The Costs of Coercive Plea Bargaining
A Conversation with Clark Neily
Interview Conducted and Transcribed by Maclain Conlin (All errors are mine alone.)

Maclain Conlin: Good afternoon, and welcome to Originalist Angles. My name is Maclain Conlin. Today, we are joined by a very special guest, Mr. Clark Neily. Mr. Neily is the senior vice president for legal studies at the Cato Institute, and a nationally recognized expert on both constitutional law and criminal justice reform. Today, he joins us to discuss a controversial but fascinating topic, "Coercive Plea Bargaining and the Decline of the American Jury Trial." Mr. Neily, thank you for your time.

Clark Neily: It's a pleasure to be here. Thanks for having me!

MC: Of course. I'd like to start off by reading aloud a quote from an op-ed you wrote for NBC News about four years ago. You said, "According to a recent study from the Pew Research Center, of the roughly 80,000 federal prosecutions initiated in 2018, just two percent went to trial. More than 97 percent of federal criminal convictions are obtained through plea bargains, and the states are not far behind at 94 percent. Why are people so eager to confess their guilt instead of challenging the government to prove their guilt beyond a reasonable doubt to the satisfaction of a unanimous jury? The answer is simple and stark: They're being coerced." Let's start there. How are prosecutors coercing criminal defendants to plead guilty in the American legal system?

CN: Let's be clear about one thing. I'm not here to say that every single plea bargain is the product of coercion. That's part of the problem; we don't know what proportion of guilty pleas are coerced. It's a very subjective question, how much pressure is enough to cross the line from permissibly motivating to impermissibly coercing. We know for a fact that there is at least some degree of coercion in plea bargaining because of the simple fact that innocent people are often induced to plead guilty to crimes that they did not commit. We know this, for example, through DNA exonerations, more than 10% of which have involved guilty pleas, and other exonerations as well.

The question is how prosecutors are able to generate this coercion. The answer is quite shocking for someone who cares about the Constitution and due process. Prosecutors are permitted to impose basically whatever pressure they wish short of physical torture. I'll give you a few examples. It starts with pre-trial detention. In other words, keeping somebody locked up instead of out on bail, which is very common in the federal system. Roughly three-quarters of federal defendants don't get bail. That's an effective tool because it's so unpleasant to be locked up in a jail. Jail is where you are when you're awaiting trial; prison is where you go after you've been convicted and sentenced. Jails are often more unpleasant than a prison-crowded, dirty, violent, ridden with disease, and lacking the same kinds of programs that prisons do. The other thing that happens when you're in jail awaiting trial is that your life begins to unravel. You're unable to pay your bills, you're unable to see your children or support them, you're probably going to lose your job, and so forth and so on. Finally, it's very difficult to communicate with your attorney. That's going to impair your ability to prepare your defense. All of those factors come together, and we know from empirical evidence that people who are locked up prior to their trial as opposed to being released on bail or on their own recognizance are more likely to plead guilty, and are more likely to plead guilty faster. That's one tool.

Some of the other tools include what is called charge-stacking, which basically means bringing more charges than the conduct at issue really warrants. An example of this might be if you shoplifted a pair of

shoes from a store and brushed past the security guard on the way out, making light physical contact. Instead of charging that as shoplifting, they could charge that as a robbery because you used at least some amount of physical force in the commission of the act. That, of course, exposes you to a far greater possibility of punishment.

Probably the most effective, or at least the most common, lever that is used in our system is the so-called "trial penalty," which is simply the differential between the amount of time that you will get if you plead guilty versus the amount that you will get if you exercise your right to a trial and lose. I'll give you a vivid illustration of that: The so-called "Varsity Blues" investigation involving Hollywood celebrities and others who did various things to try to get their children admitted into elite colleges. There were about four dozen defendants in that investigation, and most of them ended up pleading guilty, as is common.

