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# COLUMBIA LAW REVIEW

VOL. 79

JANUARY 1979

NO. 1

## Plea Bargaining And Its History \*

Albert W. Alschuler \*\*

### I. THE IDEOLOGICAL COMFORTS OF HISTORY

One statistic dominates any realistic discussion of criminal justice in America today: roughly ninety percent of the criminal defendants convicted in state and federal courts plead guilty rather than exercise their right to stand trial before a court or jury.<sup>1</sup> Behind this statistic lies the practice of plea bargaining, in which prosecutors and trial judges offer defendants concessions in exchange for their pleas.

In seeking the historic origins of this practice, one may be influenced by his opinion of plea bargaining itself. A defender of plea negotiation is likely to be comforted by the thought that the practice has "always" been with us—a conclusion that suggests both the inevitability of our nonadjudicative methods of processing criminal cases and the unreality of those who would alter these methods dramatically. Similarly, an opponent of "bargain justice" may seek comfort in the concept of a bygone golden age in which plea negotiation was unknown, an age from which we departed inadvertently and largely as a result of laziness, bureaucratization, overcriminalization, and economic pressure.<sup>2</sup>

History does of course bear on current plea bargaining issues. Social scientists who explain plea bargaining in terms of general principles of bureaucratic interaction sometimes offer historical support for their conclusions,<sup>3</sup> and by the same token their theories of courtroom dynamics are often potentially subject to historical refutation. Similarly, the view that plea bargaining is an "economic necessity" would gain plausibility if one concluded that this shortcut to conviction had been employed for as long

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\* An earlier version of this Article was presented to a Special National Workshop on Plea Bargaining sponsored by the National Institute of Law Enforcement and Criminal Justice of the Law Enforcement Assistance Administration. The conference was held in French Lick, Indiana, from June 14 through June 17, 1978. I am grateful to the participants in this conference and to Arthur H. Travers, Jr., James E. Scarboro, John H. Langbein, Mark Haller, Roger Lane, and Richard L. Abel for valuable suggestions.

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1. D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 3 (1966).

2. See M. Feeley, *The Effect of Heavy Caseloads* 23 (unpublished manuscript presented at the Annual Meeting of the American Political Science Association, San Francisco, California, Sept. 5, 1975) (revised version to appear as chapter 8 of Feeley's book, *The Process Is the Punishment*, to be published by the Russell Sage Foundation, New York City).

3. See M. HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 28-32, 157 (1978).

as there had been trials, and even more clearly, the claim of economic necessity would become strained if one concluded that the Anglo-American legal system had survived without plea bargaining during most of its existence.

Perhaps more important than the logical bearing of history on any current issue is the mystic and emotional significance of the past. Ideological disputants seek warmth in prior ages and seem to rival each other for the claim that their positions are traditional. In considering what kind of criminal justice system we ought to have, it may matter little whether plea bargaining is a recent phenomenon. Nevertheless, this historical question frequently generates an emotional response.

So strong are the emotional predilections of some defenders of plea bargaining that they have made historical statements without the slightest historical support. A vigorous endorsement of plea bargaining issued by a California grand jury began, "With respect to plea bargaining, this has been a part of the judicial system ever since man was made to account for crimes against society."<sup>4</sup> In an opinion for the en banc United States Court of Appeals for the Fifth Circuit, Judge Charles Clark proclaimed: "Plea bargains have accompanied the whole history of this nation's criminal jurisprudence."<sup>5</sup> Justice William Erickson of the Colorado Supreme Court wrote that "charge and sentence concessions to secure pleas of guilty are, and always have been, part and parcel of our criminal justice system."<sup>6</sup> And Donald J. Newman, author of a leading empirical study of plea bargaining,<sup>7</sup> concluded, "Plea agreements are not new; in all probability such bargaining has gone on as long as there have been criminal courts. . . . [I]t wouldn't surprise many knowledgeable court observers to learn that Cain had pleaded to a lesser charge after having murdered Abel."<sup>8</sup>

As an opponent of plea bargaining, I have been offended by these rhetorical historical pronouncements and perhaps even more offended by the seemingly knowledgeable but equally unsupported assertions of scholars that plea bargaining "apparently originated in seventeenth-century England as a means of mitigating unduly harsh punishment."<sup>9</sup> The defenders of plea

4. Ratliff, *Plea Bargaining Even, Effective*, Vallejo News-Chronicle, Feb. 6, 1974, at 8.

5. *Bryan v. United States*, 492 F.2d 775, 780 (5th Cir. 1974).

6. Erickson, *The Finality of a Plea of Guilty*, 48 NOTRE DAME LAW. 835, 839 (1973).

7. D. NEWMAN, *supra* note 1.

8. Newman, *Reshape the Deal*, TRIAL, May-June 1973, at 11; see Newman, *The Agnew Plea Bargain*, 10 CRIM. L. BULL. 85 (1974).

9. J. BOND, PLEA BARGAINING AND GUILTY PLEAS § 1.07[1] (1975); accord, Dash, *Cracks in the Foundation of Criminal Justice*, 46 ILL. L. REV. 385, 396 (1951); McLaughlin, *Selected Excerpts From the 1968 Report of New York State Joint Legislative Committee on Crime, Its Causes, Control, and Effect on Society*, 5 CRIM. L. BULL. 255, 256-57 (1969); Note, *Plea Bargaining—Justice Off the Record*, 9 WASHBURN L.J. 430, 432 (1970). Dash's assertions about plea bargaining were not quite so broad as those of the other sources, but he did seem to confuse plea bargaining with simple jury nullification and, remarkably, to rely on descriptions of nineteenth-century practices to support his assertions about the seventeenth and eighteenth centuries. Dash, *supra*, at 396, nn.25 & 26. Dash's misleading assertions, augmented by McLaughlin's misreading of Dash, apparently produced the erroneous historical view that the more recent sources have perpetuated.

bargaining have seemed to rely on a sense of what "must have been" in making their historical judgments, but today's method of resolving criminal cases is not, from my perspective, a matter of doing what comes naturally.<sup>10</sup> I therefore cannot claim to have approached the history of plea bargaining in an entirely neutral manner, and I am, more than a good historian should be, subject to the ideological temptations that I have described. This Article, however, reflects a sense that a priori historic views should be tested and investigated whenever possible, and I have been alert to my biases.

## II. AN OVERVIEW

### A. *A Preliminary Matter of Definition*

Plea bargaining consists of the exchange of official concessions for a defendant's act of self-conviction. These concessions may relate to the sentence imposed by the court or recommended by the prosecutor, the offense charged, or a variety of other circumstances;<sup>11</sup> they may be explicit or implicit; and they may proceed from any of a number of officials. The benefit offered by the defendant, however, is always the same: entry of

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A generally unenlightening historical treatment of plea bargaining is provided by Comment, *The Plea Bargain in Historical Perspective*, 23 BUFFALO L. REV. 499 (1974). This Comment maintained that plea bargaining has "ancient antecedents" *id.* at 500, but it seemed to treat almost everything as an antecedent of plea bargaining (for example, an offender's payment of a fixed fine to his victim in Anglo-Saxon England and the later practice of allowing qualified offenders to assert benefit of clergy). Only by including practices that involved neither a plea nor a bargain was the comment able to support its thesis.

10. I do not deny, however, that the criminal justice system poses inherent temptations for prosecutors and defendants to engage in plea bargaining. Similarly, teachers and students face inherent temptations to engage in "grade bargaining," the exchange of a favorable grade for a student's waiver of the right to a reading of his final examination. See generally Kipnis, *Criminal Justice and the Negotiated Plea*, 86 ETHICS 93 (1976). In the same way that a prosecutor can relieve caseload pressure through plea bargaining, an instructor can alleviate "bluebook backlog" through grade bargaining, and just as it is in a defendant's interest to secure a favorable sentence, it is in a student's interest to secure a favorable grade. Despite the impulses to engage in grade bargaining that both teachers and students may experience, we surely would not regard this process as natural or inevitable. If it arose, we would, to the contrary, view it as a corruption of the grading process.

The grade-bargaining analogy is obviously imprecise, but it may be somewhat instructive in another respect. If grade bargaining arose, it would undoubtedly be hidden from public view initially. The first visible signs of the practice would probably lie in its vigorous condemnation by school officials and the public. If the practice nevertheless persisted and flourished, some observers might begin to offer rationalizations for it, e.g., that grade bargaining conserves scarce resources, ensures a prompt and certain conclusion of the grading process, gives students a sense of participation in this process, and alleviates the harshness and arbitrariness that have sometimes characterized grading in the past. Moreover, once grade bargaining became familiar, people might insist that it was inevitable, that it had always occurred in one form or another, and that assertions of its absence in particular places or at particular times should be viewed with extreme skepticism. This paper contends that the history of plea bargaining has exhibited similar stages of development.

11. For example, a prosecutor may provide leniency to a defendant's accomplices, withhold damaging information from the court, influence the date for a defendant's trial or sentencing, arrange for a defendant to be sent to a particular correctional institution, request that a defendant receive credit on his sentence for time served in jail awaiting trial, agree to support a defendant's application for parole, attempt to have detainees from other jurisdictions dismissed, arrange for sentencing in a particular court or by a particular judge, provide immunity for crimes not yet charged, or simply remain silent when his recommendation might otherwise be unfavorable.

a plea of guilty. This definition excludes unilateral exercises of prosecutorial or judicial discretion, such as an unqualified dismissal or reduction of charges. It also excludes the exchange of official concessions for actions other than entry of a guilty plea, such as offering restitution to the victim of a crime, giving information or testimony concerning other alleged offenders, or resigning from public office following allegations of misconduct.<sup>12</sup>

This paper contends that plea bargaining was essentially unknown during most of the history of the common law. Such practices as nullifying harsh penalties through unilateral exercises of discretion and bargaining for information, however, have far more venerable histories.<sup>13</sup> It therefore seems important to emphasize at the outset the differences between these practices and plea bargaining.

When a prosecutor reduces or dismisses a charge in the unilateral exercise of his discretion, he does not place any pressure on the defendant to incriminate himself. Mercy is given, not sold. Exchanging official concessions for restitution or information similarly involves no element of compelled self-incrimination. The defendant is given more lenient treatment because he has made the victim whole or because he has aided the prosecution of other offenders, not because he has made his own conviction easier.

Furthermore, although the fifth amendment prohibits compelling a person to incriminate himself, the Constitution does not prohibit compelling a person to incriminate another; and when one could be imprisoned for refusing to present incriminating information, the offer of an affirmative inducement to present this information may not seem notably disturbing. Bargaining for information, like bargaining for restitution, plainly does not subject a defendant to the same burden on the exercise of a constitutional right as does bargaining for his plea of guilty. Bargaining for information may also pose a lesser risk to the accuracy of criminal judgments. When a defendant is offered lenient treatment for testifying against another, he may testify falsely to provide the prosecutor with what he wants to hear. A similar danger of unreliability may arise when a defendant is induced to convict not another but himself. When one defendant agrees to testify against another, however, his statements will be subject to refutation and critical evaluation in the courtroom. In contrast, as the Supreme Court has noted, a guilty plea "is itself a conviction. . . . More is not required; the court has nothing to do but give judgment and sentence."<sup>14</sup>

Finally, the affirmative justification for plea bargaining may be weaker than the justification for other forms of negotiation. Providing a "break"

12. Of course a defendant may obtain leniency by agreeing both to plead guilty and to provide an additional benefit such as restitution. I agree that a "package deal" of this sort should be regarded as a plea bargain.

13. See notes 77-91 and accompanying text *infra*.

14. *Kercheval v. United States*, 274 U.S. 220, 223 (1927). Some courts are currently required to ascertain that a guilty plea has a "factual basis" before accepting it. *E.g.*, *FED. R. CRIM. P.* 11(f). This requirement places some limit, but not a very substantial one, on the courts' ability to treat guilty pleas as conclusive. See Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 *YALE L.J.* 1179, 1292-94 (1975).

because the defendant has relieved the victim's suffering or because he has brought other offenders to justice is not the same as providing this break because the defendant has saved the government the time, the expense, and the risk of trial. A sacrifice of penological interests seems less objectionable when it is incurred for the sake of compensatory interests or law enforcement interests than when it is incurred for the sake of administrative interests. Of course the purpose of this brief analysis is not to deny that bargaining for information and restitution can pose significant dangers.<sup>15</sup> It is only to suggest that this sort of bargaining should not be confounded with plea bargaining.

### B. *A Brief Sketch of the History of the Guilty Plea*

The conclusion of this Article that plea bargaining did not occur with any frequency until well into the nineteenth century raises the difficulties associated with "proving a negative." To establish that something did not happen, one must account for a great deal of time during which it *might* have happened. This difficulty is augmented in an investigation of plea bargaining by the possibility that the "law in action" may have been different from the "law in the books." Detailed statistical record keeping and careful empirical investigations of the criminal courts are relatively recent developments, and in the main, it is the books—the legal treatises and case reports—that have survived. For these reasons, the claim that plea bargaining did not occur during any specified historical period cannot be established conclusively. Nevertheless, other extra-legal practices—such as "compounding," the practice of making payment to the victim of a crime for his agreement not to prosecute—have left rich histories,<sup>16</sup> and it appears probable that an established practice of plea bargaining would have left a significant trace.

This Article does not rely entirely on the lack of affirmative evidence of plea bargaining to support its conclusion that the practice was essentially unknown. Rather, legal treatises and case reports indicate that for many centuries Anglo-American courts did not encourage guilty pleas but actively discouraged them. In addition, a few American criminal-court records of the early nineteenth century reveal an extremely low guilty-plea rate.

The judicial practice of discouraging guilty pleas persisted into the second half of the nineteenth century, but at about this time prosecutorial plea bargaining emerged. Of course a history of one hundred years or more may be sufficient, from the perspective of some observers, to render plea bargaining a venerable institution. If so, however, plea bargaining may be venerable in the same sense as compounding and other consistently condemned practices. For as cases of plea bargaining reached the official re-

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15. See, e.g., *Franklin v. State*, — Nev. —, 577 P.2d 860 (1978).

16. See 2 L. RADZINOWICZ, *A HISTORY OF ENGLISH CRIMINAL LAW* 313-25 (1956); Kurland & Waters, *Public Prosecutions in England, 1854-79: An Essay in English Legislative History*, 1959 DUKE L.J. 493.

ports in the decades following the American Civil War, the overwhelming reaction was one of strong disapproval. Indeed, although the propriety of plea bargaining did not come before the United States Supreme Court during this formative period, there are indications that the Court would have invalidated the practice had the issue been presented—a development that might (or might not) have brought the brief history of plea bargaining to a speedy conclusion.

Despite general disapproval, plea bargaining became a dominant method of resolving criminal cases at the end of the nineteenth century and beginning of the twentieth—at a time when the bondsman, the ward politician, the newspaper reporter, the jailer, and the fixer exerted an everyday influence on the administration of criminal justice.<sup>17</sup> The process was accompanied and probably aided by the substantive expansion of the criminal law, particularly the enactment of liquor-prohibition statutes.<sup>18</sup>

Various crime commissions demonstrated in the 1920's that plea bargaining had become common and that the use of this route to conviction had increased in the immediately preceding decades.<sup>19</sup> For the first time, the practice came to the attention of the public, and once again the general reaction—of scholars, of the press, and of the crime commissions themselves—was disapproval.

In the decades following the 1920's, American criminal courts became even more dependent on the guilty plea. The good press that plea bargaining currently enjoys in legal circles, however, developed more recently. As late as 1958, it seemed possible that the United States Supreme Court might hold the practice illegal, and apparently to foreclose this possibility, the Department of Justice took dubious steps to prevent the Court from deciding the issue.<sup>20</sup> The Supreme Court then ignored this central facet of the criminal justice system during the period of its "due process revolution." At the same time, many of its decisions exacerbated the pressures for plea bargaining by increasing the complexity, length, and cost of criminal trials. Finally, in its 1970 decision in *Brady v. United States*,<sup>21</sup> the Court concluded that plea bargaining was "inherent in the criminal law and its administration."<sup>22</sup> Even the dissenters from the Court's analysis took pains to distinguish the practice at issue in *Brady* from what they called "the venerable institution of plea bargaining."<sup>23</sup>

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17. See text accompanying note 133 *infra*.

18. By increasing the caseloads of the courts, the expansion of the criminal law enhanced the pressure for rapid disposition of cases. See notes 197-99 and accompanying text *infra*.

19. See notes 140-82 and accompanying text *infra*.

20. See notes 201-07 and accompanying text *infra*.

21. *Brady v. United States*, 397 U.S. 742 (1970).

22. *Id.* at 751.

