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## When Plea Bargaining Became Normal

William Ortman

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## WHEN PLEA BARGAINING BECAME NORMAL

WILLIAM ORTMAN\*

### ABSTRACT

*Plea bargaining is the criminal justice system, the Supreme Court tells us, but how did it get to be that way? Existing scholarship tells only part of the story. It demonstrates that plea bargaining emerged in the nineteenth century as a response to (depending on one's theory) increasing caseloads, expanding trial procedures, or professionalizing law enforcement. But in order for plea bargaining to truly become the criminal justice system, the legal profession would have to accept and internalize it. That was not its first reaction. When legal scholars and reformers in the 1920s discovered that bargaining dominated America's criminal courts, they quickly denounced it as abusive. By the 1960s, only four decades later, the legal profession had learned to love it.*

*This Article investigates the process that made plea bargaining the normal way of doing American criminal justice. The story unfolds in three parts: plea bargaining's discovery by and frosty reception from the "crime commissions" of the 1920s, its rehabilitation by the Legal Realists in the 1930s, and finally its decisive embrace by scholars and judges in the 1950s and 1960s. The Realists' starring role is surprising, as they are not usually recognized for contributing to criminal law or procedure. This Article shows that they deserve credit (or plausibly blame) for taking the first major steps towards normalization. The Article also pays close attention to an objection to plea bargaining that arrived late—that it depends on coercing defendants to plead guilty. By the time this objection emerged, plea bargaining's momentum was too strong; legal elites, and ultimately the Supreme Court, saw no option but to rationalize it away.*

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## INTRODUCTION

In American criminal justice, plea bargaining is ubiquitous. The vital statistic is familiar—around 95% of criminal convictions are based on guilty pleas, most of which are the result of plea bargains.<sup>1</sup> The Supreme Court itself tells us that plea bargaining “*is* the criminal justice system,”<sup>2</sup> and that a negotiated guilty plea, not a trial, constitutes the “ordinary course” for a criminal case.<sup>3</sup> Plea bargaining is utterly normal. And because plea bargaining’s grip on criminal justice is so tight, it’s easy to lose sight of the fact that it was ever any other way. But it was, and not that long ago.

In the 1920s, legal scholars and reformers formed commissions to survey the criminal justice machinery in jurisdictions across the country.<sup>4</sup> When the commissions looked under the hood of American criminal courts, they found that plea bargaining had, as Professor George Fisher writes, “overrun the nation’s courts.”<sup>5</sup> They were aghast by the phenomenon they had exposed, which they decried as prosecutorial “corruption,” manipulated by criminals to “escape” their due punishment.<sup>6</sup> Plea bargaining was already pervasive when it was discovered, but it was far from normal.

Now look ahead to 1967, when President Lyndon Johnson’s blue-ribbon crime commission reported on the state of American criminal justice.<sup>7</sup> *These* commissioners praised plea bargaining for its efficiency, for importing “a degree of certainty and flexibility into a rigid, yet frequently erratic system,” and for imposing “punishment that more accurately reflects the specific circumstances of the case than otherwise would be possible.”<sup>8</sup> Just four decades after its

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<sup>1</sup> See Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 912 (2006); Darryl K. Brown, *Judicial Power to Regulate Plea Bargaining*, 57 WM. & MARY L. REV. 1225, 1228 (2016).

<sup>2</sup> *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining As Contract*, 10 YALE L.J. 1909, 1912 (1992)).

<sup>3</sup> *Lafler v. Cooper*, 566 U.S. 156, 168 (2012); see also Josh Bowers, *Plea Bargaining’s Baselines*, 57 WM. & MARY L. REV. 1083, 1087-88 (2016).

<sup>4</sup> See *infra* Sections II.A, II.B.

<sup>5</sup> GEORGE FISHER, *PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* 6 (2003).

