part of the system, and it has to be up to the parties, with approval by the court, as an option in every criminal case.

HON. LISA BRANCH: Thank you. And now for the panelists. Do you have any questions you would like to ask each other?

CARISSA HESSICK: I'd be curious what the ethics rules and the DOJ rules are that Greg referred to.

GREG BROWER: Yeah, sure. Just in general, I would say that the ethical rule is that a lawyer simply can't charge a case without having the evidence to support that case.[62] And that's just, I think, fundamental. And I wouldn't want to be the AUSA who goes before DOJ's OPR for having indicted cases with no evidence. And that's just, I think, Ethics 101.

And beyond that, look, the department policy—unless it's changed recently, and I don't think it has—it has for some time been that the U.S. attorneys will charge the most serious readily provable offense that they can.[63] No less and no more.

And so, within those confines, the idea of overcharging or charging to obtain leverage, despite not having the facts to prove those counts to trial, is simply unethical.

CARISSA HESSICK: So, I think I'd just add, I think, when Clark and others use the phrase "coercive pleas," they're not talking about prosecutors who are making up facts that don't exist. Instead, they're talking about prosecutors who are threatening to bring charges that they otherwise wouldn't bring or offering to dismiss charges that they aren't actually interested in getting convictions for in order to pressure people to plead.

So, for example, the U.S. Sentencing Commission issued a report a few years ago on child pornography offenses, because there's this weird thing where possession of child pornography has no mandatory minimum, but receipt of child pornography has a five-year mandatory minimum.[64] Can you possess child pornography without having knowingly received it? I don't know. That sounds like a fun law school hypothetical.

The point is, the Sentencing Commission, they did a huge study of thousands of cases across the country.[65] And they found the only distinctive

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[62] *Criminal Justice Standards for the Prosecution Function*, A.B.A. (Nov. 12, 2018), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/.

[63] *See Principles of Federal Prosecution*, *supra* note 15.

[64] 18 U.S.C. § 2252(b)(1)–(2) (2012).

[65] *See generally An Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System*, U.S. SENTENCING COMM'N (July 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf.

factor—the only thing that distinguished possession cases from receipt cases, as charged by U.S. attorneys offices' across the entire country—was how quickly the defendant offered to plead guilty.

And from my perspective, that suggests that (a) they're not following the most serious readily provable offense, and (b) that that charge is being used only to pressure people to plead guilty. And I haven't seen the Sentencing Commission do a similar study about 924(c) charges.[66] That's the additional five-year mandatory minimum that has to run consecutively to any sentence if you use a—or possess a gun in connection with a drug crime or what have you.[67]

But when I was clerking, that was the only time that those charges showed up. They showed up in superseding indictments where people wouldn't plead to everything.

HON. STEPHANOS BIBAS: I'll just add, there's another common tactic—federal prosecutors all know about the phone count.[68] This almost never gets charged against a defendant initially. What happens is the defendant is charged with actual drug dealing, and then when he agrees to plead guilty, there's a superseding indictment where he pleads guilty to using a phone in a drug deal. And the only reason for that is the phone count has—at the time, I think, it was a four-year maximum sentence instead of the twenty-year minimum sentence.[69] So—there is a strong correlation with whether you went to plea or trial and whether you got that count.

I'd like to add in another thing. You notice we've been talking about the rights of defendants, but almost absent from our conversations have been the rights of victims. And since I'm a judge, I need to be careful to say: I'm not saying as a matter of positive law or normatively they ought to be symmetrical. And I do recognize that there are victims' bills of rights out there, but they're kind of tepid.[70] But there are some rights to, at least, be notified of plea bargains, etc.

But even if you think the defendant can make the right decision for himself or herself, you might be concerned, as a matter of agency cost, whether the prosecutor is necessarily making the right decision that at least takes into account the victim's interest as well as the public. A lot of people here get the problem of agency cost with administrative agencies. Well, the prosecutors are another kind of agent, and may wear the white hat. I'm not

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[66] 18 U.S.C. § 924(c) (2012).

[67] *Id.*

[68] John Teakell, *Drug Trafficking – Federal Cases*, JOHN R. TEAKELL CRIM. DEF. ATT'Y (July 29, 2015), https://teakelllaw.com/drug-trafficking-federal-cases/.

[69] 21 U.S.C. § 843(d) (2012); 21 U.S.C. § 841(b) (2018).

[70] *See generally Victims' Bill of Rights*, U.S. DEP'T OF JUST., https://www.justice.gov/usao-ndga/victim-witness-assistance/victims-bill-rights (last updated April 17, 2015).

saying anything otherwise.

But I do think that the interest of the victim and whether they're being translated properly in a plea bargain is an important concern, and there's not a lot of structure to the way that the prosecutor takes those interests into account.

GREG BROWER: If I could just respond to the last point, Judge.

HON. STEPHANOS BIBAS: Sure.