23. *Parker v. North Carolina*, 397 U.S. 790, 808 (1970) (Brennan, J., dissenting in this case and concurring in the result in *Brady v. United States*).

### III. THE EARLY HISTORY OF THE GUILTY PLEA

#### A. *The Judicial Discouragement of Confessions*

From the earliest days of the common law, it has been possible for an accused criminal to convict himself by acknowledging his crime.<sup>24</sup> "Confession" was in fact a possible means of conviction even prior to the Norman conquest of England.<sup>25</sup> Nevertheless, the first common-law treatises—Glanvill's work of about 1189,<sup>26</sup> Bracton's work of about 1250,<sup>27</sup> and Britton's work of about 1290<sup>28</sup>—fail to mention any procedure resembling the guilty plea,<sup>29</sup> and confessions of guilt were apparently extremely uncommon during the medieval period.<sup>30</sup> In hundreds of reported cases, medieval defendants denied "word for word, the felony, the king's peace, and all of it," but historians have found only a handful of recorded instances of confession.<sup>31</sup>

When common-law treatises first adverted to the guilty plea, they indicated that the courts were extremely hesitant to receive it. By 1680, Sir Mathew Hale had written, "[W]here the defendant upon hearing of his indictment . . . confesses it, this is a conviction; but it is usual for the court . . . to advise the party to plead and put himself upon his trial, and not presently to record his confession, but to admit him to plead."<sup>32</sup> Earlier,

24. Constitutions of Clarendon, 1164, c. 3; Assize of Clarendon, 1166, c. 13. In this respect, the early common law was apparently the same as both Roman law, 2 C. SHERMAN, *ROMAN LAW IN THE MODERN WORLD* 488 (1917), and early continental law, A. ESMEIN, *A HISTORY OF CONTINENTAL CRIMINAL PROCEDURE* 252 (1913). On the continent, however, at least in some places, "it was very soon agreed that the confession should not constitute a complete proof unless it was supported by corroborative evidence." *Id.* at 255.

25. H. ADAMS, H. LODGE, E. YOUNG & J. LAUGHLIN, *ESSAYS IN ANGLO-SAXON LAW* 285-88 (1876).

26. GLANVILL (G. Hall ed. 1965).

27. H. BRACON, *DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE* (S. Thorne trans. 1968).

28. BRITTON (F. Nichols trans. 1901). Britton recorded only two alternatives for an accused felon at arraignment: he could "put [himself] upon [his] acquittal"—that is, consent to jury trial—or he could remain silent, in which event he would be subjected to physical pressure to consent. *Id.* at 21. Britton mentioned confession as an option only for defendants who became approvers (a process described in text accompanying notes 80-87 *infra*). *Id.* at 24.

29. This conclusion requires some qualification with respect to Bracton's treatise. The Twiss edition of Bracton, generally regarded as an unreliable work, reported that a felon sometimes confessed his crime "without any proof." In that event, he "carried [d] a judgment against himself," and "his staff [was] altogether broken." 2 H. BRACON, *DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE* 521 (T. Twiss ed. 1878). The more reliable Woodbine edition of Bracton marks the reference to the "altogether broken staff" as an "addicione" or "doubtful" passage, and it presents Bracton's remarks in a different context so that they refer, not to simple confessions or guilty pleas, but to various phases of approvement. 2 H. BRACON, *DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE* 429 (S. Thorne trans. 1968) (translation of the Woodbine edition).

30. The paucity of guilty pleas at this time seems surprising in one respect, for the usual alternative to confession was a denial under oath. It has often been supposed that, in a deeply religious age, even a person whose confession might lead to his conviction and execution would fear the supernatural consequences of false swearing. See 5 J. BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 260 (London 1827).

31. See R. HUNNISETT, *THE MEDIEVAL CORONER* 69 (1961): "Simple confessions . . . were very rare . . . Their number may have . . . been even smaller than at first appears, for what seem to be simple confessions may sometimes have been the prelude to turning approver." (See text accompanying notes 80-87 *infra* for a description of how an accused felon might turn approver.)

32. M. HALE, *HISTORY OF THE PLEAS OF THE CROWN* 225 (S. Emyln ed. London 1736).

Ferdinando Pulton had written that the plea of not guilty was "the most common and usual plea" and that "it receiveth great favour in the law."<sup>33</sup>

Statements like Hale's persisted in criminal law treatises until the end of the nineteenth century. For example, Blackstone's *Commentaries on the Laws of England* observed in the mid-eighteenth century that the courts were "very backward in receiving and recording [a guilty plea] . . . and generally advise the prisoner to retract it."<sup>34</sup> Chitty,<sup>35</sup> Stephen,<sup>36</sup> and the other English and American writers who noted this judicial phenomenon<sup>37</sup> usually did so approvingly, but the established procedure in guilty plea cases did have a notable critic. In the early nineteenth century, Jeremy Bentham declared:

In practice, it is grown into a sort of fashion, when a prisoner has [entered a plea of guilty], for the judge to endeavour to persuade him to withdraw it, and substitute the opposite plea, the plea of not guilty, in its place. The wicked man, repenting of his wickedness, offers what atonement is in his power: the judge, the chosen minister of righteousness, bids him repent of his repentance, and in place of the truth substitute a barefaced lie.<sup>38</sup>

Bentham, however, did not propose a more liberal acceptance of guilty pleas. Instead, he urged abolition of the guilty plea and the substitution of a more careful and rigorous examination of the defendant, an examination designed "to guard him against undue conviction, brought on upon him by his own imbecility and imprudence."<sup>39</sup>

Official reports of guilty plea cases remained infrequent until the last quarter of the nineteenth century, but Professor John H. Langbein's recent study of the Old Bailey during the late seventeenth and early eighteenth centuries offers a glimpse of the English criminal justice system in operation.<sup>40</sup> Working from journalistic accounts designed for a popular rather than a professional audience, Professor Langbein discovered that jury trials were extremely rapid in an era when neither party was represented by counsel, when an informally selected jury might hear several cases before retiring, and when the law of evidence was almost entirely undeveloped. In fact trials were so swift that between twelve and twenty cases could be heard in a single day. Accordingly, the administrative pressure for plea

33. F. PULTON, *DE PACE REGIS ET REGNI* 184 (London 1609). Pulton was contrasting the plea of not guilty primarily with various special pleas, however, not with the plea of guilty. See text accompanying notes 69-77 *infra*.

34. 4 W. BLACKSTONE, *COMMENTARIES* \*329.

35. 1 J. CHITTY, *CRIMINAL LAW* 429 (London 1816).

36. 4 J. STEPHEN, *COMMENTARIES ON THE LAWS OF ENGLAND* 394 (1874).

37. J. ARCHBOLD, *PLEADING AND EVIDENCE IN CRIMINAL CASES* 73-74 (1st Am. ed. New York 1824); 4 H. BROOM & E. HADLEY, *COMMENTARIES ON THE LAWS OF ENGLAND* 424-25 (London 1869); J. DAVIS, *THE MASSACHUSETTS JUSTICE* 232 (Worcester 1847); S. HARRIS, *CRIMINAL LAW* 358 (1877); PRITCHARD, *QUARTER SESSIONS PRACTICE* (2d ed. 1904). See *Green v. Commonwealth*, 94 Mass. (12 Allen) 155, 175-76 (1866).

38. 2 J. BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 316 (London 1827).

39. 3 *id.* at 127.

40. Langbein, *The Criminal Trial before the Lawyers*, 45 U. CHI. L. REV. 263 (1978).

bargaining was small. Professor Langbein found no indication that plea bargaining was practiced but did find a number of cases in which the court urged defendants to stand trial after they had attempted initially to plead guilty.

The case of Stephen Wright in 1743 seems especially revealing.<sup>41</sup> Wright announced that he would plead guilty to robbery in order to spare the court trouble, and he expressed hope that the court and jury would recommend executive commutation of the death sentence mandated for this crime. The court responded, in effect, that the defendant had it backwards, for the court could not take notice of any favorable circumstances in his case unless he agreed to stand trial. Wright then yielded to the court's advice.

The earliest reported American decision on the guilty plea reveals that the practice in America was no different.<sup>42</sup> In Massachusetts in 1804, a twenty-year-old black man was accused of raping a thirteen-year-old white girl, breaking her head with a stone, and throwing her body into the water, thereby causing her death. When the defendant pleaded guilty to indictments for rape and murder,

The court informed him of the consequences of his plea, and that he was under no legal or moral obligation to plead guilty—but that he had a right to deny the several charges and put the government to the proof of them.—He would not retract his pleas—whereupon the court told him that they would allow him a reasonable time to consider of what had been said to him—and remanded him to prison. They directed the *clerk* not to record his pleas, at present.<sup>43</sup>

When the defendant was returned to the courtroom, he again pleaded guilty.

Upon which the court examined, under oath, the sheriff, the gaoler, and the justice [who had conducted the preliminary examination of the defendant] as to the *sanity* of the prisoner; and whether there had not been tampering with him, either by promises, persuasions, or hopes of pardon, if he would plead guilty. On a very full enquiry, nothing of that kind appearing, the prisoner was again remanded, and the clerk directed to record the plea on both indictments.<sup>44</sup>

The report concluded that the defendant “has since been executed.”<sup>45</sup> In the only other American decision prior to the Civil War to discuss the guilty

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41. *Id.* at 278.

42. *Commonwealth v. Battis*, 1 Mass. 95 (1804).

43. *Id.* at 95.

44. *Id.*

45. *Id.* at 96. Not only did the court indicate that a promise of leniency would invalidate the defendant's plea, but it examined the persons who might have *made* such a promise, rather than the defendant himself, in its effort to learn whether any “hope of pardon” had been engendered. The examination of these officials, moreover, was under oath. This procedure may have been better designed to reveal the circumstances underlying the guilty plea than the modern practice of interrogating the defendant himself.

plea extensively, the persuasion of the court was successful, and the defendant withdrew his plea.<sup>46</sup>

Even at the end of the nineteenth century, courts sometimes followed a procedure reminiscent of the one that Hale had described more than two hundred years earlier.<sup>47</sup> The United States Supreme Court first upheld a guilty-plea conviction in *Hallinger v. Davis*,<sup>48</sup> decided in 1892. The Court observed, "The [trial] court refrained from at once accepting [the defendant's] plea of guilty, assigned him counsel, and twice adjourned, for a period of several days, in order that he might be fully advised of the truth, force and effect of his plea of guilty."<sup>49</sup>

A few compilations of early nineteenth-century judicial records confirm the apparent absence of a regular practice of encouraging guilty pleas. Professor Theodore N. Ferdinand examined the work of the Boston Police Court in 1824, and the statistical tables that he prepared are in many ways remarkably similar to those that might be prepared for an urban misdemeanor court today.<sup>50</sup> In one respect, however, the Boston Police Court was different: only eleven percent of the 2208 defendants who came before the court in 1824 entered pleas of guilty.<sup>51</sup> Similarly, Raymond Moley's 1928 study, *The Vanishing Jury*,<sup>52</sup> reported the percentage of felony convictions "by jury" and "by confession" in New York State for an eighty-eight year period beginning in 1839. At the outset of this period, only twenty-five percent of the state's felony convictions were by guilty plea, and in the urban counties of New York and Kings the figure was even smaller, fifteen percent.<sup>53</sup> Of course one cannot know whether some form of plea negotiation (either explicit or implicit) motivated the guilty pleas that criminal defendants did enter, but I am inclined to doubt it. These statistics reflect a period before the development of professional police forces, a time when a substantial proportion of criminal defendants were probably apprehended during the commission of crime or following hot pursuit so that their guilt was beyond question.<sup>54</sup> The guilty plea rates revealed by Moley and Ferdinand seem smaller than one might expect even in the absence of plea bargaining.

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46. *United States v. Dixon*, 1 D.C. (1 Cranch) 414 (1807).

47. See note 32 and accompanying text *supra*.

48. 146 U.S. 314 (1892).

49. *Id.* at 324. For further discussion of *Hallinger*, see notes 127-30 and accompanying text *infra*.

50. T. Ferdinand, *Criminality, the Courts, and the Constabulary in Boston: 1703-1967*, tables 1 & 2 (Oct. 1973) (unpublished manuscript). Particularly striking is the fact that more than one-fourth of the court's caseload consisted of crimes that we would today call victimless—such offenses as drunkenness, vagabondage, breaking the Sabbath, fortune telling, selling liquor on Sunday, and being a night walker.

51. *Id.*, table 2.

52. Moley, *The Vanishing Jury*, 2 S. CAL. L. REV. 97 (1928).

53. *Id.* at 108.

54. Indeed, one may speculate that cases of "red-handed apprehension" comprised a larger portion of the courts' caseload during the period just before the introduction of professional police forces than at any other time. Neighborhood self-policing (based in part on such things as rumor, reputation, and observation of someone in a suspicious location) was no longer an effective law-enforcement technique, and except in cases in which a reward or other compensation for private detectives was available, an offender who was not immediately apprehended may have been unlikely to be apprehended at all.

There were several reasons for the reluctance of the courts to receive pleas of guilty during the formative period of the common law and for centuries thereafter. First, these pleas were apparently distrusted. William Auckland, a contemporary of Blackstone, observed:

[W]e have known instances of murder avowed, which never were committed; of things confessed to have been stolen, which never had quitted the possession of the owner. . . . It is both ungenerous therefore, and unjust, to suffer the distractions of fear, or the mis-directed hopes of mercy to preclude that negative evidence of disproof, which may possibly, on recollection, be in the power of the party; *we should never admit, when it may be avoided, even the possibility of driving the innocent to destruction.*<sup>55</sup>

Probably more important than the judicial distrust of guilty pleas was the fact that English felony defendants were not represented by counsel. It was a basic duty of trial judges to see that these defendants should "suffer nothing for [their] want of knowledge in [the] matter of law."<sup>56</sup> The common advice to stand trial was probably presented not in what we would today regard as a judicial capacity but in the court's capacity as counselor.

Still another reason for the courts' discouragement of guilty pleas was that death was the prescribed penalty for every felony. When a guilty plea is an act of suicide, it is understandable that the acceptance of it should evoke squeamish feelings.<sup>57</sup> One should not suppose, however, that the English penalty structure was simply too rigid to permit any development of plea negotiation. When capital punishment reached its high-water mark in England in 1819, death was the authorized punishment for 220 offenses.<sup>58</sup> Of the 1254 defendants convicted of capital crimes during the preceding year, however, only ninety-seven were executed.<sup>59</sup> Alongside England's system of capital punishment had grown an extensive system of executive reprieves.<sup>60</sup> A recommendation by the trial judge ensured the King's pardon, and other techniques for nullifying the death penalty were also available.<sup>61</sup>

55. W. AUCKLAND, *PRINCIPLES OF PENAL LAW* 167 (2d ed. London 1771).

56. *Rex v. Twyn*, 6 How. St. Tr. 513, 516 (1663).

57. See *Sirhan Plea to Die is Denied by Court*, N.Y. Times, March 1, 1969, at 1, col. 2. But see *Gilmore v. Utah*, 429 U.S. 1012 (1976).

Blackstone attributed the judicial reluctance to receive guilty pleas to a "tenderness to the life of the subject." 4 W. BLACKSTONE, *supra* note 34, at \*329, and during the nineteenth century, commentators who described the judicial discouragement of guilty pleas sometimes added the words "at least in capital cases," e.g., J. STEPHEN, *supra* note 36, at 394.

58. J. MICHAEL & H. WECHSLER, *CRIMINAL LAW AND ITS ADMINISTRATION* 266 (1940).

59. C. COTTU, *ON THE ADMINISTRATION OF CRIMINAL JUSTICE IN ENGLAND* 69 n. (trans. London 1822).

60. See F. BRESLER, *REPRIEVE: A STUDY OF A SYSTEM* (1965).

61. At a relatively early age, for example, a first offender who could read and write could avoid capital punishment by claiming "benefit of clergy," and by 1576, common-law courts could sentence a defendant who invoked this privilege to one year's imprisonment. An Act to take away Clergy from the offenders in Rape or Burglary, 1575-76, 18 Eliz. 1, c. 7, § 3. Moreover, the death penalty was prescribed only for felonies, and there never was a time when all or most crimes fell into this category. Had the practice of reducing charges in exchange for pleas of guilty developed sooner, the alternate penalties that might have become the subject of a bargain would have included fines, maiming, transportation to the colonies, and imprisonment. Of course, juries commonly nullified the death penalty at trial by

In practice, therefore, judges did exercise substantial discretion in their recommendations concerning executive clemency, but their exercise of this discretion apparently did not lead to the exchange of leniency for pleas of guilty.