<sup>6</sup> See, e.g., Alfred Bettman & Howard F. Burns, *Prosecution*, in RAYMOND FOSDICK ET AL., *CRIMINAL JUSTICE IN CLEVELAND* 85, 143 (Roscoe Pound & Felix Frankfurter eds., 1922) (“corruption”); C.E. Gehlke, *A Statistical Interpretation of the Criminal Process*, in MO. ASS’N FOR CRIMINAL JUSTICE, *THE MISSOURI CRIME SURVEY* 269, 314 (1926) (“escape”) [hereinafter Gehlke, *A Statistical Interpretation*].

<sup>7</sup> See generally PRESIDENT’S COMM’N ON LAW ENF’T & ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* (1967) [hereinafter KATZENBACH COMMISSION].

<sup>8</sup> *Id.* at 135.

discovery, the elite legal profession's judgment on plea bargaining had turned completely around.<sup>9</sup>

Plea bargaining did not enter the consciousness of the American legal profession as a normal practice. It became normal in the four decades following its discovery in the 1920s. But how did the judgment of the legal profession—or at least that of its elite members—change so dramatically in a relatively short period of time? This is more than just an interesting historical puzzle. Because plea bargaining “is” our criminal justice system, as the Supreme Court correctly declares, its normalization is an enormously consequential chapter in the broader story of American criminal justice.<sup>10</sup>

It is also a chapter, as Part I shows, that scholarship on plea bargaining has largely overlooked.<sup>11</sup> The leading histories of plea bargaining concentrate instead on the nineteenth century, revealing the political and institutional pressures that propelled it into existence.<sup>12</sup> Because they describe plea bargaining's origins, these histories end in the first decades of the twentieth century. Our story begins where they leave off, a point at which plea bargaining was widespread but not yet normal. Part II takes a deep dive into the discovery of plea bargaining by the Progressive (and Progressive-inspired) crime-commission movement that launched in the 1920s. While these commissions liked some aspects of plea bargaining, mostly they condemned it. I have already noted their principal objections—plea bargaining, in their view, entailed corruption by prosecutors and escape by criminals.

The surveyors' objections posed an obstacle to plea bargaining becoming a normal practice. As Part III details, it would fall to the Legal Realists of the 1930s to take the next steps. Their contribution to this story is surprising, as we do not often think of the Realists as doing anything important in criminal law.<sup>13</sup> Actually, they—or at least the intellectual machinery they developed—played a role in normalizing plea bargaining. Whether that makes them the story's heroes or villains depends on what one thinks about plea bargaining.

Part IV shows that the Realists' rebuttals to the Progressives' objections carried the day in the middle decades of the twentieth century. That period also

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<sup>9</sup> See Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 51 (1968) [hereinafter Alschuler, *The Prosecutor's Role in Plea Bargaining*] (“[T]he legal profession [in 1968] seems as united in its defense of plea negotiation as it was united in opposition less than a half-century ago.”).

<sup>10</sup> *Missouri v. Frye*, 566 U.S. 134, 144 (2012).

<sup>11</sup> The foremost exception is Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1 (1979) [hereinafter Alschuler, *Plea Bargaining and Its History*], which I discuss below. See *infra* notes 56-59 and accompanying text.

<sup>12</sup> See *infra* note 55 and accompanying text.

<sup>13</sup> See Mark Fenster, *The Dramas of Criminal Law: Thurman Arnold's Post-Realist Critique of Law Enforcement*, 53 TULSA L. REV. 497, 499 (2018); see also David D. Cole, *Formalism, Realism, and the War on Drugs*, 35 SUFFOLK U. L. REV. 241, 242-43 (2001); Robert Weisberg, *Criminal Law, Criminology, and the Small World of Legal Scholars*, 63 U. COLO. L. REV. 521, 522 (1992).

saw the emergence of an objection to plea bargaining mostly missed by the Progressive-era commentary—that it is coercive. By the 1950s and 1960s, however, that objection was too little and too late to make much difference. If there had ever been an opportunity for the objection to matter, by mid-century it was gone.

The story that follows has twists and turns, but the core point is straightforward. Plea bargaining didn't start off as normal. Making it normal was a process that played out during the four decades that followed its discovery, but which has since been largely forgotten. By recovering it, I aim to contribute to a more complete account of our criminal justice system's legitimating narrative.

