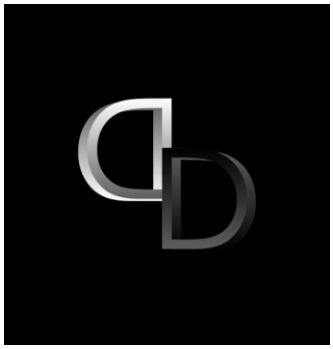

Coercive Plea Bargaining: An American Export the World Can Do Without

Clark Neily

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A 2017 article in the *Economist* titled "The Troubling Spread of Plea-Bargaining from America to the World" describes one of the United States' most pernicious exports and cautions other countries to think twice before embracing it. Although the article provides an unsparing look at American-style plea bargaining, it is not nearly critical enough about a practice that has fueled America's insatiable appetite for incarceration and helped make the United States the world's leading jailer. With just five percent of the world's population, America has more than 25 percent of its prisoners. America has achieved those numbers by rediscovering an ancient truth well known to tyrants and dictators throughout the ages: Virtually anyone can be coerced into confessing their guilt if you apply enough pressure—even the innocent.

As explained below, there are three overlapping concerns about American-style plea bargaining that the U.S. Department of Justice has made zero effort to confront in its heedless effort persuade other countries to embrace our "McJustice" approach to adjudicating criminal charges. In order, they are coercion, convicting the innocent, and loss of public confidence in the integrity of the criminal justice system.

In the centuries preceding the Enlightenment, it was not unusual for European countries to employ judicially sanctioned torture to elicit confessions from the accused. This solved a number of problems for those countries, including the requirement that certain crimes could only be proven based on testimony from two different witnesses. A variant of this practice, known as *peine forte et dure*, was employed in early colonial America to induce those who had been accused of crimes like practicing witchcraft to submit to the jurisdiction of the court by entering a plea.

Skip ahead to 21st century America, and the only thing that has changed is the mechanism by which coercive pressure is applied to induce compliance. Instead of piling boulders onto the accused, modern American prosecutors pile charges, thereby ensuring that those who choose to exercise their constitutional right to a trial may do so only by exposing themselves to years—or even decades—of additional prison time if they end up being convicted by a jury. And far from decrying this nakedly coercive practice, American judges have embraced it, unabashedly and—with a small handful of notable exceptions—enthusiastically.

Indeed, the leading U.S. Supreme Court case on the subject of coercive plea bargaining, Bordenkircher v. Hayes (1978), featured a small-time crook accused of forging a check whom the prosecutor threatened with a life sentence if he refused to accept a five-year plea deal. One might suppose that the difference between being offered few years in prison and being threatened with spending the rest of one's life there would be so obviously coercive as to arouse some concern in a system ostensibly committed to notions of due process, but unfortunately not: The Supreme Court upheld the life sentence without once mentioning the word "coercion" or making any meaningful attempt to explain how threatening someone with a life sentence in order to elicit a guilty plea differs in any meaningful way from threatening them with physical torture.

And while torture is no longer a permissible method of inducing guilty pleas in America's criminal justice system, just about everything else is. This includes pretrial detention designed to enervate and immiserate the accused while making it more difficult to participate in their own defense; threatening to indict a defendant's family members in order to exert plea leverage (a practice that is widespread and has been specifically authorized by American courts; and profligate use of the so-called "trial penalty"—that is, the differential between the comparatively light sentence offered if the defendant pleads guilty and the vastly more punitive sentence threatened should the defendant exercise her constitutional right to a jury trial and lose. To take just one example, federal prosecutors in the ongoing "Varsity Blues" college admissions scandal that netted a number of Hollywood celebrities have been threatening defendants with a 20-year prison sentence while offering two *months* to those who plead guilty—a 12,000 percent markup for exercising their right to trial.

Not surprisingly, the virtually unbridled use of coercion in plea bargaining regularly produces false convictions. For obvious reasons, it is impossible to quantify the rate of false guilty pleas in America's plea-driven criminal justice system, but there are plenty of suggestive data points. Thus, of the more than 300 people cleared by the Innocence Project, a New York City-based nonprofit that uses DNA to exonerate people charged with serious crimes like rape and murder, more than 10 percent pleaded guilty to crimes they did not commit. Similarly, of the more than 1,500 people on the National Registry of Exonerations, about 15 percent were convicted via false guilty pleas. Just this month, the revelation that NYPD narcotics detective Joseph Franco appears to have lied in an untold number of drug prosecutions has caused prosecutors to doubt the integrity of more than 90 convictions, nearly all of them obtained through guilty pleas. The same thing has happened repeatedly in the wake of drug-lab scandals when it has been discovered that technicians falsified results, leading people to plead guilty to drug-possession charges even though they possessed no drugs.