### B. *The Requirement of Voluntariness.*

Common-law courts apparently took a negative view, not of plea bargaining specifically, but of guilty pleas of any description. The courts therefore discouraged the entry even of guilty pleas that would qualify as voluntary under virtually any definition. Nevertheless, the formal requirement that a guilty plea be voluntary is at least as old as the first English treatise devoted exclusively to criminal law, Staundforde's *Pleas of the Crown*.<sup>62</sup> This work, published in 1560, declared that a guilty plea arising from "fear, menace, or duress" should not be recorded.<sup>63</sup> A half century later, Ferdinando Pulton wrote that the plea must "proceed freely, and of [the defendant's] own good will."<sup>64</sup>

Perhaps because guilty pleas were infrequent and even voluntary guilty pleas discouraged, the courts articulated the meaning of the concept of voluntariness exclusively in cases involving out-of-court confessions. The principles developed in these cases, however, suggest a basic incompatibility between plea bargaining and traditional common-law assumptions. The most famous of the confession cases was probably *Rex v. Warickshall*,<sup>65</sup> which in 1783 held any confession obtained "by promises of favor" to be inadmissible. The court declared, "[A] confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape . . . that no credit ought to be given to it."<sup>66</sup> It soon became clear that any confession "obtained by [a] direct or implied promise[ ], however slight" could not be received in evidence.<sup>67</sup> Even the offer of a glass of gin was a "promise of leniency" capable of coercing a confession.<sup>68</sup>

The basic rule was, and is still, that a promise of leniency by a person in authority invalidates an out-of-court confession.<sup>69</sup> Were this rule applied

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disregarding evidence of guilt and by acquitting the defendant or convicting him only of a misdemeanor. J. HALL, *THEFT, LAW AND SOCIETY* 126-30 (2d ed. 1952). In addition, judges frequently made tortured legal rulings to avoid the infliction of capital punishment. *Id.* at 118-26.

62. W. STAUNDFORDE, *LES PLEES DEL CORONE* (London 1560).

63. *Id.* at 142-43. See *Powtler's Case*, 11 Co. Rep. 29,30a, 77 Eng. Rep. 1181, 1183 (1610) (to be valid, a guilty plea must be "express and voluntary").

64. F. PULTON, *supra* note 33, at 176.

65. 1 Leach 263, 168 Eng. Rep. 234 (1783).

66. *Id.* at 263-64, 168 Eng. Rep. at 255. The principle that *Warickshall* articulated was not new. In *Rex v. Rudd*, 1 Cowp. 331, 334, 98 Eng. Rep. 1114, 1116 (1775), Lord Mansfield declared, "The instance has frequently happened, of persons having made confessions under threats or promises: the consequence as frequently has been, that such examinations and confessions have not been made use of against them on their trial."

67. *Bram v. United States*, 168 U.S. 532, 542-43 (1897) (quoting 3 W. RUSSELL, *RUSSELL ON CRIMES* (6th ed. 1896)).

68. *Rex v. Sexton* (1822), discussed in H. JOY, *ON THE ADMISSIBILITY OF CONFESSIONS AND CHALLENGES TO JURY IN CRIMINAL CASES IN ENGLAND AND IRELAND* \*17-21.

69. C. MCCORMICK, *EVIDENCE* § 111 (1954).

to pleas of guilty, every bargained plea would of course be invalid. Although some modern courts and scholars have attempted to escape this conclusion by suggesting distinctions between guilty pleas and out-of-court confessions,<sup>70</sup> there was apparently no such distinction in history. Indeed, while the legal phenomenon that we call a guilty plea has existed for more than eight centuries, the term "guilty plea" came into common use only about one century ago. During the previous 700 years, what we call a guilty plea was simply called a "confession."

Common-law treatises reveal that a "judicial confession" was not considered a pleading at all. Hale, for example, declared, "When the prisoner is arraigned, and demanded what he saith to the indictment, either he confesses the indictment; or pleads to it . . . ." <sup>71</sup> Early treatises contained elaborate catalogues of the pleas that a defendant might offer in a criminal case, but these catalogues did not mention confessions or pleas of guilty. Only the sections of the treatises on "evidence" described what is now thought of as a guilty plea.<sup>72</sup> The work of John Frederick Archbold is typical. Confessions, he said, are of four kinds: extra-judicial confessions, confessions during preliminary interrogations by magistrates, confessions that we would call pleas of *nolo contendere*, and confessions that we would call pleas of guilty. "All of these several species of confessions, to be of effect, must be voluntary," he concluded.<sup>73</sup>

Even in the mid-nineteenth century, the pattern persisted. Francis Wharton's treatise on indictments and pleas did not refer to the guilty plea,<sup>74</sup> but his treatise on criminal evidence described "judicial admissions" as a form of confession.<sup>75</sup> Wharton failed to differentiate between judicial and extra-judicial confessions in his discussion of the requirement of voluntariness.<sup>76</sup> The early decisions on the voluntariness of confessions, coupled with the fact that pleas of guilty were not regarded differently from other confessions, strongly suggest that the courts would have condemned the practice of plea bargaining had they had occasion to do so.

### C. *Approvement and Other Oddities*

Even a sketchy history of the guilty plea requires mention of some early practices that resembled plea bargaining but that did not involve the exchange of leniency for self-conviction. In an early form of diversion from

70. For a listing and critical discussion of these authorities, see Alschuler, *The Supreme Court, the Defense Attorney, and the Guilty Plea*, 47 U. COLO. L. REV. 1, 52-55 & n.172 (1975).

71. 2 M. HALE, *supra* note 32, at 225.

72. *E.g., id.*; 4 W. BLACKSTONE, *supra* note 34, at \* 329.

73. J. ARCHBOLD, *PLEADING AND EVIDENCE IN CRIMINAL CASES* 73 (1st Am. ed. 1824). For this work's discussion of the pleas a defendant might offer, including the "general issue" or "not guilty," see *id.* at 45-47.

74. F. WHARTON, *INDICTMENTS AND PLEAS* (2d ed. 1857).

75. F. WHARTON, *LAW OF EVIDENCE IN CRIMINAL ISSUES* § 638 (8th ed. 1880).

76. *Id.* §§ 646-674. A later edition declared, "Like any other confession, [a plea of guilty] must be shown to be voluntary." 2 F. WHARTON, *EVIDENCE IN CRIMINAL ISSUES* § 638, at 1324 (10th ed. 1912).

the criminal process, a felon who fled to a church without being captured was entitled to sanctuary there. If he then confessed his crime, he was permitted to "abjure the realm"—that is, suffer exile and a forfeiture of goods rather than conviction and judicially imposed punishment.<sup>77</sup> In addition, criminal cases were commonly compromised through the payment of money for the victim's refusal to prosecute. "Compounding," as this practice was called, was a criminal offense from the earliest days of the common law<sup>78</sup> and remained a problem for centuries.<sup>79</sup>

Particularly instructive in an assessment of attitudes toward plea bargaining is the common law's earliest form of bargaining for information, the practice of "approvement." An accused felon might confess his guilt and offer to "appeal"—or bring a private prosecution—against other participants in the crime with which he was charged.<sup>80</sup> A judge would then balance the benefits of the proposed prosecution against the danger of pardoning the accused, for if the defendant were successful in his appeal, he would be entitled automatically to a pardon. Whether to accept the defendant's offer to become an approver was "a matter of grace and discretion."<sup>81</sup>

Even this limited and regularized form of bargaining was sometimes criticized. Sir Matthew Hale argued that "more mischief hath come to good men by these . . . approvements . . . than benefit to the public by the discovery and convicting of real offenders."<sup>82</sup> By at least the mid-seventeenth century, the practice of approvement had fallen into disuse.<sup>83</sup> Nevertheless, approvement remained "a part of the common law,"<sup>84</sup> and judges regarded it as "very material"<sup>85</sup> in shaping a closely related form of bargaining for information that persisted into the late nineteenth century. Under this later practice informants were not required to bring private prosecutions or to secure the judicial condemnation of their confederates, but whenever a felon was permitted to testify against his accomplices, he gained "an equitable title" to a pardon.<sup>86</sup> The courts therefore refused to allow an offender to

77. See R. HUNNISETT, *supra* note 31, at 37-54.

78. See An Act to redress disorders in Common Informers, 1576, 18 Eliz. 1, c. 5., §§ 4-5. In an early American case, the notion that compounding is improper was applied to a public prosecutor who had sought to exact only a public penalty. *Town of Hinesburgh v. Sumner*, 9 Vt. 23 (1837) (*contra bonos mores* for prosecutor to threaten to file additional charges if defendant failed to pay fines and costs in a case on appeal).

79. See 2 L. RADZINOWICZ, *supra* note 16, at 313-18; Kurland & Waters, *supra* note 16, at 493.

80. See 2 M. HALE, *supra* note 32, at 226-35.

81. *Id.* at 226. Approvement must often have been a gamble on long odds, for in pleading his appeal, the approver was required to satisfy "a great strictness." *Id.* If he said that a stolen horse was black, for example, when in fact it was brown, "he [would] be hanged, for . . . it is a sign [the appeal] is feigned." *Id.* at 230. When the practice of approvement originated, moreover, the trial was usually by battle, and the battle was to the death.

82. *Id.* at 226.

83. *Id.*; *Rex v. Rudd*, 1 Cowp. 331, 334, 98 Eng. Rep. 1114, 1116 (K.B. 1775) (Mansfield, J.).

84. *Rex v. Rudd*, 1 Cowp. 331, 334, 98 Eng. Rep. 1114, 1116 (K.B. 1775).

85. *Id.* at 335, 98 Eng. Rep. at 1116.

86. *Id.* at 334, 98 Eng. Rep. at 1116; *People v. Whipple*, 9 Cow. 707, 711 (N.Y. O. & T. 1827); *Camron v. State*, 32 Tex. Crim. 180, 22 S.W. 682 (Crim. App. 1893).

testify against less culpable accomplices, and until the mid-nineteenth century they also forbade prosecutors from bargaining for testimony. They said that the power to grant leniency in exchange for information was "by its nature a judicial power."<sup>87</sup>

In 1878, however, the United States Supreme Court noted that a number of American jurisdictions had permitted the public prosecutor to displace the trial judge in deciding whether to allow an accomplice to testify and thereby gain a pardon.<sup>88</sup> The Court apparently favored this development, for it noted that, unlike a trial judge, a prosecutor could assess the need for an accomplice's testimony in light of the other evidence available to the state.<sup>89</sup>

In endorsing prosecutorial bargaining for testimony, the Court plainly did not endorse plea bargaining. The case in which the Supreme Court discussed prosecutorial bargaining for testimony was, in fact, also a case of plea negotiation—the first such case to come before the Court. In the *Whiskey Cases*,<sup>90</sup> a federal prosecutor had struck a complex bargain. The defendants had agreed to plead guilty to one count of a criminal indictment, to testify fully concerning a corrupt agreement involving internal revenue officials, and to withdraw their defensive pleas in a civil condemnation case. In exchange, the prosecutor had agreed to forego prosecution of the other counts of the indictment and to forego action on some other civil claims as well. The defendants alleged that they had fully performed their part of the bargain and that the prosecutor, in violation of the agreement, had pressed the civil claims that he had agreed to abandon. The Supreme Court held that the prosecutor had exceeded his authority in entering the agreement and that the bargain was therefore unenforceable. Because the defendants had been permitted to testify, they had an equitable claim to a pardon—a claim which the Supreme Court expressed confidence that the Chief Executive would honor.<sup>91</sup> Nevertheless, the prosecutor's agreement had purported to guarantee nonprosecution of the government's civil claims, and it was therefore improper.

As the *Whiskey Cases* reveal, the common law did permit a sacrifice of the public interest in punishing a single offender in order to gain his assistance in convicting other criminals, and it devised an open and regularized form of bargaining to accomplish this result. Nevertheless, the courts apparently did not countenance bargaining for pleas of guiltiness at all.

Of course, a case in which a defendant has offered to testify against his confederates is an unusually strong case for permitting some form of plea bargaining. An offender ordinarily cannot reveal the role of his accomplices in a crime without at the same time revealing his own, and when this offender

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87. *People v. Whipple*, 9 Cow. 707, 712 (N.Y.O.&T. 1827); see *United States v. Lee*, 26 F. Cas. 910 (C.C.D. Ill. 1846) (No. 15,588); *Wight v. Rindskopf*, 43 Wis. 344, 348 (1877).

88. *The Whiskey Cases*, 99 U.S. 594, 603 (1878).

89. *Id.*

90. 99 U.S. 594 (1878).

91. *Id.* at 606.

is willing to accept a reduced punishment in exchange for his testimony, to insist that he be pardoned entirely may seem to involve a needless sacrifice of public interests. Nevertheless, when defendants were induced to testify against their accomplices, Anglo-American courts refused to convict them on the basis of their bargained confessions. The courts instead insisted that these defendants be given what modern lawyers would call transactional immunity. In short, in the sort of case in which plea bargaining seemed most likely to occur, it did not occur—a fact which may suggest that plea bargaining did not occur with significant frequency in other cases either. For this reason, it is unnecessary to infer the absence of plea bargaining entirely from the lack of affirmative evidence of plea bargaining and from the fact that the courts invited and encouraged defendants who offered to plead guilty to reconsider this action. When one offender offered his help in convicting others, the usual result was either refusal of the offer or immunity from punishment, not the entry of a bargained plea.

#### IV. THE EMERGENCE OF PLEA BARGAINING

##### A. *Plea Bargaining Before the Civil War*

For most of the history of our legal system, guilty pleas were discouraged more than they were encouraged, but four specific indications of plea bargaining prior to the American Civil War have come to my attention. First, Professor John H. Langbein's study of the preliminary examination in renaissance England discussed a statute enacted in 1485 that authorized the commencement of prosecutions for unlawful hunting before justices of the peace. As Professor Langbein interpreted this statute, it authorized a justice to convict the defendant of a summary offense when he confessed his crime, and it also authorized the justice to hold the defendant for prosecution as a felon if he denied his guilt.<sup>92</sup> The statute thus rewarded defendants who brought about their own convictions, but Professor Langbein's study of the early preliminary examination did not reveal any other evidence of this practice.<sup>93</sup>

A second indication of plea bargaining prior to the Civil War appears in the findings of Professor J. S. Cockburn's examination of some 5000 in-

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92. J. LANGBEIN, *PROSECUTING CRIME IN THE RENAISSANCE: ENGLAND, GERMANY, FRANCE* 70 (1974). The statute accomplished this result by making the unlawful hunting itself a fineable offense while making concealment of the unlawful hunting before the justice of the peace a felony.

93. From the earliest days of the office, justices of the peace were empowered to decide cases in which only summary offenses were charged, and at the time of the statute that Professor Langbein noted, they were beginning to develop the authority to conduct preliminary examinations in felony cases as well. Non-law-trained judges might have been tempted to resolve felony cases by accepting speedy pleas of guilty to summary offenses, but in fact they lacked authority to discharge a person arrested for a felony prior to his trial for that crime. Their only discretionary power following the preliminary examination was to jail the accused felon or admit him to bail. *Id.* at 7.

dictments at the Home Circuit assizes between 1558 and 1625.<sup>94</sup> For the first thirty years of this period, confessions of guilt were virtually unknown. Then, quite suddenly, for a two- or three-year period, "five or six prisoners [at every assizes]—sometimes as many as half the calendar—confessed to their indictments and were sentenced without further process."<sup>95</sup> In some cases the indictments to which the defendants confessed had been altered: burglary charges had been reduced to larceny charges, thus enabling the accused to claim benefit of clergy, and larceny charges had been reduced from felonies to misdemeanors by the substitution of lesser values for the stolen property. These charge reductions seemed plainly to bespeak plea bargaining, and they occurred at a time when judges traveling the counties of the Home Circuit faced "a rising crime rate, a ludicrously inadequate local law enforcement system, negligent and absentee justices of the peace, ignorant and absentee jurors, and [a] high acquittal rate."<sup>96</sup> Professor Cockburn noted that plea negotiation was part of a much broader pattern of lawlessness that came to characterize the administration of justice outside of London at this time. Nevertheless, during the final thirty-five years of the period, the altered indictments disappeared,<sup>97</sup> and defendants entered confessions in only 15 to 20% of the cases considered at the assizes.<sup>98</sup>

In a study of criminal justice in colonial Massachusetts, Professor David H. Flaherty noted a third instance of plea bargaining, a 1749 case in which three defendants pleaded guilty to theft from a brigantine after the Attorney General announced that he would not prosecute them for the burglary charged in the indictment.<sup>99</sup> Professor Flaherty's examination of the records of the

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94. Cockburn, *Trial By the Book?: Fact and Theory in the Criminal Process, 1558-1625*, in *LEGAL RECORDS AND THE HISTORIAN* (J. Baker ed. 1978) [hereinafter cited as Cockburn, *Trial By the Book?*]. See also Cockburn, *Early-Modern Assize Records as Historical Evidence*, 5 J. Soc'y ARCHIVISTS 215 (1975) [hereinafter cited as Cockburn, *Early-Modern Assize Records*].