GREG BROWER: That's a very good point, Judge—the rights of the victims. You're right, we have not talked about that, and that's a significant and difficult dilemma for prosecuting offices. Because as much as prosecuting offices, and police departments, federal law enforcement agencies do care deeply about victims' rights and try their very best to take care of victims, inform victims, and notify victims—in fact, every U.S. Attorney's office has a victims' rights coordinator who does nothing but that—it's still tough.[71]

I can recall accepting a plea in a white-collar, Ponzi-scheme sort of case—a Madoff-type case on a much smaller level—and hearing from victims who lost their life savings, in some cases. And the plea was absolutely the right thing. I think we were getting a twenty-year sentence, if I recall.

But from the victims' perspectives—and I heard this from more than one victim—the question was, "Well, I think that the defendant should get the death penalty." And it's a tough thing to respond to as a prosecutor. And, of course, I would say something like, "Well, you know, we don't do that. The system doesn't allow for executing fraud defendants. That's just not . . ." And the response routinely would be, "Why not? That was my life savings."

And so, it is a very difficult thing. And I think offices do their very best to take into consideration the victims' concerns. But again, it's really, at bottom, the defendant's right, not the victim's right.

HON. LISA BRANCH: Yes, Mr. Neily.

CLARK NEILY: At the risk of giving opposing counsel more time at the podium, I have a question as well. [Laughter]

For those who are familiar with this area of law, there's a famous 1978 Supreme Court case called *Bordenkircher v. Hayes*.[72] The question in that case was whether the following series of events was or was not unconstitutional.[73]

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[71] *See, e.g.*, *Victim & Witness Services*, U.S. DEP'T OF JUST., https://www.justice.gov/usao-sdny/programs/victim-witness-services (last visited June 15, 2020).

[72] Bordenkircher v. Hayes, 434 U.S. 357 (1978).

[73] *Id.* at 358.

A man in Kentucky was prosecuted for passing an eighty-eight dollar bad check for which the statutory range was two to ten years.[74] The prosecutor offered five years in a plea and told the defendant, "If you don't take that plea, I will go and re-indict you as a habitual offender because you have two prior convictions, and that will be life."[75]

In the case, it is acknowledged that the prosecutor made that threat for the express purpose of discouraging the defendant, Mr. Bordenkircher, from exercising his constitutional right to a jury trial.[76] And I ask, Greg, putting aside ethics and law, would you—just descriptively—would you say that that is or is not coercive?

GREG BROWER: It could certainly be interpreted that way and—[Laughter]—and I'll rely on my counsel to the right of me to tell me I don't have to say anything further if I don't want. [Laughter]

Yeah. Especially, in the state systems, historically, we can point to any number of what might seem, to most in this room, as abusive tactics by prosecutors. That also is probably happening somewhere in this country today, somewhere. It shouldn't, but it is. It's part of the system. But again, it's not the way the system is supposed to work. Those things, I think, are rare and should be called out when they're discovered.

HON. LISA BRANCH: And I have a question for Mr. Neily and Professor Hessick. We were talking about the most serious readily provable offense. Does that in and of itself set up the concern that you're expressing about the plea-bargaining system? That if a prosecutor is going to charge based on that standard, does that cause the issues you're talking about or at least contribute to them?

CARISSA HESSICK: So that standard is one that makes sense, right? If we have a set of statues that tell us what's good and bad, and how much to punish them, it seems like in a rule-of-law system we would tell prosecutors, "Maybe you don't to have charge every single crime that occurred, but you should find the one that's most serious, that you think you could actually prove at trial, and that's the one you should charge." That makes perfect sense.

What doesn't make sense, to me, is that if you look in the congressional record, you will find efforts being made to either establish mandatory minimum sentences, or efforts pushing back against reform to repeal or reduce those mandatory minimum sentences.[77] And you will see people from the Department of Justice say that those mandatory minimums

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[74] *Id.*

[75] *Id.* at 358–59.

[76] *Id.*

[77] H.R. 384, 116th Cong. (1st Sess. 2019) (seeking to enact new mandatory minimums); H.R. 3800, 115th Cong. (1st Sess. 2017) (seeking to eliminate mandatory minimum sentences for all drug offenses).

can't be repealed, that you shouldn't be bamboozled by the fact that the text would seem to reach very low-level players.

They use those statutes to pressure people to cooperate. So, don't think to yourself, "Is a five-year mandatory-minimum sentence the appropriate sentence for this crime?" Think to yourself, "Do we want people who do really bad things to go to prison? If you give us this mandatory minimum, we will let people plead to a lower crime, and we can use this sentence to pressure them to cooperate." Literally in the congressional record.

So, I guess that's where I find myself saying I appreciate that that's the memo that the U.S. Attorney's office has received from the Attorney General. But at the same time, you have DOJ telling Congress, "Give us mandatory minimums that we actually don't expect to use. We aren't going to argue that they're appropriate sentences. We are going to use them to pressure people to flip."

HON. LISA BRANCH: Mr. Brower.

GREG BROWER: Yeah. If I could. Excuse me, Clark, just real quick.

CLARK NEILY: Please take all the time you need. [Laughter]

GREG BROWER: Filibuster till five here. It's a great point, Professor. It really is. And that leads me to a thought that I've had as we've been here today, and as I've been preparing for this, that a lot of the criticism of the system really points back to the legislature and the mandatory minimums, the statutory ranges, etc. And as the Judge mentioned in my introduction, I, at the state level, had the privilege of serving five sessions in my home-state legislature in Nevada. And if for every jury trial I've done, I've lost a year of my life, for every legislative session I've done, I've lost two years of my life I'm afraid.