They were offered, on average, about two months in prison if they would agree to plead guilty and were explicitly threatened with a twenty-year "conspiracy to commit fraud" charge if they went to trial and lost. Would they have done the full twenty years? Probably not. Would they have done at least a few years? Definitely. That's an enormous differential, and again, we refer to that as a "trial penalty."

I'll end with one more example to hopefully vindicate my assertion that virtually everything short of physical torture is permitted. The last tool, which I think is quite horrifying, is that prosecutors can threaten to indict your family members-people you love and care for-simply in order to exert plea leverage on you. They can't make up charges, but given the breadth of our overcriminalization in this country, you can usually find something on anybody. There are documented instances of prosecutors who want a person to plead guilty threatening to indict that person's child or wife or whatever it might be, not because they have any independent law enforcement interest in that other person. They wouldn't have paid any attention to that person except as a means of exerting pressure on a defendant.

An important thing to keep in mind, just to conclude, is that it isn't any of these things by itself that usually constitutes coercion. It's all of them put together. It's such a mistake when people look at these things in isolation. It's the combination of all these levers and the pressure that they exert. When people say, "Prosecutors don't usually indict your family members," my response is, "They usually don't have to!" It's the pre-trial detention, and if that's not enough, it's the charge stacking, and if that's not enough, it's the trial penalty. If you think of somebody piling rocks on top of you, they don't have to start with boulders. All they need to do is put enough rocks on you that you'll do what they say. That's the broad contours of how coercive plea bargaining works.

MC: What did the Founding Fathers think about this practice? Was it present in the eighteenth century?

CN: No, it wasn't. There really wasn't anything approaching what we think of as plea bargaining. In fact, it was quite unusual even for defendants to plead guilty. There was no systematic process of either coercing or incentivizing them to do so. I remember reading about a case in the early 1800s where a defendant was charged with a pretty horrible crime. He told the court that he was guilty and that he wanted to get this off his conscience. The judge was actually so surprised that he sent the man home to think about his decision! This was a pretty serious crime that was a capital offense.

Early on, when plea bargaining first emerged, judges were very skeptical of it. They essentially viewed it as a form of corruption. It really wasn't until the judiciary became overwhelmed and judges' dockets became crowded with both civil and criminal cases that there was pressure to consider alternative mechanisms for resolving criminal charges. Prohibition on alcohol, for example, generated a tremendous amount of new criminal charges for the courts. Also, with the advent of the industrial age, you had lots of new tort claims. These are injury claims by people harmed on the job, etc. As the workload of the courts increased, judges became more open to more efficient methods of resolving criminal cases.

Then, of course, there was the so-called "Criminal Procedure Revolution" of the 1950s and 1960s, where new procedural protections for criminal defendants-things like having a public defender, being advised of your rights, etc.-made trials somewhat more complicated and somewhat longer. There were multiple sources of pressure and incentive that ultimately caused judges to change from being extremely skeptical of plea bargaining to embracing it, to the point where the U.S. Supreme Court in just the last ten years has said that ours is no longer a system of trials, but a system of pleas, which I don't think is an exaggeration.

MC: Do you think that plea bargaining is unconstitutional?

CN: I think it's a close call. I will say this: even if it is not unconstitutional on its face-and I think you can make a case for that, because the only constitutionally prescribed mechanism for resolving criminal charges is the jury trial that's described in the Sixth Amendment-it's clear to me that plea bargaining can *become* unconstitutional. In other words, if the government applies so much pressure that the decision to plead guilty is no longer voluntary, then plainly that violates due process. Even the Supreme Court and the lower courts have recognized, at least in theory, that coercive plea bargaining is unconstitutional. The problem is that they purport to never see it. There's no judicially administrable line between a permissibly motivating offer and coercion. Even if I would say that offering to shave off 5% of someone's sentence-for example, reducing a ten year sentence by six months-is unlikely to feel coercive to most people.

On the other end of the spectrum, I think it's obvious that threatening someone with twenty years and then offering them a couple of months must be coercive, especially if that person has kids like I do. If you threaten me with a sentence that would plausibly mean that I might never get a chance to see my kids grow up, and then offer me a couple of months, I'll sign whatever you put in front of me. That's the very definition of coercion.