95. Cockburn, *Trial By the Book?*, *supra* note 94, at 73.

96. Cockburn, *Early-Modern Assize Records*, *supra* note 94, at 230.

97. Letter from Professor Cockburn (Sept. 6, 1978).

98. Cockburn, *Trial By the Book?*, *supra* note 94, at 73-74. Professor Cockburn apparently concluded that plea negotiation persisted throughout this period. That the guilty plea rate was higher in the later years than it had been at the outset of the period studied by Professor Cockburn does not necessarily indicate plea bargaining, however. Without affirmatively encouraging pleas of guilty, judges may simply have relaxed their formerly rigorous practice of discouraging them. A 15 to 20% guilty plea rate seems to me more consistent with this possible neutral stance than with active judicial plea negotiation. Moreover, it bears reiteration that Professor Langbein's study of the Old Bailey in the seventeenth and eighteenth centuries showed that the practice of discouraging guilty pleas was intact more than a century after the period studied by Professor Cockburn. Langbein, *supra* note 40. Either the plea bargaining discovered by Professor Cockburn was a brief historic aberration, or practices on the circuit were substantially different from those in the central courts.

Elsewhere in England, the guilty plea rate may have been even lower than that found by Professor Cockburn at the Home Circuit assizes. See Cogan, *Entering Judgment on a Plea of Nolo Contendere: A Reexamination of North Carolina v. Alford and Some Thoughts on the Relationship Between Proof and Punishment*, 17 ARIZ. L. REV. 992, 1010 (1975) (at the Middlesex Quarter Sessions for the period 1613-15: 109 convictions following trial and 11 following confessions for nonfelonious larceny and related offenses).

99. D. Flaherty, *Criminal Justice in Provincial Massachusetts* 30 n.6 (unpublished manuscript presented at the Conference on Atlantic Society, 1600-1800, University of Edinburgh, June 29 - July 1, 1973).

Court of Assize and General Jail Delivery prior to this time had uncovered no evidence of plea bargaining, and he reported, "Guilty pleas were uncommon for the crimes tried at the Assizes; even if a defendant had signed a confession upon a preliminary examination, he normally rescinded it and sought trial by jury."<sup>100</sup>

A French jurist, Charles Cottu, observed the English courts during the early nineteenth century, and his report for the French government provides a fourth indication of plea bargaining. Cottu reported that when a defendant was charged with forging bank notes, two indictments were prepared, one for forgery and the other for possessing forged notes with the intention of using them to defraud. The punishment for the first offense was death; for the second, it was transportation to the colonies for a term of years. When a defendant charged with forgery was brought into the courtroom, an attorney representing the defrauded bank would approach the defendant's attorney and ask whether the defendant would be willing to plead guilty to the second indictment. If the answer were affirmative, the defendant would be convicted of lesser offense "upon his own confession," and because the bank's solicitor would then fail to offer any proof, the jury would find the defendant not guilty of the capital offense. Cottu commented, "Let it not be thought that such an incredible transaction takes place in darkness and secrecy: no, the whole is done in open court, in the presence of the public, of the judge, and the jury."<sup>101</sup> In other cases, however, Cottu noted that a defendant who sought to plead guilty was strongly discouraged: "[T]he judge, . . . the clerk, the gaoler, almost all the counsel, even the prosecutors, persuade [the defendant] to take the chance of an acquittal."<sup>102</sup>

These instances of pre-Civil War plea bargaining seem to stand alone, but Raymond Moley's compilation of guilty plea rates in New York State suggests that attitudes toward the guilty plea were changing throughout the final two-thirds of the nineteenth century. Although only 15% of all felony convictions in Manhattan and Brooklyn were by guilty plea in 1839, this figure increased steadily at decade intervals to 45, 70, 75, and 80. This last figure remained steady until 1919, when it grew to more than 85%. By 1926, 90% of all felony convictions in Manhattan and Brooklyn were by plea of guilty, and the figures for New York State as a whole revealed a comparable increase.<sup>103</sup>

100. Letter from Professor Flaherty (Sept. 5, 1974).

101. C. COTTU, *supra* note 59, at 95.

102. *Id.* at 73. The distinct treatment of forgery cases is not easy to explain, but it is noteworthy that the eighteenth century saw a proliferation of forgery statutes that burgeoning commercial interests apparently used for their private advantage. See 11 W. HOLDSWORTH, *HISTORY OF ENGLISH LAW* 534 (1938).

103. Moley, *supra* note 52, at 108. Although it barely seems possible, the guilty plea rate continued to grow in the period following Moley's study. Today in New York City approximately 97% of all felony convictions are by plea of guilty. See VERA INSTITUTE OF JUSTICE, *FELONY ARRESTS: THEIR PROSECUTION AND DISPOSITION IN NEW YORK'S CITY'S COURTS*, figure 3, at 7 (1977).

Professor Roger Lane's study of all homicide prosecutions in Philadelphia between 1839 and 1901 uncovered no evidence of plea bargaining prior to the late 1880's. It was only then that "defendants began for the first time in any number to plead guilty to a lesser degree

### B. *The Early Judicial Response to Plea Bargaining*

It was only after the Civil War that cases of plea bargaining began to appear in American appellate court reports. In the first such case, which arose in Tennessee in 1865, the defendant pleaded guilty to two counts of gambling. In accordance with an agreement that he had entered with the prosecutor, eight other charges of gambling were dismissed. The defendant was fined twenty-five dollars on one count and ten dollars on the other. The Tennessee Supreme Court observed:

[This] statement of fact [was] unprecedented in the judicial history of the State . . . [The defendant was,] among other things highly improper, told by the Attorney General, that if he did not submit, he would have to go to jail, and that he could certainly prove his guilt. The plea of guilty was entered . . . while the prisoner was protesting against his guilt, but as the best, under the circumstances, he could do.<sup>104</sup>

In ordering a new trial on a plea of not guilty, the court relied on a theory of unconstitutional conditions: "By the Constitution of the State, the accused, in all cases, has a right to a 'speedy public trial . . .,' and this right cannot be defeated by any deceit or device whatever."<sup>105</sup>

As guilty plea cases came before the courts with increasing frequency in the late nineteenth and early twentieth centuries, the usual judicial response was expressed in statements like these:<sup>106</sup>

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of homicide after being indicted for 'murder.'" In earlier years, "the defendant typically pleaded not guilty, suggesting he had acted in self defense, and was let off in more than half of all cases. If convictions were obtained at all, they were usually for manslaughter whatever the evident facts." Letter from Professor Lane (Oct. 25, 1978). Professor Lane's study may indicate that the criminal justice system has been characterized by broad discretion far longer than it has been characterized by plea bargaining. "Flexibility" and "plea bargaining" should not be confused with one another as a matter either of analysis or of history. See text accompanying note 61 *supra*.

104. *Swang v. State*, 42 Tenn. (2 Cold.) 212, 214-15 (1865). The "unprecedented" statement of facts apparently included allegations of misconduct other than plea negotiation, but it was the plea negotiation upon which the court relied in reversing the defendant's conviction. The court refused to describe the other alleged misconduct, and the briefs and records in the case have been lost. Letters from Ramsey Leathers, Clerk of the Tennessee Supreme Court (Oct. 16, 1967) and from Cleo A. Hughes, Archivist, Tennessee State Library (Oct. 18, 1967).

105. 42 Tenn. (2 Cold.) at 213-14. For the argument that a seemingly modern theory of unconstitutional conditions had developed in the nineteenth century and that the "right-privilege distinction" of the late nineteenth and early twentieth centuries represented a departure from prior law, see Alschuler, *supra* note 70, at 60-63.

106. Because some readers have criticized this paper for relying on appellate court opinions as evidence of trial court practices, a brief reply seems in order. This paper does not in fact rely on appellate opinions for evidence of trial court practices. Indeed, I have noted explicitly that the gap between judicial rhetoric and the practices of many urban trial courts at the turn of the century was extreme. See text accompanying notes 131-39 *infra*. The reaction of appellate courts to plea bargaining is, however, important for its own sake. Although one object of this paper is to sketch the development of current practices, another is to trace the history of the ideology surrounding the guilty plea. This ideological history requires no extrinsic justification, but it may yield a lesson. It reveals that the justifications for plea bargaining so often asserted today—for example, that it ameliorates harsh penalties prescribed by legislatures, affords both parties the option of compromising disputed factual and legal issues, and rewards defendants who exhibit remorse—were not immediately accepted or invented. These justifications are in essence post hoc rationalizations for a process that

The least surprise or influence causing [the defendant] to plead guilty when he had any defense at all should be sufficient cause to permit a change of the plea from guilty to not guilty.<sup>107</sup>

The law favors a trial upon the merits . . . .<sup>108</sup>

No sort of pressure can be permitted to bring the party to forego any right or advantage however slight. The law will not suffer the least weight to be put in the scale against him.<sup>109</sup>

[W]hen there is reason to believe that the plea has been entered through inadvertence . . . and mainly from the hope that the punishment to which the accused would otherwise be exposed may thereby be mitigated, the Court should be indulgent in permitting the plea to be withdrawn.<sup>110</sup>

As the plea of guilty is often made because the defendant supposes that he will thereby receive some favor of the court in the sentence, it is the English practice not to receive such plea unless it is persisted in by the defendant after being informed that such plea will make no alteration in the punishment. . . . [J]udicial discretion . . . should always be exercised in favor of innocence and liberty. All courts should so administer the law . . . as to secure a hearing upon the merits if possible.<sup>111</sup>

The plea should be entirely voluntary by one competent to know the consequences and should not be induced by fear, misapprehension, persuasion, promises, inadvertence, or ignorance.<sup>112</sup>

In more detailed statements, the courts offered a catalogue of theoretical and practical objections to plea bargaining that will probably seem familiar to modern observers. In 1877, the Wisconsin Supreme Court considered an agreement in which a defendant had secured a lenient sentence by plead-

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developed more by accident than by choice. Far from readily embracing plea negotiation, commentators and appellate courts accepted it only after almost a century of severe disapproval.

107. *State v. Williams*, 45 La. Ann. 1356, 1357, 14 So. 32, 32 (1893).

108. *Pope v. State*, 56 Fla. 81, 85, 47 So. 487, 489 (1908); *Deloach v. State*, 77 Miss. 691, 692, 27 So. 618, 619 (1900); *Griffin v. State*, 12 Ga. App. 615, 622, 77 S.E. 1132, 1136 (Ct. App. 1913).

109. *O'Hara v. People*, 41 Mich. 623, 624, 3 N.W. 161, 162 (1879).

110. *People v. McCrory*, 41 Cal. 458, 462 (1871).

111. *Deloach v. State*, 77 Miss. 691, 692, 27 So. 618, 619 (1900).

112. *Pope v. State*, 56 Fla. 81, 84, 47 So. 487, 489 (1908). Other cases that indicate the courts' wary attitude toward guilty pleas are *Wolfe v. State*, 102 Ark. 295, 144 S.W. 208 (1912) (guilty plea coupled with agreement for deferred sentencing is invalid); *People v. Walker*, 250 Ill. 427, 95 N.E. 475 (1911) (retained attorney induced belief defendant would not be sent to penitentiary); *Myers v. State*, 115 Ind. 554, 18 N.E. 53 (1888) (unkept bargain); *Sanders v. State*, 85 Ind. 318 (1882) (plea induced by fear of mob violence); *People v. Brown*, 54 Mich. 15, 19 N.W. 571 (1884); *State v. Stephens*, 71 Mo. 535 (1880) (unkept bargain); *State v. Nicholas*, 46 Mont. 470, 128 P. 543 (1912) (retained attorney told defendant he would get a light sentence if he pleaded guilty and 40 years if he did not); *State v. Keep*, 85 Or. 265, 166 P. 936 (1917) (dictum) (because district attorney has no authority to control actions of subsequent grand jury, he cannot dismiss charges in exchange for plea of guilty); *State v. Kring*, 8 Mo. App. 597 (1880) (men.) ("the act of fixing the punishment, being purely judicial, cannot be made the subject of an agreement between the circuit attorney and the accused"); *Harris v. State*, 17 Tex. Civ. Cas. 559 (Ct. App. 1885); *Saunders v. State*, 10 Tex. Civ. Cas. 336 (Ct. App. 1881).

ing guilty and offering his testimony against other offenders. The court called this agreement "hardly, if at all, distinguishable in principle from a direct sale of justice." It also noted that "[s]uch a bargain . . . could not be kept . . . in any court not willing largely to abdicate its proper functions in favor of its officers."<sup>113</sup> Perhaps the most serious problem that the Wisconsin court saw in plea bargaining, however, was its secrecy:

The profession of law is not one of indirection, circumvention, or intrigue. . . . Professional function is exercised in the sight of the world . . . . Private preparation goes to this, only as sharpening the sword goes to battle. Professional weapons are wielded only in open contest. No weapon is professional which strikes in the dark. . . . Justice will always bear litigation; litigation is . . . the safest test of justice.<sup>114</sup>

The following year, the Michigan Supreme Court expressed concern about the motives of prosecutors in bargaining, and it plainly did not view the conservation of public resources through plea bargaining as a virtue. "[T]here was danger," the court said, "that prosecuting attorneys, either to save themselves trouble, to save money to the county, or to serve some other improper purpose, would procure prisoners to plead guilty by assurances they have no power to make of influence in lowering the sentence. . . ." <sup>115</sup>

The Louisiana Supreme Court was troubled by what plea bargaining might mean to innocent defendants:

In the instant case the accused accepted the certainty of conviction of what he took to be a minor offense not importing infamy. . . . Not only was there room for error, but the thing was, what an innocent man might do who found that appearances were against him, and that he might be convicted notwithstanding his innocence.<sup>116</sup>

The Georgia Court of Appeals invoked the analogy to out-of-court confessions:

A plea of guilty is but a confession of guilt in open court, and a waiver of trial. Like a confession out of court, it ought to be scanned with care and received with caution. . . . The law . . . does not encourage confessions of guilt, either in or out of court. Affirmative action on the part of the prisoner is required before he will be held to have waived the right of trial, created for his benefit. . . . The affirmative plea of guilty is received because the prisoner is willing, voluntarily, without inducement of any sort, to confess his guilt and expiate his offense. . . . It has been said that with-

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113. *Wight v. Rindskopf*, 43 Wis. 344, 354-55 (1877).

114. *Id.* at 356-57.

115. *Edwards v. People*, 39 Mich. 760, 762 (1878).

116. *State v. Coston*, 113 La. 718, 720, 37 So. 619, 620 (1904).

drawal of the plea should be allowed whenever interposed on account of 'the flattery of hope or the torture of fear'. . . ." <sup>117</sup>

A Chicago trial judge also relied upon cases involving extrajudicial confessions to support his conclusion that a guilty plea must not be "obtained by any direct or implied promises, however slight." <sup>118</sup> In commenting on the case, however, the *Harvard Law Review* argued that pleas of guilty should not be governed by the same standards as out-of-court confessions. Unlike most modern observers who have sought distinctions between confessions and guilty pleas, the *Law Review* maintained that the rules of voluntariness governing out-of-court confessions were too weak, rather than too strong, for the purpose of ensuring fairness in guilty-plea cases. <sup>119</sup>

The judicial decisions that did uphold guilty pleas during this period included an 1883 federal case in which the defendant's plea had been induced by prosecutorial bargaining. <sup>120</sup> In the main, however, the courts affirmed guilty plea convictions only in cases in which there had been no bargains (or at least no explicit bargains) and in which the defendants' alleged expectations of leniency seemed to lack a plausible basis. <sup>121</sup>

117. *Griffin v. State*, 12 Ga. App. 615, 622-23 (1913).

118. *People v. Arkins*, 33 CH. LEGAL NEWS 192 (Cook County Crim. Ct. 1901).

119. 14 HARV. L. REV. 609, 610 (1901).

120. *United States v. Bayaud*, 23 F. 721 (C.C.S.D.N.Y. 1883). In this case, knowledgeable defendants had sought to escape from a plea agreement only when the government's ability to prove its case was substantially impaired. The court, moreover, may have been influenced by a federal statute that expressly authorized compromises in internal revenue cases. Act of July 20, 1868, ch. 186, § 102, 15 Stat. 125.