But that really is, I think, a big part of what we're talking about. This sounds, maybe, like a cop-out, but it's, I think we all know what I'm talking about when I say that DOJ just takes what's given by Congress in terms of everything from the mandatory minimums that exist, to statutory ranges, to the guidelines themselves, which are approved by Congress, and has to work within those constraints.

Now, DOJ has a lot of latitude and a lot of discretion within those constraints. But a lot of the anomalies that some of us think we see when it comes to plea bargaining that relate to the threat of the mandatory minimum—let's go talk to Congress. And that debate is actually happening right now on

the Hill with respect to this piece of legislation that's pending.[78]

But that's where that buck stops, in my opinion.

CLARK NEILY: I–

HON. LISA BRANCH: And—oh, go ahead.

CLARK NEILY: I have to say, I think that really sells DOJ too short. I think it really sells the creativity of DOJ lawyers far too short, that they're just stuck with what Congress hands them. Let's talk about whether readily provable offense—what that actually means by way of disciplining DOJ conduct. And we'll do it in the form of an audience quiz.

Who can tell me what the following have in common? Senator Stevens, Yates, Bond, Salman, Bundy, Enron. These are all cases that DOJ prosecuted, and went to trial, and resulted in debacles.[79] Debacles for DOJ. DOJ took the position in all of those cases that presumably they had a readily provable offense and, oh, my, no.

Some of them went down the tubes because of extraordinarily creative interpretations of law such as that a fisherman who threw fish overboard was engaged in document destruction.[80]

The Bond case, of course, was a woman who smeared some caustic element on a doorknob to get back at a friend who had become pregnant by the other woman's husband.[81] They charged that under the International Chemical Weapons Treaty.[82]

Noor Salman was the wife of the Orlando night club shooter.[83] She was acquitted by a jury.[84] The federal district judge was very angry at the

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[78] H.R. 5682, 115th Cong. (2d Sess. 2018). This Act was signed into law in December 2018 by President Trump. *President Donald J. Trump Is Committed to Building on the Successes of the First Step Act*, THE WHITE HOUSE (Apr. 1, 2019), https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-committed-building-successes-first-step-act/.

[79] Anna Stolley Persky, *A Cautionary Tale: The Ted Stevens Prosecution*, D.C. BAR (Oct. 2009), https://www.dcbar.org/bar-resources/publications/washington-lawyer/articles/october-2009-ted-stevens.cfm; Yates v. United States, 574 U.S. 528 (2015); Bond v. United States, 564 U.S. 211, 214–15 (2011); Barbara Liston & Matt Zapotosky, *Noor Salman, the Orlando Nightclub Shooter's Wife, Acquitted of Charges She Aided 2016 Massacre*, WASH. POST (Mar. 30, 2018, 1:57 PM), https://www.washingtonpost.com/world/national-security/jury-acquits-orlando-nightclub-shooters-wife-of-charges-she-aided-husbands-isis-inspired-massacre/2018/03/30/e12015c88-32cc-11e8-94fa-32d48460b955_story.html; Peter Burke, *Ted Bundy Convicted of FSU Murders in Miami Trial 40 Years Ago*, LOCAL NEWS 10 MIAMI (July 24, 2019, 2:56 PM), https://www.local10.com/news/local/miami/ted-bundy-convicted-of-fsu-murders-in-miami-trial-40-years-ago; Alexei Barrionuevo, *Enron Chiefs Guilty of Fraud and Conspiracy*, N.Y. TIMES (May 25, 2006), https://www.nytimes.com/2006/05/25/business/25cnd-enron.html.

[80] Vikrant P. Reddy, *Meet the Fisherman Who Faced 20 Years in Prison for Losing Three Fish*, THE FEDERALIST (Nov. 6, 2014), https://thefederalist.com/2014/11/06/meet-the-fisherman-who-faces-20-years-in-prison-for-losing-three-fish/.

[81] *Bond*, 564 U.S. at 214–15.

[82] *Id.* at 215.

[83] Liston & Matt, *supra* note 79.

[84] *Id.*

prosecution in that case for some information they withheld.[85]

The Bundy case, of course, was an unlosable case in Nevada that the trial judge, the federal district court judge, dismissed with prejudice because of prosecutorial misconduct.[86]

And for those who forget, the Enron case did result mostly in plea convictions.[87] But there were six cases that went to trial and resulted in convictions, and five of those were reversed on appeal.

Consider what we are missing when ninety-seven percent of criminal convictions are obtained through plea bargain, and we don't get an opportunity to see how many of those cases would have blown up just like the ones that I listed. I'd like to know.

GREG BROWER: And—

HON. LISA BRANCH: And—no, go ahead.

GREG BROWER: I was just going to say, Clark, and I'm afraid to say that I could add to your list.

CLARK NEILY: [Laughter] Please do.