MC: On that point, I would also like to read aloud a quote from someone who offered a response to your research about four years ago. This is from Rafael Mangual of the Manhattan Institute, writing for Law and Liberty, in 2020: "In making his argument, Niely points to the existence of a trial penalty, which he defines as the differential between the time a defendant will serve if he pleads guilty and the time he will serve if he exercises his right to a trial and loses. But such a differential doesn't necessarily connote a penalty (as opposed to, say, a discount)." Is Mr. Mangual correct that plea bargaining often represents a "discount" to defendants? What would be your response to that?

CN: I know Rafael well, and there's a good reason why no one quotes him or cites him on this subject. He is not an expert on plea bargaining, nor does he purport to be. He will occasionally weigh in on the topic, but to his credit, he hasn't made a point of it because he doesn't really know a lot about it.

The giveaway here is what a straw man that quote is. I never said that in all cases the differential between the time offered by way of a plea bargain versus the time threatened upon conviction is a penalty or is coercive. A straw man is a classic example of where you attack an argument that no one is making, which is exactly what he's doing in this case. Again, I think offering someone a relatively small discount if they save the government the trouble of trying the case is not necessarily a penalty and not necessarily coercive. What you generally won't see people like Rafael Mangual commenting on is the differential between a couple of months and twenty years. That's something they don't really want to talk about because it is so obviously a penalty. It's a 12,000% differential, and for someone to say, "Oh, that's just a discount, that's not a penalty," would be preposterous! That's why you never see them confront those kinds of differentials.

I want to emphasize a point I made before. The question is not what the average differential in our system is, because that would be a misnomer. All you would see there is how much pressure it takes on average to get someone to relinquish their right to a trial and plead guilty. The real question is how far prosecutors can go in pressuring someone to plead guilty, and as we've discussed, the answer in effect is as high as necessary. There's no real limit. The Supreme Court, believe it or not, has even signed off on threatening someone with the death penalty and then offering them something less than that. I just don't see how anybody with a genuine understanding of the meaning of the word "coercion" could look at a case where the government says, "If you go to trial and lose, we're going to kill you, but if you agree to plead guilty, we can talk about something less than death," and not see that. Honestly, how is that *not* coercive?

MC: How can we go about reforming plea bargaining? At the beginning of our discussion, you brought up the issue of bail reform and pre-trial detainment. In 2020, Professor Paul Cassell of the University of Utah published a paper arguing that releasing pre-trial detainees causes an uptick in crime. What are some reforms to plea bargaining that you believe could balance public safety interests along with the right of every criminal defendant to due process?

CN: That is such an unfortunate and illiberal way to look at things, and it really hides the ball. I don't know if Professor Cassell is doing it on purpose, but it's an unbelievably simplistic and ultimately bad-faith way of looking at the issue. At the end of the day, we know who commits most crime, and it is young men between the ages of 15 and about 25 or 30. So if you really want to reduce violent crime, just lock up every young man between the ages of 15 and 30, right? Guess what? You'll have almost no violent crime! But our system doesn't permit that, even in the name of public safety, and even though you could show to a complete certainty that you would get a vast reduction in violent crime. You still don't get to do it.

Believe it or not, the same thing holds true for pre-trial detention. This is not some policy that's up for grabs, where we can do it this way or that way. The Constitution of the United States, including its protection of due process and the Eighth Amendment itself, contemplates a default of pre-trial freedom,

and that's the way it was historically. The default is, when you get arrested and charged with a crime, it is simply that-a charge, an allegation. You are presumed to be innocent, and remain presumed to be innocent until you are convicted. It's incumbent on the government to demonstrate that you are either an exceptional flight risk or an exceptional threat to public safety, and if the government is unable to make that showing, then the Eighth Amendment kicks in and you are entitled to be released pending trial. How has the government tried to change that? The way they've changed that is by saying, "Well, we can't necessarily show that you're an exceptional flight risk, and we can't necessarily show that you in particular are an exceptional threat to public safety, but we have a hunch that you might be a threat to public safety, so we'll set bail at an amount that we suspect you won't be able to pay, and you will remain in jail pending trial even though we were unable to make the constitutionally requisite showing." I think that's a very shady and underhanded way of accomplishing this goal.