This federal revenue statute was occasionally the subject of harsh comment. For example, the Wisconsin Supreme Court declared,

[I]t is said that it was the policy of Congress to treat offenses under the revenue law, not strictly as crimes to be prosecuted and punished always, but rather as a system of penalties and forfeitures in aid of the collection of revenue, satisfied when that end is attained. It is humiliating to confess that such appears to be a fair construction of the statute. . . . [W]e were educated in too high a reverence for federal authority in its sphere to have thought possible such a provision in a federal statute. . . . It is not for us to consider whether the federal judiciary is bound . . . to submit to such tyranny of immorality.

*Wight v. Rindskopf*, 43 Wis. 344, 361-63 (1877). See also 13 Op. Att'y Gen. 479, 480 (1871) ("It has been doubted whether a statutable authority to compromise acts charged as criminal . . . is not an encroachment upon the President's constitutional power to grant pardons.").

In *State v. Wyckoff*, 107 N.W. 420 (Iowa 1906), the defendant alleged that his guilty plea had been induced by a prosecutorial promise to recommend a minimum fine and that the trial court had in fact imposed a more severe fine. The Iowa Supreme Court noted that the prosecutor had apparently made the promised recommendation and concluded that the trial judge's failure to follow this recommendation did not entitle the defendant to relief. Although the court thus upheld a bargained plea, it did not directly consider the propriety of plea bargaining.

121. See *People v. Miller*, 114 Cal. 10, 45 P. 986 (1896) (expectation apparently based on nothing); *People v. Lennox*, 67 Cal. 113, 7 P. 260 (1885) (defendant's father, his lawyer and a deputy sheriff suggested defendant might avoid capital punishment by pleading guilty); *Monahan v. State*, 135 Ind. 216 (1893) (suggestion by person not connected with the court that defendant would probably receive the same treatment as three associates who had already pleaded guilty); *State v. Reininghaus*, 43 Iowa 149 (1876) (in response to defense attorney's inquiry, district attorney said that, although he of course had no control of that matter, he thought that the court would impose a small fine of 25 or 50 dollars); *State v. Yates*, 52 Kan. 566 (1894) (usual fine in past cases \$100 but no promises made); *Mounts v. Commonwealth*, 89 Ky. 274 (1889) (expectation apparently based on nothing); *Mastronada v. State*, 60 Miss. 86 (1882) (expectation of leniency because defendant had received a light sentence on a previous occasion when he was a first offender).

The United States Supreme Court did not directly address the propriety of plea bargaining during this era, but there are indications of the position that the Court would probably have taken. For example, this Article has noted the *Whiskey Cases*<sup>122</sup> of 1878 in which the Court insisted that defendants who had been permitted to testify against their accomplices were entitled to pardons, and that a plea agreement that had led instead to a reduction in punishment and an abandonment of the government's civil claims was invalid.<sup>123</sup>

An 1874 case, *Insurance Co. v. Morse*,<sup>124</sup> illustrates more strikingly the Court's reluctance to permit bargained waivers of procedural rights. In this case the Court invalidated a Wisconsin statute that required insurance companies, as a condition of doing business in the state, to waive their right to remove civil lawsuits from the state to the federal courts. The Court noted that, under well established law, the parties to a private contract could not agree to waive the usual mode of trial for disputes arising under the contract—for example, by including an arbitration clause or by stipulating that disputes would be submitted to a judge rather than a jury. In a criminal case, moreover, a defendant could not “be tried in any other manner than by a jury of twelve men, although he consent in open court to be tried by a jury of eleven men.”<sup>125</sup> The Court thus manifested its hostility to procedural waivers far less sweeping than a waiver of the right to trial through plea bargaining. If a criminal defendant had consented to trial by a jury of fewer than twelve, the Court apparently would have held the waiver invalid regardless of whether it had been induced by bargaining. In *Morse*, however, the Court emphasized the bargained character of the waiver sought by the Wisconsin statute, and Justice Hunt's opinion for the Court indicates how the Court might have viewed the propriety of plea bargaining:

Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life or his freedom, or his substantial rights.<sup>126</sup>

In 1892 in *Hallinger v. Davis*,<sup>127</sup> the Supreme Court upheld a guilty plea conviction in a case in which there had been no bargain and in which the trial court had been extraordinarily solicitous in affording the defendant an opportunity to reconsider his plea. A New Jersey statute provided that following a guilty plea to murder the trial court should conduct a hearing to determine whether the murder was of the first or second degree. The defendant contended that any waiver of the right to jury trial on this issue, even a waiver by a knowing and voluntary guilty plea, violated the four-

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122. 99 U.S. 594 (1878).

123. See text accompanying notes 88-91 *supra*.

124. 87 U.S. (20 Wall.) 445 (1874).

125. *Id.* at 451.

126. *Id.*

127. 146 U.S. 314 (1892).

teenth amendment's due process clause. Although the defendant's argument was rejected, the fact that it was seriously made and considered indicates how far the Supreme Court was, in a relatively formalistic era, from countenancing any form of plea bargaining. Had one of the early plea bargaining cases reached the Supreme Court,<sup>128</sup> it seems possible that the later history of plea bargaining, including the Court's own treatment of this issue in the mid-twentieth century, might have been significantly different.

The results of the various guilty plea cases were summarized in annotations and encyclopedias that appeared at the end of the nineteenth century:

The plea of guilty must be voluntarily and sensibly made by the accused, induced by no fear of punishment, nor hope of leniency. . . .<sup>129</sup>

We would conclude, from an examination of all the cases upon the subject, that where there is an inducement of any kind held out to the prisoner, by reason of which he enters the plea of guilty, it will . . . better comport with a sound judicial discretion to allow the plea to be withdrawn . . . , and especially so when counsel and friends represent to the accused that it has been the custom and common practice of the court to assess a punishment less than the maximum upon such a plea. . . .<sup>130</sup>

### C. *The Growth of Plea Bargaining*

The gap between these judicial denunciations of plea bargaining and the practices of many urban courts at the turn of the century and thereafter was apparently extreme. In these courts, striking political corruption apparently contributed to a flourishing practice of plea bargaining. Richard Canfield, later an operator of elegant gambling casinos in several cities, testified that as early as 1885 his friend, the Mayor of Providence, Rhode Island, had acted as an intermediary in arranging a plea agreement with the state Attorney General.<sup>131</sup> By 1914, there were accounts of a New York defense attorney whose financial arrangements with a magistrate enabled him to "stand out on the street in front of the Night Court and dicker away sentences in this form: \$300 for ten days, \$200 for twenty days, \$150 for thirty days."<sup>132</sup> The Dean of the University of Illinois Law School, Albert J. Harno, wrote in 1928:

128. The Supreme Court's jurisdiction in criminal cases was in fact extremely limited. It was only in 1889 that Congress permitted criminal defendants to file writs of error in the Supreme Court, and then only in capital cases. See *United States v. Scott*, 437 U.S. 82, 88 (1978).

129. 2 *ENCYCLOPEDIA OF PLEADING AND PRACTICE* 780 (1895).

130. Hopkins, *Withdrawal of Plea of Guilty*, 11 *CRIM. L. MAGAZINE* 479, 484 (1889). This annotation also declared, "[I]t will be universally conceded to be an abuse of judicial discretion not to allow the withdrawal of the plea of guilty . . . when . . . the plea of guilty has been entered . . . from the hope that the punishment to which the accused would otherwise be exposed might thereby be mitigated." *Id.* at 479.

131. A. GARDNER, *CANFIELD: THE TRUE STORY OF THE GREATEST GAMBLER* 77 (1930). Canfield maintained, however, that he had received a six-month sentence after being assured by the mayor that he would not be incarcerated.

132. Story No. 870-A, Magnes Archives, Jerusalem (Oct. 8, 1914). I am indebted to Professor Mark H. Haller for this and the preceding reference.

When the plea of guilty is found in records it is almost certain to have in the background, particularly in Cook County, a session of bargaining with the State's Attorney. . . . These approaches, particularly in Cook County, are frequently made through another person called a "fixer." This sort of person is an abomination and it is a serious indictment against our system of criminal administration that such a leech not only can exist but thrive. The "fixer" is just what the word indicates. As to qualifications, he has none, except that he may be a person of some small political influence.<sup>133</sup>

Although most of the reported decisions on plea bargaining involved bargains struck by prosecutors, police officers may also have played a significant role in the development of this practice. Arthur Train, an assistant district attorney in Manhattan, wrote in 1906:

Court officers often win fame in accordance with their ability as "plea getters." They are anxious that the particular Part [courtroom] to which they are assigned shall make as good a showing as possible in the number of cases disposed of. Accordingly each morning some of them visit the pens on the floor below the courtroom and negotiate with the prisoners for pleas. . . . The writer has known of the entire population of a prison pen pleading guilty one after another under the persuasion of an eloquent blue-coat. . . .<sup>134</sup>

An early twentieth-century edition of Wharton's *Criminal Evidence* ascribed a corrupt motive to bargaining police officers and suggested that they often made false promises to defendants simply "to earn the transportation and mileage incident to conveying [them] to prison."<sup>135</sup> The work concluded, "[I]t has become a 'business' to misuse the power given [to policemen who have charge of detention], and this, too, when both court and prosecution are entirely innocent of the wrong so shamelessly inflicted."<sup>136</sup>

In the late 1960's, when I interviewed participants in the criminal justice system about the plea bargaining process, a number of older attorneys reported that corruption had been the norm at the outset of their legal careers. One attorney observed that in the 1920's, "cases of whiskey for probation officers were . . . a necessity, and it was sometimes advantageous to bribe even newspaper reporters whose recommendations could be influential with certain judges."<sup>137</sup> Another recalled a former prizefighter who

133. Harno, *The Workings of the Parole Board and Its Relation to the Court*, 19 J. AM. INST. CRIM. L. & CRIMINOLOGY app. at 83, 103 (1928) (part of a report of the Committee on the Study of the Workings of the Indeterminate Sentence Law and of Parole in the State of Illinois).

134. A. TRAIN, *THE PRISONER AT THE BAR* 223-24 (3d ed. 1926).

135. 2 F. WHARTON, *EVIDENCE IN CRIMINAL ISSUES* 1326 n.22 (10th ed. 1912).

136. *Id.*

137. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1185 n.18 (1975) (statement of Benjamin M. Davis).

became an attorney and who worked out of a bondsman's office. This attorney commonly offered half his fee to a police inspector to arrange a plea agreement, and if the inspector turned him down, the attorney returned the money to his client. "In that respect, this attorney was more honest than most of the guys in the criminal courts 35 years ago."<sup>138</sup>

In its infancy, as today, the practice of plea negotiation undoubtedly produced many satisfied customers, and serious judicial review of the process was rare. This fact, coupled with the corrupt atmosphere of urban criminal justice in the late nineteenth and early twentieth centuries, helps explain the growth of plea negotiation despite its condemnation by appellate courts.<sup>139</sup>

#### V. THE DISCOVERY OF PLEA BARGAINING BY THE CRIME COMMISSIONS OF THE 1920's

During the 1920's, a number of states and cities conducted surveys of criminal justice. These surveys, which offered a far more complete picture of the working of American criminal courts than has generally been available in later years, revealed a lopsided dependency on the plea of guilty: in Chicago, 85% of all felony convictions were by guilty plea; in Detroit 78; in Denver 76; in Minneapolis 90; in Los Angeles 81; in Pittsburgh 74; and in St. Louis 84.<sup>140</sup>

The dominance of the guilty plea apparently came as a remarkable surprise to contemporary observers. The first of the criminal justice surveys, the Cleveland survey of 1921, noted that 77% of all convictions in that jurisdiction were by guilty plea, but the survey's discussion of prosecution focused only briefly on this phenomenon and concentrated primarily on abuses in the granting of dismissals.<sup>141</sup> From the time of this early survey until that of the Missouri survey in 1926, the surveys largely ignored plea negotiation, apparently because its importance was unsuspected.<sup>142</sup> Nevertheless, the Missouri, Illinois, and New York surveys soon brought the practice into focus, and in the words of Raymond Moley, "the public learned

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138. *Id.* (statement of James Martin MacInnis).

139. Professor Mark H. Haller's commentary on this paper and on that of Professor Lawrence M. Friedman emphasizes that the criminal courts comprised a distinct subculture at and after the turn of the century. They were not effectively scrutinized by appellate courts, bar associations, or legal scholars. Their bars were composed of lawyers who had attended less prestigious law schools, who usually did not join the bar associations, and who were typically members of ethnic minorities. The courts' norms and methods, moreover, were political rather than legal. Thus the "discovery" of plea bargaining by the elite bar, by academics, and by the public in the 1920's could and did produce a genuine sense of shock.

140. Moley, *supra* note 52, at 105. These figures are drawn from a table that reported the percentage of convictions by guilty plea in 24 American jurisdictions. This percentage ranged from a low of 33 in San Francisco to a high of 95 in St. Paul and Syracuse.

141. R. FOSDICK, *CRIMINAL JUSTICE IN CLEVELAND* (1922).

142. Moley, *supra* note 52, at 110.

how much the spirit of an auction had come to dominate the process of justice."<sup>143</sup>

The surveys commonly revealed a substantial increase in the percentage of guilty pleas in the period just before their publication, and they also indicated that plea bargaining became routine in different jurisdictions at different times. In urban jurisdictions in Virginia, half of all convictions were by guilty plea in 1917, but three-quarters were by guilty plea in 1927.<sup>144</sup> Between 1916 and 1921 the number of guilty pleas in urban misdemeanor courts in Georgia increased approximately three times as rapidly as the total number of cases.<sup>145</sup> In New Haven in 1888, fully 75% of all felony convictions were by plea of guilty; a steady increase brought the figure to over 90% by 1921.<sup>146</sup>

In the federal courts, the statistics date from 1908, when only about 50% of all convictions were by plea of guilty. This percentage remained fairly constant until 1916, when it increased to 72%.<sup>147</sup> Because the number of cases in the federal courts actually declined during 1916, the increase cannot be attributed to the pressures of the caseload. The American Law Institute commented, "It would appear that the habits of the prosecution suddenly changed in that year . . . . A method of handling cases which may be referred to as the guilty plea technique came into extensive use. . . ." <sup>148</sup> Soon, a flood of cases under the federal prohibition laws seemed to preclude any retreat. By 1925, the percentage of convictions by guilty plea had reached almost 90,<sup>149</sup> approximately the same level as that of recent years.

The surveys of the 1920's indicated that increased plea bargaining might have led some defendants to plead guilty although they would not have been convicted at trial. As the percentage of convictions by guilty plea grew in the period just preceding the 1920's, both the percentage of convictions by trial and the percentage of acquittals showed a sharp decline.<sup>150</sup> If one

143. *Id.* at 114. Moley added:

The very difficulty with which the facts concerning this practice have been unearthed show how easy it has been for prosecutors to indulge in this sort of compromise without exciting public interest. It has cost thousands of dollars in Missouri, New York, Cleveland and Illinois to develop the facts which we have summarized. . . . It is hardly to the intellectual credit of the American public, or of the American press which informs it, or the American bar which should guide it, that this practice has continued so long and so successfully.

144. H. FULLER, *CRIMINAL JUSTICE IN VIRGINIA* 81 (1931). These figures exclude cases involving liquor offenses. Were liquor cases included, the increase in the guilty-plea rate would be more striking.

145. Georgia Dep't of Public Welfare, *Crime and the Georgia Courts*, 16 J. AM. INST. CRIM. L. & CRIMINOLOGY 169, 190 (1924).

146. Moley, *supra* note 52, at 107.

147. AMERICAN LAW INSTITUTE, *A STUDY OF THE BUSINESS OF THE FEDERAL COURTS*, pt. I, at 58 (1934). For a year-by-year tabulation of the statistics, see *id.* at 56.

148. *Id.* at 58, 12.

149. *Id.* at 56.