GREG BROWER: There are more than that unfortunately. Certainly, those in the department, and those of us who are veterans of the department wince, to say the least, every time we see one of those situations. It does happen from time to time. Sometimes, I have to say, it's a judge that just got it wrong—but vociferously got it wrong—and is out to get the department. But sometimes the department just screws up; that is absolutely true.

But those are outliers, and though, they don't really—

CLARK NEILY: Well, are they outliers, by definition, because they went to trial?

GREG BROWER: Well, no. [Laughter] The defendant, again, has that—I get back to it's the defendant's right. I don't know what we do with that other than let the defendant decide if they want to roll the dice or take a deal. And I'll stop there.

HON. LISA BRANCH: And, Mr. Brower, I have one question for you before I turn it over to the audience. So, you've listened to the other

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[85] Glenn Greenwald & Murtaza Hussain, *At Trial of Omar Mateen's Wife, Judge's Questioning Reveals a Huge Hole in Prosecution's Case and Deceit by Prosecutors*, THE INTERCEPT (Mar. 22, 2018, 7:51 PM), https://theintercept.com/2018/03/22/at-trial-of-omar-mateens-wife-judges-questioning-reveals-a-huge-hole-in-prosecutions-case-and-deceit-by-prosecutors/.

[86] David Ferrara, *Prosecutors Appeal Dismissal of Nevada Rancher Cliven Bundy's Case*, LAS VEGAS REV. J. (Feb. 6, 2019, 12:41 PM), https://www.reviewjournal.com/crime/courts/prosecutors-appeal-dismissal-of-nevada-rancher-cliven-bundys-case-1591339/.

[87] Barrionuevo, *supra* note 79.

panelists, and they have identified what they perceive to be problems with the plea-bargaining system. Are there any solutions that you see? Is there a legislative fix?

GREG BROWER: It's hard, frankly, to see a solution. It's interesting to talk about potential solutions. But I think if we had another couple of hours, we could run each potential solution to ground and find that we probably agree that wouldn't quite work.

I think there are two solutions that I would throw out there. They aren't really solutions. But they're principles that, I guess, the executive branch and the legislature branch need to keep in mind as we talk about this problem that the third branch has—arguably.

The first is the absolute necessity to ensure that the U.S. attorneys making these decisions are the best possible people that can be put into those positions. And I know that's a very fuzzy concept that sounds great in principle. But I will tell you—and we all know this—the U.S. Attorney in any particular district has enormous power over all of these issues.

I'll let others judge my tenure. But let me just say that the U.S. Attorney who doesn't make it his or her mission to closely supervise what his or her AUSAs are doing—and it's hard to supervise—is not doing his or her job. In the Southern District, Judge, hundreds of AUSAs? In Nevada, fifty AUSAs. And districts in between. It's hard, but it's—and mistakes will be made, and the U.S. Attorney can't catch everything.

But it's just got to be the mission of every administration, every DOJ, to do its very best due diligence to make sure that those U.S. Attorneys, that are being selected, are the best and that there are checks and balances on their powers. That's number one.

Number two, I get back to the first branch. If mandatory minimums, for example, are a big part of the perceived problem here—yes, there are arguments in favor of the necessity of mandatory minimums. But there are also good arguments in favor of eliminating or reducing the number of statutes with mandatory minimums.[88] And I think Congress needs to take a hard look at that.

HON. LISA BRANCH: Well, thank you, and I'd like to turn it over to the audience. We have two microphones, and I will tell you if—good, I see some people standing up. If you weren't going to stand up, there are people from Atlanta in the audience, and I was just going to start calling on them. [Laughter]

So, you're helping all of those who are members of the Atlanta Mafia,

[88] *See generally* Phillip Ollis, Comment, *Mandatory Minimum Sentencing: Discretion, The Safety Valve, and the Sentencing Guidelines*, 63 U. CIN. L. REV. 1851 (1995).

whether they know it or not. And I'm going to start over here.

QUESTIONER 1: So, the quick preface, back in 1986, Senator Thurmond and Senator Kennedy got together, and there was a bi-partisan agreement that we were going to create what became the Sentencing Guidelines.[89] And one of the primary underlying reasons for that was it was considered wrong on a bi-partisan or a bi-ideological basis for person A to go to prison for 10 years and person B to get probation. Even sometimes in the same courthouse. There were all kinds of racial permutations to that. But there were also the problems that different judges have very different philosophies of what is deserving of a particular sentence.

And post-*Booker*, we are now back in that universe. To the extent we are talking about sentencing guidelines and not mandatory minimums, we are seeing judges engage in the exact same behaviors that the guidelines were designed to ameliorate or eliminate. And I was wondering what any of the panelists think about that, particularly in the context of whether it has affected plea bargaining?

HON. LISA BRANCH: Who would like to take that?

GREG BROWER: I could try to start.

HON. LISA BRANCH: Alright.

GREG BROWER: And then I would be happy to hear from others. I don't know—that's a great question. And, look, the genius of the guidelines—especially when they were mandatory, despite the eventually revealed constitutional infirmities—was that they did, in effect, ameliorate the problem that was eluded to.