Dismayingly, the system is so deep in denial about the prevalence of the so-called "innocence problem" that judges and prosecutors make it virtually impossible for people who have pleaded guilty to later contest their convictions. As a result, we can do little more than guess at the actual rate of false guilty pleas in our system; but based on his survey of the literature, leading scholar Lucian Dervan puts the figure somewhere between 1.6 and 8 percent of all convictions, leading him to conclude that "plea-bargaining certainly has a significant and unacceptable innocence problem."

Finally, embracing American-style plea-bargaining is a terrible idea for other countries because it undermines public confidence in the process by which allegations of criminal conduct are

adjudicated and punished. To go back to a previous example, doesn't it seem fairly obvious that most parents would plead guilty to just about anything in order to receive a sentence of two months rather than two decades and thereby avoid the risk of never seeing their children again? And when the public knows that that was the choice the defendant faced—but little if anything about the strength of the case against her given that the government never had to present its evidence in open court—then there will be no reason to have confidence in the validity of that conviction or any other obtained through similarly coercive means.

And this is not mere speculation. Again, we know that innocent people are regularly induced to condemn themselves by American prosecutors exerting intolerable pressure, such as the ones who coerced Viken Keuylian into pleading guilty to wire fraud by threatening to indict his sister. Keuylian's innocence only came to light as a result of a subsequent civil lawsuit that showed the prosecutors had made a mistake. Particularly in countries with a history of political corruption and oppressive dictators, it will not take very many false guilty pleas to destroy people's faith in the integrity of the system.

So the wisest thing for other countries to do when urged by the U.S. Department of Justice to adopt American-style plea bargaining is to reject that suggestion and choose instead a process for adjudicating criminal charges that it is transparent, adversarial, and prevents prosecutors from employing coercion to induce guilty pleas. But this may be a lost cause. According to the *Economist*, a study by Fair Trials International indicated that between 1990 and 2017, the number of countries that use plea bargaining increased from 19 to 66—an unmistakable trend.

Still, there is one thing other countries can do that America does not to ameliorate the manifest problems with plea bargaining: They can include mechanisms for auditing the process. As explained at greater length in the author's recent law review article about coercive plea bargaining, two promising methods are plea integrity units and the so-called "trial lottery."

A plea integrity unit is a group of lawyers within a prosecutors' office who are charged with examining a sample of cases in which a plea agreement has been reached in order to ensure that (a) the defendant is in fact guilty; (b) the government did not use any palpably coercive techniques to obtain the guilty plea (such as threatening a massive trial penalty or to indict family members); and (c) the guilty plea does not represent a corrupt bargain to provide the defendant with more leniency than he deserves, as when the U.S. Department of Justice allowed serial child molester Jeffrey Epstein to receive what amounts to a slap on the wrist and agreed not to prosecute any of his co-conspirators.

Another way to audit plea bargaining is to take some random selection of cases in which the defendant has agreed to plead guilty and send them to trial anyway to see whether the government is actually able to obtain conviction. Over time, a sufficiently robust data set will emerge to determine whether guilty pleas are a nearly infallible method for determining guilt, as most American judges and prosecutors claim to believe, or whether they are in fact rife with abuse and inaccuracies, as alarming but still anecdotal evidence of false convictions in the U.S. would suggest.

Most Americans recognize that their country has a problem with mass incarceration. What few appreciate, however, is the role that plea-driven mass adjudication has played in transforming their criminal justice system into little more than a conviction machine. Other countries would do

well to treat American-style plea bargaining as a spectacularly failed experiment and a policy to avoid rather than emulate.

Written by Clark Neily

Clark Neily is senior Vice President for criminal justice at the Cato Institute. His areas of interest include constitutional law, overcriminalization, coercive plea bargaining, police accountability, and gun rights. Before joining Cato in 2017, Clark Neily was a senior attorney and constitutional litigator at the Institute for Justice and director of the Institute's Center for Judicial Engagement.