150. See H. FULLER, *supra* note 144, at 78: "The increase in the proportion of pleas of guilty between 1917 and 1927 apparently came about 70 per cent from the convicted column and 30 per cent from the not guilty column. . . ." In urban misdemeanor courts in Georgia, although the total number of cases increased 48% between 1916 and 1921, the absolute number of acquittals declined by 13%. The apparent explanation for this decline in acquittals (as well as for a decline in the proportion of defendants convicted at trial) lay

assumes both that the character of the cases coming before the courts did not change significantly during this period and that prosecutors did not significantly alter their screening practices, it seems probable that the increased ranks of guilty-plea defendants came in part from defendants who would have been convicted had they stood trial and in part from defendants who would have been acquitted.<sup>151</sup>

A reward to defendants who waive their right to trial lies at the heart of any system of plea negotiation, and many of the surveys focused specifically on the nature of this reward. In Chicago in 1926, 78% of all guilty pleas in felony cases were to offenses less serious than the offenses originally charged. Indeed, most of the guilty pleas in cases in which felonies had been charged were not to felonies at all but to misdemeanors.<sup>152</sup> In New York City in 1926, 85% of all guilty pleas were to offenses less serious than those initially charged.<sup>153</sup> The *Illinois Crime Survey* observed, "Either [the state] is 'bluffing' in the charges that are originally brought . . . , that is, charging persons with more serious crimes than they should be charged with, or . . . the force of law administration [is being whittled down] to a mere fragment of its basic seriousness."<sup>154</sup>

The rewards associated with pleas of guilty were manifested not only in the lesser offenses of which guilty-plea defendants were convicted but also in the lighter sentences that they received. The *Missouri Crime Survey* de-

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in a 117% increase in the number of guilty pleas. Georgia Dep't of Public Welfare, *supra* note 145, at 190. Increased plea bargaining was also accompanied by a substantially increased overall conviction rate in the federal courts. See AMERICAN LAW INSTITUTE, *supra* note 147, at 58; Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 HARV. L. REV. 293, 301-02 (1975).

151. In fact, the character of the cases coming before the courts probably did change, but not in a manner favoring the prosecution. The increased volume of liquor prosecutions and other cases of "victimless" crime might have been expected to produce a lower conviction rate, not the higher conviction rate that in fact materialized. To establish guilt in a case of "victimless" crime usually seems more difficult than to establish guilt when a specific victim appears as the complainant. See H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 150-52 (1968). Moreover, it was notoriously difficult to secure convictions in liquor cases, for juries were often unsympathetic to the purposes of the law.

Another explanation for the increased conviction rate might look to the increased volume of judicial business. The pressure of the caseload may have caused prosecutors to be more selective in the cases that they filed, and if prosecutors in fact filed stronger cases, an increase in the overall conviction rate would be a natural consequence (quite apart from any intensification in plea negotiation or any likelihood that this practice would cause "unconvictable" defendants to plead guilty). This "increased screening" hypothesis is plausible, and by failing to consider it, the article by Finkelstein cited in note 150 *supra* seriously overdramatizes its conclusions. Nevertheless, it also seems possible that a growing caseload, by reducing the time that prosecutors could devote to each case, would tend to reduce the conviction rate. Any conclusion is therefore speculative, but plea negotiation may very well have enabled prosecutors significantly to improve their "batting averages" in the period just before the 1920's. At least the material developed by the crime commissions of the 1920's (as well as some more modern material presented by Finkelstein) should give pause to commentators who assert that plea bargaining is likely to produce approximately the same results as trial. E.g., Enker, *Perspectives on Plea Bargaining*, in PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT—THE COURTS 108, 113 (1967); Note, *Official Inducements to Plead Guilty: Suggested Morals for a Marketplace*, 32 U. CHI. L. REV. 167, 176 (1964).

152. ILLINOIS ASS'N FOR CRIMINAL JUSTICE, *THE ILLINOIS CRIME SURVEY* 47 (1929).

153. Moley, *supra* note 52, at 111 (extrapolation).

154. ILLINOIS ASS'N FOR CRIMINAL JUSTICE, *supra* note 152, at 310.

clared, "[A] plea of guilty upon arraignment reduces the chances of a penitentiary sentence in the cities by about one-half."<sup>155</sup> The *Illinois Crime Survey* reported, "[T]he chances of getting probation are roughly two and one-half times as great if one pleads guilty to begin with as they are if one pleads not guilty and sticks to it."<sup>156</sup> The New York survey found that suspended sentences were more than twice as frequent in cases in which guilty pleas had been entered than in cases in which defendants had been convicted at trial.<sup>157</sup>

A few of the surveys noted that the increased volume of guilty pleas in the early 1920's had been accompanied by an intensification in the concessions offered to guilty-plea defendants. In 1917, a defendant in Virginia who pleaded guilty was 2.3 times more likely to receive a suspended sentence than a defendant convicted at trial, but in 1927, his chance for a suspended sentence was 6.3 times greater than that of a defendant convicted at trial.<sup>158</sup> In Georgia, 38% of all defendants convicted at trial were sentenced to prison, and this figure remained unchanged during the five-year period from 1916 to 1921. The chance of receiving a prison sentence following a plea of guilty declined during this period, however—from 24 out of 100 in 1916 to 13.5 out of 100 in 1921.<sup>159</sup>

Although plea bargaining had become a central feature of the administration of justice by the 1920's, it had few apologists and many critics. Most of the criticism came from the hawks of the criminal process rather than the doves. The President of the Chicago Crime Commission condemned plea negotiation as "paltering with crime" and demanded the immediate removal from the Criminal Court bench of three judges, solely on the ground that these judges had permitted the reduction of felony charges to misdemeanors in exchange for pleas of guilty.<sup>160</sup> The judges ultimately kept their jobs, but only after an inquiry by a committee of Circuit and Superior Court judges that cast primary responsibility for the reduction of felony charges upon the State's Attorney.<sup>161</sup>

155. MISSOURI ASS'N FOR CRIMINAL JUSTICE, *MISSOURI CRIME SURVEY* 149.

156. ILLINOIS ASS'N FOR CRIMINAL JUSTICE, *supra* note 152, at 84.

157. NEW YORK STATE CRIME COMMISSION, *REPORT TO THE COMMISSION OF THE SUB-COMMITTEE ON STATISTICS* 135 (1927).

158. H. FULLER, *supra* note 144, at 117. The average sentence of those guilty-plea defendants who did go to prison in 1917 was three months shorter than that of defendants convicted at trial and sentenced to prison. By 1927, the average prison sentence of guilty-plea defendants was eight months shorter than that of defendants convicted at trial. *Id.* at 103-05.

159. Georgia Dep't of Public Welfare, *supra* note 145, at 191. If, as some defenders of plea negotiation maintain, the difference in treatment for guilty-plea and trial defendants reflects the fact that guilty-plea defendants are better prospects for rehabilitation, at least the courts' assessment of the defendants' potentialities for reform underwent a convenient change during the first quarter of this century.

160. Moley, *supra* note 52, at 120.

161. See Haller, *Urban Crime and Criminal Justice: The Chicago Case*, 57 J. AM. HIST. 619, 633-34 (1970); ILLINOIS ASS'N FOR CRIMINAL JUSTICE, *supra* note 152, at 262-63; *Judges Will Give Kerner a Hearing*, Chicago Herald Examiner, Apr. 28, 1928, at 1; *In Re Investigation of Charges of the Chicago Crime Commission and Frank J. Loesch* (Crim. Ct. Cook County 1928).

The *Illinois Crime Survey* argued that plea negotiation "gives notice to the criminal population of Chicago that the criminal law and the instrumentalities for its enforcement do not really mean business. This, it would seem, is a pretty direct encouragement to crime."<sup>162</sup> The Virginia survey added, "[Persons who boast of their real or fancied bargains] are the best and most persistent advertisers in the world for the bargain counter. Surely this does not make for deterrence."<sup>163</sup> The New York Appellate Division declared,

[Through] acceptance of a plea of a lesser degree than that for which the defendant was indicted, those deserving of extreme punishment are permitted to escape with a suspended sentence or with punishment all too inadequate for the crime committed. We deplore the tendency of some district attorneys, following the course of least resistance, thus to relax the rigid enforcement of our penal statutes.<sup>164</sup>

Dean John H. Wigmore wrote, "Owing to defective criminal procedure, th[e] function [of deterrence by threat] is clogged. But that is only a passing phase; it will be reformed."<sup>165</sup> Dean Roscoe Pound observed, "[P]rosecutors publish statements showing 'convictions' running to thousands each year. But more than ninety per cent of these 'convictions' are upon pleas of guilty, made on 'bargain days,' in the assured expectation of nominal punishment, as the cheapest way out, and amounting in effect to license to violate the law."<sup>166</sup>

Observers who saw plea bargaining as a threat to the rights of criminal defendants occasionally added their voices. Dean Justin Miller wrote in the first issue of the *Southern California Law Review*:

There can be no doubt that [our undercover system of criminal law administration] is dangerous, both to the rights of individuals and to orderly, stable government. . . . [T]he poor, friendless, helpless man is most apt to become the one who helps swell the record of convictions. The necessity for making a good record . . . may very well result in prosecutors overlooking the rights, privileges and immunities of the poor, ignorant fellow who . . . is induced to confess crime and plead guilty through hope of reward or fear of extreme punishment. . . .<sup>167</sup>

In its *Report on Crime and the Foreign Born*, the Wickersham Commission found that a frequent complaint of foreign-born prisoners was that their

162. ILLINOIS ASS'N FOR CRIMINAL JUSTICE, *supra* note 152, at 318.

163. H. FULLER, *supra* note 144, at 154.

164. *People v. Gowasky*, 219 A.D. 19, 24, 219 N.Y.S. 373, 379 (1926), *aff'd*, 244 N.Y. 451, 155 N.E. 737 (1927).

165. Wigmore, *Juvenile Court vs. Criminal Court*, 21 ILL. L. REV. 375, 377 (1926).

166. R. POUND, *CRIMINAL JUSTICE IN AMERICA* 184 (1930). In addition, newspaper writer Frank Sullivan published a column in which a defendant tried on several pleas, talked about how expensive they were and finally told the prosecutor, "I'll take a nice petty larceny if you have one." Moley, *supra* note 52, at 114 n.34.

167. Miller, *The Compromise of Criminal Cases*, 1 S. CAL. L. REV. 1, 21-22 (1927).

appointed attorneys had urged them to plead guilty after discovering that they lacked money to pay legal fees.<sup>168</sup>

Some observers denounced the irrationality of the guilty-plea system without characterizing it as either too lenient or too harsh. The Wickersham Commission's *Report on Prosecution* labeled plea bargaining an "abuse" without further analysis.<sup>169</sup> The *Chicago Tribune* called it an "incompetent, inefficient, and lazy method of administering justice."<sup>170</sup> The Virginia survey noted that the practice had enhanced the power of prosecutors and shifted the focus of criminal proceedings from courtrooms to corridors. It said, "The usual case is now decided, not by the court, but by the commonwealth's attorney [who is] often young, often rather inexperienced. . . ." <sup>171</sup>

Other critics challenged the motives of prosecutors in plea negotiation, and they did not accept the view that a prosecutor's acquiescence in a bargain ordinarily ensures that it serves public interests.<sup>172</sup> "Many prosecutors," the Missouri survey observed, "have an inordinate fear of trying a weak case. As a matter of fact, the case may be weak because the prosecutor himself is weak . . . ." <sup>173</sup> Raymond Moley noted that not only the burden of a protracted trial but also the political value of a high conviction rate could provide strong inducements for prosecutors to enter plea agreements.<sup>174</sup>

When bargaining prosecutors answered their critics, they generally contended that they bargained for guilty pleas only in cases that would be difficult to try.<sup>175</sup> They insisted that "half a loaf is better than none." The *Illinois Crime Survey* responded, "[T]he interpretation of 'the best he can get' is left to [the prosecutor]. Such a course . . . may . . . be used to excuse weak and careless prosecution." <sup>176</sup>

Just as critics in the 1920's took a different view of the motivation of prosecutors in plea bargaining than some observers today, they also took a different view of the motivation of defendants. Modern courts and scholars sometimes argue that an acknowledgment of guilt provides a sign of repentance and that defendants who plead guilty should therefore receive

168. NATIONAL COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON CRIME AND THE FOREIGN BORN 180 (1931). For another analysis of plea bargaining emphasizing its potential injustice to defendants, see Herzog, *Bargaining By the District Attorney for Pleas of Guilty*, 47 MEDICO-LEGAL J. 4 (1930).

169. NATIONAL COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PROSECUTION 95-97 (1931).

170. *Chicago Tribune*, Apr. 27, 1928, at 1. The *Tribune* did add, "This, it is claimed in defense, saves jury trials and the danger of acquittals, and insures some punishment at least."

171. H. FULLER, *supra* note 144, at 155-56.

172. For modern expressions of the view that the prosecutor's acquiescence does adequately safeguard the public interest, see ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY 63 (1968); Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Pleas of Guilty*, 112 U. PA. L. REV. 865, 878-80 (1964).

173. MISSOURI ASS'N FOR CRIMINAL JUSTICE, *supra* note 155, at 150.

174. R. MOLEY, POLITICS AND CRIMINAL PROSECUTION 157, 187, 190 (1929).

175. See Baker, *The Prosecutor—Initiation of Prosecution*, 23 J. CRIM. L. & CRIMINOLOGY 770 (1933); Miller, *supra* note 167, at 6 n.24, 7 n.25.

176. ILLINOIS ASS'N FOR CRIMINAL JUSTICE, *supra* note 152, at 262.

lighter sentences than defendants who stand trial.<sup>177</sup> The *Missouri Crime Survey* commented, "The popular impression is that when an offender enters a plea of guilty he throws himself upon 'the mercy of the court.' As a practical proposition he does nothing of the kind."<sup>178</sup> The Illinois survey added, "This tendency to plead guilty is no abject gesture of confession and renunciation; it is a type of defense strategy."<sup>179</sup> The New York survey, after noting the increase in the number of guilty pleas, observed, "This is not because those accused of crime are becoming to a greater degree repentant of their misdeeds. . . . It is a development of the tactics of the defense combined with the rise of certain conditions in the machinery of justice."<sup>180</sup>

The conditions to which the New York survey referred included growing caseloads caused in part by an expansion of the substantive criminal law. Dean Pound observed that "of one hundred thousand persons arrested in Chicago in 1912, more than one half were held for violation of legal precepts which did not exist twenty-five years before."<sup>181</sup> In 1931, the Wickersham Commission noted the effect that federal prohibition, the most important victimless crime in American history, had produced in the administration of justice:

[F]ederal prosecutions under the Prohibition Act terminated in 1930 had become nearly eight times as many as the total number of all pending federal prosecutions in 1914. In a number of urban districts the enforcement agencies maintain that the only practicable way of meeting this situation with the existing machinery of the federal courts . . . is for the United States Attorneys to make bargains with defendants or their counsel whereby defendants plead guilty to minor offenses and escape with light penalties. . . .

Lawyers everywhere deplore, as one of the most serious effects of prohibition, the change in the general attitude toward the federal courts. . . . [T]he huge volume of liquor prosecutions . . . has injured their dignity, impaired their efficiency, and endangered the wholesome respect for them which once obtained.<sup>182</sup>

177. E.g., *Brady v. United States*, 397 U.S. 742, 753 (1970); *People v. Darrah*, 33 Ill. 2d 175, 180, 210 N.E.2d 478, 481 (1965), cert. denied, 383 U.S. 919 (1966); *Proceedings of the Pilot Institute on Sentencing*, 26 F.R.D. 231, 287 (1959).

178. MISSOURI ASS'N FOR CRIMINAL JUSTICE, *supra* note 155, at 149.

179. ILLINOIS ASS'N FOR CRIMINAL JUSTICE, *supra* note 152, at 310.

180. NEW YORK STATE CRIME COMM'N, *supra* note 157, at 129. Accord, Moley, *supra* note 52, at 103.

181. R. POUND, *supra* note 166, at 23. Dean Justin Miller listed as areas of human activity that had recently been affected by the substantive expansion of the criminal law the manufacture and sale of liquor, the sale of securities, the issuance of checks, the driving of automobiles, the construction of buildings, and the maintenance of public health. Miller, *supra* note 167, at 17-18.

182. NATIONAL COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON THE ENFORCEMENT OF THE PROHIBITION LAWS OF THE UNITED STATES 56 (1931). At least one federal judge responded to prohibition cases by announcing that all liquor defendants then before his court could change their pleas to guilty, receive \$500 fines and go home. Alschuler, *The Trial Judge's Role in Plea Bargaining* (pt. 1), 76 COLUM. L. REV. 1059, 1077 n.65 (1976) (statement of J. W. Ehrlich).