Let's just say, for example, the African American bank robbery defendant in Alabama would no longer receive a harsher sentence than the same sort of defendant in San Francisco. That was the idea. And there's a certain genius to the way that was done. In fact, in my home state of Nevada, we don't have sentencing guidelines, and I've long been a proponent of going to a federal-type system.[90]

I don't know that there is enough evidence yet to know what, if any, the effect *Booker* has had on—and its progeny have had on—that. My sense is that judges are more or less following the guidelines despite their advisory nature. But I would be open to suggestions to the contrary by those who may

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[89] Naomi Murakawa, *The Racial Antecedents to Federal Sentencing Guidelines: How Congress Judged the Judges from* Brown *to* Booker, 11 ROGER WILLIAMS U. L. REV. 473, 481 (2006).

[90] Nevada only has a Sentencing Commission, which releases reports as required by statute. *Nevada Sentencing Commission: Final Report*, NEV. SENTENCING COMM'N (Jan. 2019), https://www.leg.state.nv.us/App/NELIS/REL/80th2019/ExhibitDocument/OpenExhibitDocument?exhibitId=36340&fileDownloadName=0222_hardesty_report.pdf.

have studied it recently.

Just in general, the system of uniform guidelines guiding judges in very different parts of the country to deal with similarly situated defendants who have committed similar crimes the same makes a lot of sense, and should be the way it works, in my view.

CARISSA HESSICK: Yeah. I would just add, I think, that what's happened in the wake of *Booker* really depends on where you are. Some districts, judges vary more than others. I'd say I think one big problem with the sentencing guidelines is once we sat down and tried to figure out what made people similarly situated and what made them differently situated, we actually realized it was a way more complicated task.

And the guidelines that ended up being written—if you're interested in this, I highly recommend—it's a bit dated at this point—the book by Professor Kate Stith and Judge Jose Cabranes that talks about the particular guidelines that were chosen, and why they were so problematic, and how more happened with the adoption of the guidelines than just trying to make sentencing similar was also made significantly more severe.[91]

HON. LISA BRANCH: Alright. Let's take a question from over on that side.

QUESTIONER 2: Yes. Thank you for coming here and speaking today. A number of scholars have pointed out that federal enforcers rely heavily on the resources of local police officers and enforcers. For example, local officers make most of the arrests for convictions at our current federal court. They convey a lot of the information that is used by federal prosecutors. How, if at all, does this interaction play positively or negatively into plea bargaining?

HON. STEPHANOS BIBAS: Well, there's really very little in the way of rules that governs when a joint federal-state task force decides to take something federal rather than state. And so, you might imagine that the principle would be what has the most interstate effects? And sometimes that's true. If a conspiracy spans several states, it's easier—as a matter of venue and subpoenas and things—to get the witnesses together in federal court.

Sometimes it's a matter of, well, who deserves the most punishment? Or who has the longest criminal record? Or where do we need to draw cooperators or witnesses from? And the federal system is more set up for multi-defendant cases involving cooperation.

The evidence I'm aware of suggests a fair amount of randomness or chance in terms of whether the tip happened to come to the cop or the FBI

[91] *See generally* JOSÉ A. CABRANES & KATIE STITH, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (1998).

agent and whether that person had a good relationship with somebody in the DA's office or the federal office. My sense is, more often, the feds get first dibs. But there's not a lot of good rules or policies to structure this.

It went so far that, thirty years ago, Rudy Giuliani, when he was the U.S. Attorney in Manhattan, announced Federal Day.[92] There was going to be one random day a week where all the drug cases were going to go federal.[93] And, well, he was going to show off that he was doing a lot. The problem is it's actually the worst way to deter because the people just put off their drug deals till the next day. [Laughter]

But it doesn't strike me as a really measured, respectful-of-federalism-and-the-commerce-clause kind of way to allocate which cases go federal and which cases go state.

HON. LISA BRANCH: Anyone else? We'll take over here.

QUESTIONER 3: And thank you. Mr. Brower, you said something that was very intriguing. I've had dozens of cases where it got to the point where the defendant did not accept the plea. And then, I'm from Kentucky, so I'm very familiar with that case—the Commonwealth's attorney says "Oh, well, I'll just indict you for a persistent felony offender, which takes a one to five, then to a five to ten on a low-level felony."

You mentioned that, well, if the prosecutors are doing that, you should go report it, but if you have—in our state, we have elected prosecutors, and the prosecutors—that may be what they do. And that may be how they run their office with their assistant prosecutors. So, when you have situations like that that obviously are putting it in a coercive nature and situation, what do you do as a member of the defense bar when that is the policy of the office of the elected Commonwealth's attorney?

GREG BROWER: Yeah, that's a great question, and if it doesn't otherwise constitute a violation of some state bar rule, or some ethical rule, or a court rule, that's the problem with elected prosecutors, in my view. My FBI SAC and I in Las Vegas used to talk often about how lucky we were, frankly, that unlike the elected DA and the elected sheriff in Clark County, we didn't have to worry about politics or what people thought. We just did the right thing every day, as best we saw it, and didn't have to worry about that nonsense.

But as a result, we were under the umbrella of DOJ that enforced that we did the right thing, right? With an elected DA, yeah, that's an interesting

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[92] William Glaberson, *Giuliani's Powerful Image Under Campaign Scrutiny*, N.Y. TIMES (July 11, 1989), https://www.nytimes.com/1989/07/11/nyregion/giuliani-s-powerful-image-under-campaign-scrutiny.html.