I am the first to admit that you would get a significant reduction in crime if you locked up every single person who is arrested, and you make them wait in prison until they're trial. Stipulated. It would also be a massive violation of the Constitution, and this idea that we can get around that by setting bail at an amount that most people won't be able to make, isn't credible.

MC: What reforms would you recommend to Congress and state legislatures on this issue?

CN: It depends on what you mean by "this issue." If, for example, you don't particularly care about the constitutional commitment to pre-trial freedom, and there are a lot of people who don't, then your attitude is going to be to lock up as many of them as you can and in any way that you can. Again, I think that is a blatant violation of the Constitution. When we talk about whether there is a solution here, I don't think there is really a "solution" because I'm not sure what the problem is. I will say that we should do our best to accommodate the clear constitutional commitment to pre-trial freedom, and recognize that when we embrace policies that are an affront to that commitment, such as turning a blind eye to the use of cash bail as a proxy or substitute for showing that a particular defendant represents a public safety risk, then I think we're in the wrong place. We are going to have to accept some additional risk to public safety, in the same way that we do when we say that police cannot beat confessions out of suspects. Would you get a reduction in crime and an increase in public safety if you allowed police officers to beat confessions out of suspects, the way they used to do? You probably would. But most of us have a strong commitment to the constitutional prohibition of coerced confessions, even if we could show that the general population would receive public safety benefits. For whatever reason, and frankly I don't understand it very well, people who would be horrified at the idea of trying to increase public safety by allowing police to beat confessions out of suspects seem to lose those same constitutional concerns when it comes to trying to increase public safety by ignoring the constitutional commitment to pre-trial freedom. But those are both constitutional commitments and both must be upheld equally, even though those two values-not allowing the government to coerce confessions on the one hand and respecting a defendant's right to pre-trial freedom on the other-are different, they must both be respected. We can't deny or disparage either one of these provisions even though I think that many judges and prosecutors unfortunately do.

MC: After this interview is posted, it will be shared with high school students around the country. Are there sources that you would recommend our readers start following if they want to learn more about this issue and perhaps take on a role in it?

CN: My friend Carissa Hessick, who is a professor at the University of North Carolina, just wrote a book that came out last year called *Punishment Without Trial.* It's about plea bargaining, and a great deal of it touches on coercion. That's probably the single best source for one-stop shopping on this topic.

This is a little bit off the wall, but I will also say that if you want to learn more about what the stakes are in this issue, there's a really horrifying movie called Shot Caller. That's prison lingo for someone who has risen up so high in the prison hierarchy that they call the shots and are the boss of the prison. It tells the story of an ordinary guy in California who is driving his car after a couple glasses of wine and gets in a car wreck in which his best friend is killed, so he goes to prison. It's such a horrible environment that within a few years he is completely integrated into the prison atmosphere, joined a gang, and will never be able to interact with his family again because it would put them at risk. I found that to be one of the most sobering movies that I've ever seen. It helps underscore the other side of the coin, and the cost that we incur as a country when, instead of restorting to our system of criminal punishment as a tool of last resort for public policy problems, we turn to it as a tool of first resort. We are the most carceral nation on the planet. We lock up both a higher percentage of our own people and a higher total number than any other country in the world. I don't think that's a statistic to be proud of, nor do I think it's a foregone conclusion that there's just no other way. I don't agree with the argument that America is always destined to have high crime rates and therefore high incarceration rates. I think that represents a surrender. Those are two sources that are quite different that would help to paint a picture for people that are interested in this issue.

MC: Thank you so much for your time, sir! I really enjoyed our discussion, and I'm sure that our readers will as well.

CN: Thanks for having me. It was a pleasure!