## VI. THE RECENT HISTORY OF THE GUILTY PLEA

Raymond Moley endorsed a reform, already enacted in some jurisdictions,<sup>183</sup> that he said would cause "an immediate decline in the proportion of pleas of guilty."<sup>184</sup> In the early 1920's, the only alternative to a guilty plea in most states was a jury trial, and Moley suggested that defendants be permitted to elect trial by the court instead. This reform—typically qualified by a requirement that the prosecutor consent to a jury waiver—was enacted almost universally by the mid-1930's.<sup>185</sup> It may have had the effect that Moley predicted, but only briefly. After surveying the practices of state courts across the country, the Federal Bureau of the Census reported that in 1936, 77% of all felony convictions were by plea of guilty. By 1938, the figure was 80%, and by 1940, 86%—as high or higher than the level revealed by most of the criminal justice surveys of the 1920's.<sup>186</sup>

The high guilty plea rates of the 1920's left little room for dramatic increases. In recent years, however, prosecutors may have found it necessary to offer greater concessions simply to keep guilty plea rates constant. This hypothesis is supported by statements of participants in the criminal justice system whom I have interviewed in various jurisdictions<sup>187</sup> and also by a study of the United States District Court for the District of Columbia between 1950 and 1965, a study conducted by the President's Commission on Crime in the District of Columbia. During the period of this study, guilty pleas accounted for approximately 74% of all felony convictions in the District of Columbia; there was little fluctuation in this figure. In 1950, however, 58% of the District of Columbia's guilty pleas were to the charges originally filed, with no reduction in the number of offenses or their seriousness. By 1965, only 27% of all guilty pleas were to the indictments as

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183. See *State v. Worden*, 46 Conn. 349 (1878) (upholding an 1874 statute allowing a criminal defendant to elect trial by the court rather than by a jury).

184. Moley, *supra* note 52, at 127.

185. See, e.g., CAL. CONST. art. 1, § 7 (1928); 1927 Mich. Pub. Acts, No. 175, ch. 3, § 3. The Supreme Court ruled that a federal defendant could waive trial by jury and consent to trial by the court in *Patton v. United States*, 281 U.S. 276 (1930).

186. U.S. DEPT OF COMMERCE BUREAU OF THE CENSUS, JUDICIAL CRIMINAL STATISTICS (published in separate pamphlets for each year from 1933 through 1945).

By 1940, Rhode Island could claim the all-time record for successful plea negotiation. Every one of the 1250 convictions obtained during the previous two years had been by guilty plea. *Id.* (pamphlets for 1938 and 1939).

187. Older prosecutors and defense attorneys almost universally agreed that the concessions offered to guilty plea defendants had become greater over the course of their careers, and some defense attorneys noted that at the same time prosecutorial overcharging had grown in intensity. Thus, as the rewards offered for a guilty plea became more generous, trial itself became a more threatening alternative. In Cleveland, for example, J. Frank Azzarello, who had practiced in the criminal courts for 42 years, observed, "It has been only within the past dozen years that prosecutors started overcharging, throwing a lot of dirt at the walls in the hope that some of it might stick," and John P. Butler added, "When I was a member of the Prosecuting Attorney's staff, from 1936 to 1942, our philosophy was to underindict and overprove. Today the philosophy is to overindict and underprove." Interviews with Mr. Azzarello and Mr. Butler (Nov. 14, 1967).

originally drawn.<sup>188</sup> In view of the more frequent use of the charge-reduction mechanism, it is not surprising that sentences became lighter during this period.<sup>189</sup> At the same time, the crimes charged in the district court became more serious.<sup>190</sup>

Although the length of the average criminal trial in the District of Columbia increased notably during the period of the Crime Commission's study,<sup>191</sup> the intensification of plea negotiation probably cannot be explained by the pressures of the caseload. Indeed, as greater concessions were offered to guilty-plea defendants, the number of felony cases reaching the district court declined,<sup>192</sup> and the staff of the United States Attorney increased substantially.<sup>193</sup> One possible explanation for the growing concessions to guilty-plea defendants is simply that the attitudes of bureaucracy, emphasizing the maximization of production and the minimization of work, became more pronounced as the prosecutor's staff grew.<sup>194</sup> As Judge Arthur L. Alarcon noted in discussing what he regarded as a growing reliance on plea bargaining in Los Angeles, "The increase in the number of deputy district attorneys has fully kept pace with the increase in cases. Prosecutors say that bargaining is a way to reduce the backlog, but in reality it is simply a way to reduce the work."<sup>195</sup>

In other jurisdictions, growing caseloads probably did contribute substantially to the courts' dependence on the guilty plea. The "crime wave" of the 1960's, produced in part by the post-World War II baby boom and by the increased proportion of young people in American society, led to expanded caseloads,<sup>196</sup> and as the volume of traditional crime increased, the courts also confronted cases involving marijuana and other victimless crimes in greatly increased numbers.<sup>197</sup> These developments led to a major ad-

188. REPORT OF THE PRESIDENT'S COMM'N ON CRIME IN THE DISTRICT OF COLUMBIA, table 5, at 243 (1966) (extrapolation). In New York, similarly, during the seven-year period from 1960 through 1966, the number of felony charges reduced to misdemeanors increased markedly in relation to the number of actual felony convictions. The ratio was approximately 16 to 15 at the outset of the period and approximately 23 to 15 at the end. McLaughlin, *Selected Excerpts From the 1968 Report of the New York State Joint Legislative Committee on Crime, Its Causes, Control, and Effect on Society*, 5 CRIM. L. BULL. 255, 258 (1969).

189. REPORT OF THE PRESIDENT'S COMM'N ON CRIME IN THE DISTRICT OF COLUMBIA 245 (1966).

190. *Id.* at 248-49. The increase in the seriousness of the crimes charged in the district court is probably due not to overcharging but rather to the fact that the crime rate itself increased more rapidly for crimes of violence than for crimes involving property. Additionally, it is likely that prosecutors screened out a larger proportion of the less serious cases than in the past, thus altering the overall mix of cases.

191. See note 210 and accompanying text *infra*.

192. REPORT OF THE PRESIDENT'S COMM'N ON CRIME IN THE DISTRICT OF COLUMBIA 248-55 (1966). This decline in the felony caseload was not attributable to a reduction in crime. The number of felonies reported to the police nearly doubled during the relevant period. *Id.* at 248.

193. *Id.* at 236.

194. For an alternative explanation emphasizing the increased bargaining power of defendants, see text accompanying notes 212-18 *infra*.

195. Interview with Judge Alarcon (Feb. 15, 1968).

196. See J. WILSON, THINKING ABOUT CRIME 3-20 (1975).

197. In California in 1968, for example, approximately one-fourth of all felony charges were for violation of the marijuana laws, and the number of adult marijuana arrests had multiplied more than ten times since 1962. J. KAPLAN, MARIJUANA: THE NEW PROHIBITION 29 (1970).

ministrative crisis in the courts. The volume of criminal cases commonly doubled from one decade to the next,<sup>198</sup> while judicial resources increased only slightly.<sup>199</sup>

In 1967, both the American Bar Association Project on Minimum Standards for Criminal Justice and the President's Commission on Law Enforcement and Administration of Justice proclaimed that, properly administered, plea bargaining was a practice of considerable value.<sup>200</sup> Nevertheless, a case that reached the United States Supreme Court in 1958, *Shelton v. United States*,<sup>201</sup> suggests that only a few years before the beginning of today's reign of "realism," the legality of plea bargaining had been very much in doubt.

A federal defendant, Paul Shelton, alleged in a pro se post-conviction petition that his guilty plea was involuntary because it had been induced by prosecutorial promises, and his contention that this plea bargaining was unlawful was accepted by a panel of the United States Court of Appeals for the Fifth Circuit. Judge Richard T. Rives's opinion for a two-to-one majority proclaimed, "Justice and liberty are not the subjects of bargaining and barter."<sup>202</sup>

The en banc Court of Appeals for the Fifth Circuit reversed the panel decision by a vote of three-to-two,<sup>203</sup> however, with Judge Elbert P. Tuttle writing for the majority. Shelton then sought review of his conviction in the United States Supreme Court. The Court resolved the case in a brief

198. In Houston the number of felony indictments increased from 2,582 in 1956 to 5,811 in 1967—then to 13,996 in 1975. Unpublished statistics supplied by R. J. Roman, Clerk's Office, Harris County District Courts. In Cleveland, the number of indictments rose from 4,514 in 1952 to 9,470 in 1963. Unpublished statistics supplied by John L. Lavelle, Court Administrator for the Court of Common Pleas of Cuyahoga County.

199. See, e.g., *City Courts Facing a Growing Crisis*, N.Y. Times, Feb. 12, 1968, at 41, col. 1.

Although a lack of personnel was the principal administrative problem confronting the criminal courts, these courts were in physical shambles as well. In Cleveland, for example, the resourceful clerk of the criminal court hired a new typist after he found space for her to work in the lavatory, *Court Speeds Up, but Loses Ground*, Cleveland Plain Dealer, Oct. 12, 1967, and in New York small robing rooms were pressed into service as courtrooms.

200. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY (tent. draft 1967); PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 134-37 (1967).

201. 356 U.S. 26 (1958).

202. *Shelton v. United States*, 242 F.2d 101, 113 (5th Cir.), judgment set aside, 246 F.2d 571 (5th Cir. 1957) (en banc), rev'd per curiam on confession of error, 356 U.S. 26 (1958).

203. *Shelton v. United States*, 246 F.2d 571 (5th Cir. 1957), rev'd per curiam on confession of error, 356 U.S. 26 (1958).

Judge Rives, now in dissent, explained the basis of his earlier opinion more fully. He wrote that "a plea of guilty, a confession in open court, is subject to no less rigorous tests than those applicable to simple confessions. In either case, voluntariness requires that the confession be not induced by a promise or threat..." *Id.* at 579. The majority opinion by Judge Tuttle, however, noted that Shelton had challenged the propriety of his guilty plea only when it was too late to resurrect the charges that the government had abandoned. Although Judge Tuttle's opinion did not explain directly why the standards of voluntariness applicable to out-of-court confessions should be disregarded, it set forth a test of voluntariness that turned primarily on whether the government's promises had been honored and whether the defendant had been threatened with unlawful government action. *Id.* at 572 n.2. This test was later endorsed by the Supreme Court, *Brady v. United States*, 397 U.S. 742, 755 (1970), and it is discussed in Alschuler, *supra* note 70, at 58-70.

per curiam opinion: "Upon . . . confession of error by the Solicitor General that the plea of guilty may have been improperly obtained, the judgment of the United States Court of Appeals for the Fifth Circuit is reversed and the case is remanded to the District Court for further proceedings."<sup>204</sup>

Although the Solicitor General's confession of error does not appear in most collections of Supreme Court briefs and records, I was able to locate a copy in the Supreme Court library. This document relied upon a largely technical defect in the trial court proceedings. It maintained that the trial court had failed to conduct an adequate inquiry when it accepted the defendant's plea of guilty, and that "in these circumstances, taken as a whole, together with all the other facts in the case," reversal was appropriate.

The Solicitor General's confession of error in *Shelton* seemed peculiar. For one thing, the Solicitor General, J. Lee Rankin, failed to mention the ruling of the court of appeals on the issue in question. The Fifth Circuit had held that even if the trial court should have conducted a more thorough inquiry, this court's subsequent determination that the defendant's guilty plea was voluntary—a determination that the court had made after a full evidentiary hearing—had cured any error.<sup>205</sup> Even the initial panel opinion by Judge Rives had concluded that the failure to conduct an adequate inquiry into voluntariness would not entitle the defendant to post-conviction relief but only to a hearing at which the government would bear the burden of demonstrating that the guilty plea was voluntary.<sup>206</sup>

204. *Shelton v. United States*, 356 U.S. 26 (1958). The Fifth Circuit later ruled that this cryptic reversal had not meant to endorse the views of the Fifth Circuit dissenters, *Martin v. United States*, 256 F.2d 345 (5th Cir. 1958), and it continued to apply the standards of voluntariness that Judge Tuttle had announced for the en banc majority in *Shelton*. E.g., *Brown v. Beto*, 377 F.2d 950 (5th Cir. 1967). Although the Fifth Circuit's position was undoubtedly correct, the Supreme Court's per curiam reversal led another federal court of appeals to take a different view. In *Scott v. United States*, 349 F.2d 641, 643 (6th Cir. 1965), the court said, "It is clear, of course, that a plea of guilty induced by a promise of lenient treatment is an involuntary plea and hence void. *Shelton v. United States*, 356 U.S. 26 . . . (1958), reversing, 5 Cir., 246 F.2d 571."

205. 246 F.2d at 572-73.

206. 242 F.2d at 112.

Almost a dozen years after *Shelton*, in *McCarthy v. United States*, 394 U.S. 459 (1969), the Supreme Court held that a federal trial court's failure to conduct an adequate inquiry at the time that it accepted a guilty plea rendered the plea invalid. In *McCarthy*, however, the argument of the Solicitor General's office was the opposite of its argument in *Shelton*. The Solicitor General contended that the trial court's failure should entitle the defendant, not to a new trial, but only to an evidentiary hearing on the validity of his plea. Brief for the United States at 17-23, *McCarthy v. United States*, 394 U.S. 459 (1969). Moreover, the Supreme Court applied its ruling in *McCarthy* only prospectively, *Halliday v. United States*, 394 U.S. 831 (1969); it was apparently unaware that it had made essentially the same ruling more than a decade before, at the time that it accepted the government's confession of error in *Shelton*.

To be sure, because the Solicitor General attempted to confine his confession of error to the facts of the *Shelton* case, the *Shelton* ruling may not have been as broad as the later ruling in *McCarthy*. Nevertheless, the ruling in *Halliday* was plainly inconsistent with the ruling in *Shelton*, for the Court held in *Halliday* that, in cases resolved prior to *McCarthy*, a trial judge's failure to conduct an adequate inquiry would never itself entitle a defendant to a new trial; in the face of such a procedural failure, a pre-*McCarthy* defendant would be required to bring a post-conviction proceeding challenging the substantive voluntariness of his plea. At the very least, however, *Shelton* had held that the failure to conduct an adequate inquiry could in some circumstances entitle a defendant to a new trial.

Although the Solicitor General has sometimes been described as the "tenth Justice of the Supreme Court," this official's confession of error in a case before the Court is sometimes troublesome. When the government's position has been sustained by a United States Court of Appeals, respectable arguments in support of this position are rarely lacking, and it seems presumptuous for a single advocate, in effect, to "reverse" the decision of a federal court of appeals.<sup>207</sup> Surely the Solicitor General should hesitate before confessing error in a case decided en banc by one of the nation's most respected appellate tribunals, on a procedural issue on which this court was unanimous, and on an issue that two judges of the caliber of Tuttle and Rives had considered specifically. In light of the dubious merits of the confession of error in *Shelton*, it seems possible that this confession masked the Department of Justice's strategic concerns. In 1958, the Solicitor General (or perhaps some other official in the Justice Department) may have assessed the probable votes of individual Supreme Court Justices, may have sensed a substantial likelihood that the Court would hold the practice of plea bargaining unlawful, and may have sought to foreclose this ruling through a confession of error on narrow and disingenuous grounds. One wonders whether, even at this relatively late date, the history of plea bargaining might not have taken a dramatically different turn but for the action of the Solicitor General.

In the decade following *Shelton*, the Supreme Court had other opportunities to consider the legality of plea negotiation but did not use them.<sup>208</sup> Instead, during the period of its "due process revolution," the Court seemed to treat the police as the principal villains of the criminal process. In a regime in which the pressures for self-incrimination were ordinarily far greater at the courthouse than at the stationhouse, the Court repeatedly ignored the leverage that prosecutors exerted upon criminal defendants at the courthouse.<sup>209</sup>

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Both the Supreme Court's failure to consider the significance of *Shelton* when it decided *McCarty* and *Halliday* and the Sixth Circuit's misreading of *Shelton*, see note 204 *supra*, demonstrate a need for the Court to provide a more meaningful statement of reasons when it accepts a confession of error than it provided in *Shelton*.

207. Technically, of course, a court is not required to accept a confession of error. In a case like *Shelton*, however, it may have no realistic alternative. The Supreme Court could hardly have "reached out" to consider the legality of plea negotiation in a case in which the vigor of the Solicitor General's advocacy was questionable and in the face of his suggestion that it was unnecessary for the Court to decide the issue.

208. See, e.g., *Carlino v. United States*, 400 F.2d 56 (2d Cir. 1968), *cert. denied*, 394 U.S. 1013 (1969); *Cooper v. Holman*, 356 F.2d 82 (5th Cir.), *cert. denied*, 385 U.S. 855 (1966); *Pinedo v. United States*, 347 F.2d 142 (9th Cir. 1965), *cert. denied*, 382 U.S. 976 (1966); *People v. Darrah*, 33 Ill. 2d 175, 210 N.E.2d 478 (1965), *cert. denied*, 383 U.S. 919 (1966); *Green v. State*, 327 P.2d 704 (Okla. Crim. App.), *cert. denied*, 358 U.S. 905 (1958); *Bailey v. MacDougall*, 247 S.C. 1, 145 S.E.2d 425 (1965), *cert. denied*, 384 U.S. 962 (1966).

209. It did hold that prosecutors could not burden a defendant's exercise of the privilege against self-incrimination by commenting before the jury on his failure to testify, *Griffin v. California*, 380 U.S. 609 (1965), but this sort of comment was not the principal form of pressure that prosecutors used.