[93] *Id.*

dilemma.

QUESTIONER 3: Because if you do take it to the next level, and file—sorry, Judge, I don't mean to ask a follow-up. But—

HON. LISA BRANCH: But I am. [Laughter]

QUESTIONER 3: If the only remedy—

CLARK NEILY: It's an *actus reus*, not a *mens rea*. [Laughter]

QUESTIONER 3: If the only remedy is to, then, file something with the disciplinary council, as someone who may practice criminal law on a frequent basis, you're kind of that guy who did that, and your clients are never going to—there will be other repercussions if you do that.

GREG BROWER: And compound that with elected judges who may be afraid to reign in that elected DA—

CLARK NEILY: Right.

GREG BROWER: Because they have to run again, and they don't want to appear to be against law enforcement. Yes.

HON. LISA BRANCH: And I hope I'm not going to have jump in here as a former elected judge, but I'll—

CLARK NEILY: Judge, can I respond to this—

HON. LISA BRANCH: Yeah.

CLARK NEILY: So, it turns out there's actually an app for this. [Laughter]

And it's this wonderful thing called a founding-era jury.[94] And actually, during the founding-era, jurors were told something that modern-day jurors are not, and that is the punishment that the defendant will likely receive if they convict. And this was to enable them to exercise the two roles that juries have, throughout one-thousand years of Anglo-American history, exercised—and used to exercise—in America up until less than a century ago. And that is the fact-finding role that they still exercise, and the injustice-preventing role that is sometimes referred to as jury nullification, but is more accurately referred to as conscientious acquittal.[95]

This was a founding-era practice that was very much in the mind of the people who wrote our Constitution. And the idea was that if the prosecution cannot go to bat for the punishment that they are threatening the defendant with, then it is permissible, and indeed perhaps even laudable, for

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[94] Andrew G. Ferguson, *The Jury as Constitutional Identity*, 47 U.C. DAVIS L. REV. 1005, 1113 (2014).

[95] David C. Brody, Sparf *and* Dougherty *Revisited: Why the Court Should Instruct the Jury of Its Nullification Right*, 33 AM. CRIM. L. REV. 89, 91 (1995).

the jury to acquit even a factually guilty defendant.

And what I would propose—and I think is coming regardless of how prosecutors feel about it—is that juries from now on should be informed of the likely punishment for the defendant if they convict. There are two ways to do that, by the way. One is to request that the judge give the instruction. That is impermissible in some jurisdictions, actually. In other jurisdictions, it's an open question. The other way is for ordinary citizens to simply communicate that information.

My wife was called for jury duty in—ironically enough in front of the very judge that I clerked for, Royce Lamberth. So, she didn't get seated. But if that had been a drug—let's say a drug prosecution, and she came home one night, and said, "I'm really troubled. This guy's definitely guilty. He was definitely selling drugs, but he seems like a good guy. It seems like, maybe, he just fell off the wagon. He's selling a few drugs to support his habit. I'm not sure I feel comfortable convicting him. Can you figure what's likely to happen to him if we convict?" If I go and get that information and share it with my wife, that is felony jury tampering.[96]

And that raises very serious First Amendment concerns. Just sharing truthful information with my wife about that case could be prosecuted by the government as jury tampering when I'm doing something that is precisely consistent with founding-era practice. They would essentially be trying to impose a completely novel vision of the jury as being solely about fact-finding that is inconsistent with 1,000 years of Anglo-American precedent. I would like to tee that issue up in court as a First Amendment issue. And in fact, my colleagues and I at Cato, are working on doing that.

GREG BROWER: Interesting. Of course—

CARISSA HESSICK: I know we need to get to the next person. But I study elected prosecutors, can you find me after?

QUESTIONER 3: Yes, ma'am.

CARISSA HESSICK: Thank you.

HON. LISA BRANCH: And I would like to find out how a former prosecutor feels about the issue of jury nullification, Mr. Brower?

GREG BROWER: Conscientious acquittal. Yeah. I was just going to—Clark, as you know your wife violated the judge's admonition when she came and talked to you as well. [Laughter]

That's not a felony though.

CLARK NEILY: To be clear, she was never seated. [Laughter]

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[96] 18 U.S.C § 1503 (2012).

GREG BROWER: Jury nullification. Yeah. I'd like to think that good prosecutors make the best call they can on whether and how a case should be indicted. But good prosecutors also know that it's never a slam-dunk. And sometimes juries, for whatever reason—a witness goes south on you. A jury just sees the evidence differently than the lawyers and the government office saw it. The jury can do that. It does do that. It's the *de facto*—as was mentioned—a *de facto* option, the jury has, if not, a completely legal one. So, I'm not sure what I think of it other than I always tried to avoid it.

HON. LISA BRANCH: Alright. And let's go over here.

JOHN HAYES: Yes. My name is John Hayes, and I'm from Austin, Texas. And I would like to initially address this to Mr. Neily, and then hear what the others may have to say. I'm a civil lawyer. I think I've been involved in one criminal case in my entire career, where I was appointed by the federal judge to be the assistant attorney to defend someone. And that did go to trial because he would not—over our advice—would not agree to the plea bargain.

But I was struck and would like to hear the comments on the validity of the analogy to just civil settlements. Because I've been involved in countless civil settlements over the years. Both of lawsuits and with regulatory agencies. And a couple of things strike me as radically different, and I'd like to hear the comments on.

One, in civil settlements I've been involved in, nobody was facing time behind bars. And at least to most of us, that's far more serious than just facing paying out money even if it's most of my life's savings.

And secondly, when we do a civil settlement, including a mediation—we heard analogy to that—I tell my clients we don't want to go into mediation until we've done full discovery and gotten the information from the other side. And it's my understanding, we normally don't have that in the criminal process. And I tell them that we need to have a heads-up. You also need to make sure that nobody's bought off a witness against us, if we can, by offering favorable terms and another deal. And I'd like to hear the comments on that. Thank you.

CLARK NEILY: Thanks, John. You and I are both from Texas, so I'm going to share an expression I learned when I was practicing law in Dallas from my mentor. It was a different setting, but I'm going to adopt it for this setting.

"In a criminal plea negotiation, the role of the defendant is very much like the role of the pig in a ham and egg breakfast. The chicken participates, but the pig is fully committed." [Laughter]

Prosecutors have, basically, no skin in the game during a plea negotiation. And we know this based on the number of years that they'll offer up. The Aaron Swartz, where they charged him with thirty-five years, and the prosecutor's like, "But, you know, well, let me just give you thirty-four-and-a-half years." It's like they're playing with Monopoly money. That's not a true negotiation because the defendant absolutely has skin in the game.

Think about if you were involved in a plea negotiation, what the value—or the cost that you would assign—to every additional year in prison. You're probably looking at five-hundred thousand dollars or one-million dollars per extra year in prison. That is a very real, tangible cost to you. And you've got a prosecutor across the table who's basically playing with Monopoly money. What do they care if it's thirty years or twenty?

And so, they have this tremendous ability to go up and down that is not matched by your ability to go up down. And Judge Bibas mentioned that, I think, during his talk. And so, the other thing that I want to underscore, that he pointed out as well, is that in a negotiation, in a true negotiation, the counter-party doesn't have the ability to just arbitrarily set whatever it is you're negotiating over at whatever level they want to. We could probably get to a hundred-percent plea-bargain rate in this country if we just made the penalty for every crime life without the possibility of parole. Ninety-seven percent? Those are rookie numbers.

So that's the, I think, one of the biggest differences between the two—and I was a civil lawyer throughout my career, and I've been in plenty of negotiations. And I didn't get to just move the goal post whenever it served my negotiating position. But that's exactly what the government gets to do in the criminal justice system at large. Not necessarily in the—well, actually, yes, necessarily in the context of a specific plea negotiation. You can always go back and re-indict for conspiracy or a habitual offender if you want to up the cost to the defendant.

So, I think there's basically zero comparison between a civil negotiation and a criminal plea negotiation.

CARISSA HESSICK: But there doesn't have to be, right? You could have motions to dismiss. You could have complete discovery and depositions. You could have motions for summary judgment. You could have all of these rules. And, in fact, when the Federal Rules of Criminal Procedure were initially written, they were written by the same folks who wrote the Federal Rules of Civil Procedure, and they were going to do them the same. And then at the last minute they decided not to because they thought it might be too onerous for one side. I'm happy to refer you to a law review article about that if you're interested.

But you might think to yourself, "Well, that sounds crazy. Why

would you have a real motion to dismiss? How would you have full discovery with depositions? How would you have summary judgment in a criminal case?"

But actually, if you look around the country, in different state systems, you can find pieces of these things in different systems. So our system, if we want our criminal justice system to be a system like the civil system, where the assumption is we really hope that you settle, we could change the procedures to look like that instead of wholly failing to regulate it, which is what we do right now. And we can see it actually happen in other courtrooms in different places, at least piecemeal, if we want to.

GREG BROWER: Yeah. Now, just two things, real quick, to my civil colleague. Thank you for that question. So, first of all, in the federal system anyways, the defendant does have discovery before a plea deal is typically done.[97] That's what forces most plea bargains, is the case is indicted, discovery is provided, the defense lawyer looks at the discovery, and says, "Holy cow. We need to get you a deal. Let me tell you what the government has." And a plea bargain is worked out. At least, in the federal system that's the normal way things are done.

To your first point, I've litigated more civil case than criminal cases, like you. And I'll tell you that you're right about the difference in exposure. In civil cases, the exposure is typically money, sometimes a lot of money. And in the criminal case, it's much more important. It's one's liberty, perhaps one's life.

That is why, in my view, it is so important to allow the defendant facing that exposure to make the decision on whether to accept the deal or go to trial. And again, for me—if I've said it twice, I've said it three times now—that's the bottom line. This is a right the defendant has along with the executive. They come together. They reach a deal. Judge doesn't find it's defective. That's got to be the way the case ends.

HON. LISA BRANCH: Let's go over here.