In focusing on the police, the Supreme Court directed its efforts toward the criminal justice agency that enjoyed the greatest degree of political support and that was least subject to effective judicial control. Decisions like *Miranda v. Arizona*, 384 U.S. 436 (1966), and

A major effect of the "due process revolution" was to augment the pressures for plea negotiation. For one thing, the Supreme Court's decisions contributed to the growing backlog of criminal cases. Prosecutors' offices were required to devote a greater share of their resources to appellate litigation, and both prosecutors and trial judges spent a greater portion of their time on pretrial motions and post-conviction proceedings. In addition, the Court's decisions probably contributed to the increased length of the criminal trial. In the District of Columbia, the length of the average felony trial grew from 1.9 days in 1950 to 2.8 days in 1965,<sup>210</sup> and in Los Angeles the length of the average felony jury trial increased from 3.5 days in 1964 to 7.2 days in 1968.<sup>211</sup>

The "due process revolution" also led directly to more intense plea negotiation. In the words of an Oakland public defender, "rights are tools to work with,"<sup>212</sup> and rather than insist on a hearing on a motion to suppress illegally obtained evidence, a defense attorney was likely to use a claim of illegality to exact prosecutorial concessions in plea bargaining. A New York defense attorney explained, "As the defendant gains more rights, his bargaining position grows stronger. That is a simple matter of economics,"<sup>213</sup> and an Assistant Attorney General in Massachusetts observed, "If guilty pleas are cheaper today, it is simply because Supreme Court decisions have given defense attorneys an excellent shot at beating us."<sup>214</sup>

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Mapp v. Ohio, 367 U.S. 643 (1961), involved the Court in intense political controversy, but their immediate impact on the everyday administration of criminal justice was probably small. See, e.g., J. SKOLNICK, *JUSTICE WITHOUT TRIAL* 223-43 (1966); Note, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519 (1967). When the Court turned to the judicial process, it not only achieved more meaningful reforms but did so without generating very significant public controversy. See *In re Gault*, 387 U.S. 1 (1967); *Fay v. Noia*, 372 U.S. 391 (1963); *Douglas v. California*, 372 U.S. 353 (1963); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

Plea negotiation might have been a more appropriate target for the due process revolution than the targets that the Supreme Court selected. In a decade of intense concern about crime, Americans were naturally suspicious of restrictions on crime-detection techniques, but they probably retained the faith that accused criminals should be afforded their day in court. Moreover, the American public may well have suspected that plea negotiation cheated its own interests as well as those of criminal defendants. See D. FOGEL, "... WE ARE THE LIVING PROOF . . .": THE JUSTICE MODEL FOR CORRECTIONS, app. III, at 300 (1975) (public opinion poll in Michigan: 70% disapproval of plea bargaining; 21% approval; 9% don't know).

Of course I do not suggest that the Supreme Court should select or decide its cases on the basis of public opinion polls. The Court should decide its cases "without fear or favor" (at least some of the time). In neglecting plea negotiation throughout the decade of the "due process revolution," however, the Court used its power to control its own jurisdiction, not for the purpose of confining its attention to significant issues, but for the purpose of evading them. This evasion, in my view, helped to ensure the ultimate failure of the due process revolution, for as is indicated in the text accompanying notes 210-11 *infra*, the accordian-like properties of the guilty-plea system often deprived the Court's reforms of their desired effect.

210. REPORT OF THE PRESIDENT'S COMM'N ON CRIME IN THE DISTRICT OF COLUMBIA 263 (1966).

211. SAN FRANCISCO CO.-MITTEE ON CRIME, A REPORT ON THE CRIMINAL COURTS OF SAN FRANCISCO, PART I: THE SUPERIOR COURT BACKLOG—CONSEQUENCES AND REMEDIES 1 (1970).

212. Interview with John D. Nunes, in Oakland, Cal. (Feb. 13, 1968).

213. Interview with Stanley Arkin, in New York City (Jan. 11, 1968).

214. Interview with Donald Conn, in Boston, Mass. (Jan. 12, 1968).

In states that did not exclude illegally seized evidence prior to 1961, the decision in *Mapp v. Ohio*<sup>215</sup> probably affected the plea negotiation process more than any other ruling, but decisions guaranteeing indigent defendants the right to an adequately presented appeal<sup>216</sup> also had an impact. By increasing the likelihood of appeal, these decisions encouraged prosecutors to magnify the concessions granted to defendants in exchange for guilty pleas that would effectively foreclose appellate review of most issues.

Professors Dallin H. Oaks and Warren Lehman documented the changes that expanded right to appeal had brought about in Chicago.<sup>217</sup> On January 1, 1964, a new code of criminal procedure became effective, and this code provided for the automatic appointment of appellate counsel as soon as an indigent defendant filed a notice of appeal. During the following year, the rate of conviction at trials without juries declined substantially. Oaks and Lehman hypothesized that as the conviction process became subject to increased scrutiny, judges became more cautious about convicting. Juries are unlike trial judges, however, in that they seem unlikely to be influenced by what an appellate court may do after their duties have been concluded. Oaks and Lehman found that the rate of conviction at jury trials had remained unchanged.

Oaks and Lehman anticipated that defense attorneys would respond to their increased chances of success at jury-waived trials by taking more cases to trial. They found the reverse instead. The number of guilty pleas increased—to such an extent that, overall, a greater proportion of defendants were convicted in 1964 than had been convicted in 1963. The critical response to procedural developments, the authors concluded, was the reaction of prosecutors, not that of defense attorneys. With a declining prospect of success at trial, prosecutors found additional incentive to bargain for pleas of guilty. This reaction was so pronounced that Oaks and Lehman wondered whether the due process revolution was yielding the antithesis of its objective and whether procedural reforms were resulting in the conviction of a greater number of defendants.

Statistics for the entire period of the due process revolution do not support this remarkable proposition. It is remarkable enough, however, that prosecutors were able to keep conviction rates fairly constant in the face of both burgeoning caseloads and procedural developments apparently favoring the defense.<sup>218</sup> As Oaks and Lehman observed, procedural reforms did not benefit defendants primarily through increased judicial control of the criminal

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215. 367 U.S. 643 (1961).

216. *E.g.*, *Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956).

217. D. OAKS & W. LEHMAN, *A CRIMINAL JUSTICE SYSTEM AND THE INDIGENT* 53-81 (1968). Oaks and Lehman analyzed a number of hypotheses that might have explained the data that they presented. The text following this footnote summarizes what the authors considered the most likely explanation for these data.

218. *See* REPORT OF THE PRESIDENT'S COMM'N ON CRIME IN THE DISTRICT OF COLUMBIA 245 (1966) (no trend apparent); CALIFORNIA BUREAU OF CRIMINAL STATISTICS, *CRIME AND DELINQUENCY IN CALIFORNIA 1967*, chart V-B, at 97 (slight decline in conviction rate).

process. Rather, these reforms became levers in the bargaining process and had their principal impact in reducing the punishment that guilty-plea defendants received.

As American criminal courts became more dependent on plea bargaining, a return to the historic principle that a guilty plea should be entered "freely and of the defendant's own good will," without "inducement of any kind," began to seem unrealistic, and the legal profession apparently decided that this principle was sour anyway. By 1970, the due process revolution had run its course, and the Supreme Court, which bore a share of responsibility for the dominance of the guilty plea, was ready at last to confront this central feature of American criminal justice. In a series of decisions which implied that any other course would be unthinkable, the Court upheld the propriety of plea bargaining.<sup>219</sup> It insisted that plea bargaining was "inherent in the criminal law and its administration"<sup>220</sup> and that "[d]isposition of charges after plea discussions is not only an essential part of the [criminal] process but a highly desirable part for many reasons."<sup>221</sup>

## VII. SOME CONCLUDING OBSERVATIONS

Americans tend to view history as progress and to assume that throughout history the law has afforded increasing dignity to persons accused of crime. The lash, the rack, and the thumbscrew have given way to *Miranda* warnings, and lynchings and blood feuds have become rare. The history of plea negotiation, however, is a history of mounting pressure for self-incrimination, and in explaining this phenomenon, a growth in the complexity of the trial process over the past two-and-one-half centuries seems highly relevant. Professor Lawrence M. Friedman discovered that one American felony court could conduct a half-dozen jury trials in a single day in the 1890's.<sup>222</sup> This figure was only half as great as the number of cases that an Old Bailey jury had been able to resolve in a single day in the early eighteenth century,<sup>223</sup> but it contrasts dramatically with the 7.2 days that an average felony jury trial required in Los Angeles in 1968.<sup>224</sup> One may fairly conclude that if there was a golden age of trials, it was not one in which trials

219. *Santobello v. New York*, 404 U.S. 257 (1971); *North Carolina v. Alford*, 400 U.S. 25 (1970); *Brady v. United States*, 397 U.S. 742 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); *Parker v. North Carolina*, 397 U.S. 790 (1970).

220. *Brady v. United States*, 397 U.S. 742, 751 (1970).

221. *Santobello v. New York*, 404 U.S. 257, 261 (1971).

222. L. Friedman, *Plea Bargaining in Historical Perspective* 18 n.26 (unpublished manuscript presented at the Special National Workshop on Plea Bargaining, French Lick, Indiana, June 15, 1978).

223. See Langbein, *supra* note 40, at 271.

224. SAN FRANCISCO COMMITTEE ON CRIME, *supra* note 211, at 1. The length of the average felony jury trial in Los Angeles was apparently unusual, however. See Y. KAMISAR, W. LAFAYE & J. ISRAEL, *MODERN CRIMINAL PROCEDURE: CASES, COMMENTS AND QUESTIONS* 13 (4th ed. 1974): "Most trials to the court last one day or less, and trials to a jury usually last two days or less. Less than 10% of all felony trials are likely to last 4 days or more." See also Bird Engineering-Research Associates, Inc., *Jury System Operation Final Report* 14-17 & app. D (unpublished Nov. 1974).

were golden.<sup>225</sup> The rapid trials of the past plainly lacked safeguards that we consider essential today. It may be equally true, however, that our system of resolving criminal cases has now become absurd both in the complexity of its trial processes and in the summary manner in which it avoids trial in the great majority of cases. For all the praise lavished upon the American jury trial, this fact-finding mechanism has become so cumbersome and expensive that our society refuses to provide it. Rather than reconsider our overly elaborate trial procedures, we press most criminal defendants to forego even the more expeditious form of trial that defendants once were freely afforded as a matter of right.

The paradox of our current criminal justice system has a notable parallel in history.<sup>226</sup> During the late middle ages and the Renaissance, as English courts were discouraging guilty pleas, confession assumed an overwhelming importance on the European continent. Both torture and false promises of pardon were commonly used to induce defendants to confess.<sup>227</sup> Indeed, what is probably history's most famous case of plea bargaining arose in 1431 in an ecclesiastical court in France. When Joan of Arc yielded to the promise of leniency that this court made, she demonstrated that even saints are sometimes unable to resist the pressures of plea negotiation. Joan, however, was able to withdraw her confession and go to her martyrdom.<sup>228</sup>

Part of the explanation for the greater importance of confession on the continent than in England lay in the fact that standards of proof were much higher on the continent. Neither the testimony of a single witness nor any amount of circumstantial evidence could justify a defendant's conviction of a serious crime. Confession was therefore essential to conviction in a great many cases, and this fact led to the exertion of extraordinary pressures for confession. Formal courtroom requirements that apparently had been designed to protect defendants were transmuted into something like their antithesis through the adoption of expedient shortcuts.<sup>229</sup>

225. This statement is borrowed from a participant in the Special National Workshop on Plea Bargaining in French Lick, Indiana, in June, 1978, whose identity I unfortunately failed to note.

226. See J. Langbein, *Torture and Plea Bargaining* (unpublished manuscript, July 25, 1978) (revised version to appear in *The University of Chicago Law Review*).

227. Currie, *Crimes Without Criminals: Witchcraft and its Control in Renaissance Europe*, 3 *LAW & SOC'Y REV.* 7 (1968); see J. LANGBEIN, *TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN RÉGIME* (1977).

228. See V. SACKVILLE-WEST, *SAINT JOAN OF ARC* (1936). Apparently the court that tried Saint Joan was less attached to the doctrine of "finality" in guilty plea cases than are many American courts today. See Erickson, *The Finality of a Plea of Guilty*, 48 *NOTRE DAME LAW.* 835 (1973).

229. See J. LANGBEIN, *supra* note 227. Torture was occasionally employed in renaissance England, but never as part of a judicial proceeding (and never, contrary to common belief, in the Court of Star Chamber. See G. ELTON, *THE TUDOR CONSTITUTION* 169-70 (1960)). Its most frequent use was in cases of religious and political crime, and its usual object was not to secure evidence against the person tortured (which often existed in abundance before the torture began) but rather to determine the scope of what might prove to be an ongoing plot against the state. See *id.* at 88-90. Even in the relatively infrequent cases of ordinary crime in which torture was employed, its object was commonly the discovery of accomplices rather than the coercion of a suspect's confession. See *id.* at 192-205.

Today, in a sense, the situation is reversed. Methods of proof are far more formal, more expensive, and more time-consuming in Anglo-American justice than on the continent, and our elaboration of safeguards for the trial process has produced enormous pressure for plea bargaining. As a consequence, our supposedly accusatory system has become more dependent on proving guilt from the defendant's own mouth than any European "inquisitorial" system.<sup>230</sup> The lessons of our own history and that of other nations, therefore, are essentially the same: the more formal and elaborate the trial process, the more likely it is that this process will be subverted through pressures for self-incrimination. The simpler and more straightforward the trial process, the more likely it is that the process will be used.<sup>231</sup>

The growing complexity of the trial process was not the only factor that contributed to the development of today's regime of plea bargaining. Urbanization, increased crime rates, expansion of the substantive criminal law, and the professionalization and increasing bureaucratization of the police, prosecution, and defense functions may have also played their parts. For a variety of reasons, we have come a long way from the time when guilty pleas were discouraged and litigation was thought "the safest test of justice." We have also come a long way from the first appellate decision on plea bargaining, in which the court refused to permit the right to trial to be defeated "by any deceit or device whatever." Indeed, the view advanced by the Supreme Court one hundred years ago that "a man may not barter away his life or his freedom, or his substantial rights" is disparaged by the Supreme Court today, and judges no longer proclaim that "[n]o sort of pressure can be permitted to bring the party to forego any right or advantage however slight. The law will not suffer the least weight to be put in the scale against him."<sup>232</sup>

How very far we have travelled is illustrated by the Supreme Court's 1978 decision in *Bordenkircher v. Hayes*.<sup>233</sup> The prosecutor in this case offered to permit the defendant, a repeated offender charged with uttering a forged check, to plead guilty in exchange for the recommendation of a five-year sentence. When the defendant rejected this offer, the prosecutor carried out a threat that he had made during the negotiations to return to the grand jury and to obtain an indictment under the Kentucky Habitual Criminal Act. The defendant was then convicted at trial, and the court imposed the life sentence that the Habitual Criminal Act required. The Supreme Court upheld the constitutionality of the penalty that the defendant had incurred by exercising his right to trial, and indeed, even the four Justices who dissented indicated that they would have upheld this penalty if only the prosecutor had observed some additional niceties in the timing of his threat and

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230. See, e.g., J. LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* (1977).

231. A similar lesson can be drawn from the experience of some modern American jurisdictions. The low guilty plea rates in Philadelphia and Pittsburgh are largely explained by the informal and expeditious bench-trial procedures employed in those cities. See Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 61 (1968).

232. See text accompanying note 109 *supra*.

233. 434 U.S. 357 (1978).

offer. The Supreme Court thus gave its imprimatur to a bizarre system of justice in which the crime of uttering a forged \$88 check is "worth" five years and in which the crime of standing trial is "worth" imprisonment for life. The road from common-law principles to the Supreme Court's decision in *Bordenkircher v. Hayes* has indeed been long, and although Sir Winston Churchill once observed that the quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law, Americans can hope that there are other yardsticks.<sup>234</sup>

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234. The general attitudes of the legal profession toward plea bargaining are probably fairly illustrated by the majority and dissenting opinions in *Bordenkircher v. Hayes*: courts must move gingerly around the outer edges of the practice of plea bargaining for fear of upsetting this indispensable institution. Nevertheless, this view is far from universal. In 1973, the National Advisory Commission on Criminal Justice Standards and Goals called for the abolition of all forms of plea bargaining, NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS 46-49 (1973), and promising experiments in the abolition of plea bargaining are underway in the State of Alaska and other jurisdictions, see ALASKA JUDICIAL COUNCIL, INTERIM REPORT ON THE ELIMINATION OF PLEA BARGAINING (1977).