QUESTIONER 5: Thank you. I have a question about, maybe, the potential costs of separation of powers in this system. I guess among the legislators, who write those statutes in the guidelines, and the prosecutors, who are doing their best to follow them and then there are the public defenders, jurors who aren't told the punishments, etc. I wonder if whether, and to what extent, the responsibility to do justice is so dispersed that the substantive of moral order that the criminal law system is trying to uphold gets lost in the shuffle. And only more so thanks to negotiations being put

[97] Daniel S. McConkie, *Criminal Law: Structuring Pre-Plea Criminal Discovery*, 107 J. CRIM. L. & CRIMINOLOGY 1, 3 (2017).

into the mix.

CLARK NEILY: A very fascinating argument that some have made is that in fact the jury can best be seen as a fourth branch of government, and that in order for the government to convict anybody of a crime, they should have to clear all four gates.[98] So you should have to have the legislature decide to criminalize the conduct. You have to have the executive decide to prosecute it. You have to have the judiciary willing to not dismiss it, at least in theory.

But then, an absolutely vital part of the system was meant to be that you don't get that conviction unless you can get a super-majority of twelve members of the community to be the final gate, and say, "Yep. That's an appropriate thing to convict somebody of." So, in a sense, you could see the jury as a fourth branch of government. And if that is a potentially valid way of looking at it, to almost completely eliminate from the process this kind of quasi-fourth-branch of government should trouble us, at least as much as the separation of powers issues that you have raised in terms of the elimination of a mechanism that is absolutely at the heart of American criminal justice, and that's public participation.

HON. STEPHANOS BIBAS: De Tocqueville actually calls the judiciary bicameral, and the upper house is the judge, like the senate, more removed from the people, and the lower house is the jury. It's more directly popular and responsive. And you have to get the assent of both before the government can exercise its coercion.

CLARK NEILY: I'm tempted to run out the clock because I see Orin at the microphone, but I won't. [Laughter]

HON. LISA BRANCH: We're actually only going to take one more question because we're running out of time. We're going to take one over here.

QUESTIONER 6: So, this has been a terrific panel, and there's been some discussion of the difference between the federal system and state systems. And I was hoping there could be a little bit more discussion of it specifically on the issue of—is there any particular system that you think is best? We've got fifty-two jurisdictions, right? That's fifty states and the District of Columbia and the federal system that are all dealing with these questions. Is there any one that you think handles these intractable problems better than the others and, if so, why?

HON. STEPHANOS BIBAS: So, what I'm aware of—I don't

[98] Leo C. Donofrio, *The Federal Grand Jury is the 4th Branch of Government*, NAT'L LIBERTY ALLIANCE (Jan. 22, 2009), https://www.nationallibertyalliance.org/files/docs/DocumentsEssays/The%20Federal%20Grand%20Jury%20is%20the%204th%20Branch%20of%20Government.pdf.

know a lot about military justice. But my understanding is the military justice system has serious plea review. It has vigorous adversarial combat on both sides with rigorous, very good lawyers and a very professional judiciary that is skeptical and tosses some cases out. Military juries toss some cases out.

The problem is the difference between trial and plea is so great. The chances that we're going to make our trials in the civilian system so much less costly and safeguarded are almost nil. But the chances we could bring the level of safeguard up in pleas is substantial. So, I really like the late Bill Stuntz's idea that, let's have judges inquire more deeply into the factual basis of pleas than they do in the typical state courthouse in America where pleas are entered in a minute or two, and sometimes there's not much of a factual basis.[99] And when you get to an *Alford*—a no-contest plea—and I know these are not common in the federal system, but a lot of states, five to ten percent of convictions come from people who either say, "I'm not contesting this," or affirmatively, "I'm innocent, but I'm pleading guilty."[100] Well, you don't get to do that in the military system. You really have some rigorous checks to make sure that this is not just a collusive deal or made-up facts, but the judge finds this is what actually happened.

CLARK NEILY: So, I'm not sure that there's any state that's exactly getting it right. But I do want to end on a really—what I hope is a very optimistic note. And I want to pick up on something that Greg said, which is that it's so common—it's part of our cultural ethos—that you complain when you get the jury summons. Everybody complains, and that's probably true.

But you know what? Talk to somebody who's served on a jury and see if they're complaining then. They don't.[101] What people who have served on juries say is that it is one of the most profound experiences that they have ever had in their entire life, and it served to reconnect them to this country and to the wonderfully exceptional place that America is and was meant to be. And it is jury service for many people that does that for them. If, for no other reason, that is a reason to try to push down the amount of plea bargaining and bring that back, the criminal jury trial. Because it connects people to what is special about this country, and we've basically eliminated it.

HON. LISA BRANCH: I really think we have ended on the perfect note with that. And thank you all. Thank you all for being here. And thank you to the panel.

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[99] *See generally* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011).

[100] North Carolina v. Alford, 400 U.S. 25 (1970).

[101] *See, e.g.*, Paula Carter, *I Thought Jury Duty Was for Suckers—Until I Helped Save an Innocent Man from Conviction*, USA TODAY (Oct. 21, 2018, 5:35 PM), https://www.usatoday.com/story/opinion/voices/2018/10/16/jury-duty-never-felt-more-significant-citizen-column/1603079002/.