Before we start, I have one caveat and one clarification. The caveat is that this is an intellectual history of plea bargaining during its normalizing years, not a cultural or social history. My sights will be on the legal profession, not the public at large, which has never really understood plea bargaining and which has certainly never accepted it.<sup>14</sup> Within the legal profession, my focus will mostly be on the elite lawyers, judges, and scholars whose views are recorded in commission reports, books, articles, legal opinions, and speeches. It is possible that others in the profession had systematically different opinions about plea bargaining.<sup>15</sup> Even if they did, elite opinion matters in the legal profession, for better or for worse.<sup>16</sup> Perhaps plea bargaining would have thrived even if legal elites had persisted in the 1920s view that it was illegitimate, but its path may have been different.<sup>17</sup>

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<sup>14</sup> See CANDACE MCCOY, *POLITICS AND PLEA BARGAINING: VICTIMS' RIGHTS IN CALIFORNIA* 64-69 (1993).

<sup>15</sup> Indeed, we will see some evidence of that. See *infra* note 321 and accompanying text.

<sup>16</sup> See generally Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 *GEO. L.J.* 1515 (2010). Whether that is a good thing for the profession or the country is well beyond my scope.

<sup>17</sup> I return to this in the Conclusion. See *infra* note 423. On a related point, I do not claim that the development of ideas about plea bargaining alone *caused* it to become normal. Ideas aside, plea bargaining is a powerful institution that serves the interests of prosecutors, judges, defense lawyers, and legislators. See FISHER, *supra* note 5, at 175-80; William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 *HARV. L. REV.* 2548, 2557-58 (2004). As Fisher has powerfully shown, during its rise in the late nineteenth and early twentieth centuries, plea bargaining was an institutional "juggernaut" that steamrolled any obstacles in its path. See FISHER, *supra* note 5, at 205; see also Michael Willrich, *Dickering for Justice: Power, Interests, and the Plea Bargaining Juggernaut*, 31 *REVS. AM. HIST.* 430, 436 (2003) (reviewing FISHER, *supra* note 5). It is even possible that plea bargaining's institutional potency did *all* the causal work of normalizing plea bargaining, while the ideological developments I trace were post hoc rationalizations. Cf. Alschuler, *Plea Bargaining and Its History*, *supra* note 11, at 19 n.106. But even if the justifications were rationalizations, they are still important. Whether or not they caused plea bargaining to become normal, the ideas about plea bargaining that we will encounter are the narratives that (purport to) legitimate our criminal justice system. For a fascinating discussion of causation

The clarification consists of a definition and a persnickety but necessary distinction. I use “normal” to denote a practice or understanding that is not just routine, but that is generally accepted as legitimate or even taken for granted as inevitable.<sup>18</sup> When I say that plea bargaining became normal in the twentieth century, I mean that the *practice* of plea bargaining—what lawyers, judges, and defendants do in actual criminal cases—became normal and has remained so ever since. As an *institution*, on the other hand, plea bargaining has never been fully normal in this sense. Many critics of plea bargaining as an institution do *not* take it for granted or accept it as legitimate.<sup>19</sup> (Full disclosure—I am one of them.<sup>20</sup>) Nonetheless, those who criticize plea bargaining as a pathological institution do not often suggest that a lawyer, judge, or defendant who engages in it has, by virtue of that fact alone, done anything immoral or illegitimate.<sup>21</sup> Plea bargaining as a practice and as an institution are inextricably linked, but they are not one and the same.

### I. HISTORY AND PLEA BARGAINING

This Part surveys the historiography of plea bargaining. As recently as the late 1970s, plea bargaining had no historiography.<sup>22</sup> Four decades later, the situation is better. We understand when plea bargaining gained a foothold in American courts, and we have theories about why it did. But while much has been written

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in legal intellectual history, see Charles Barzun, *Causation, Legal History, and Legal Doctrine*, 64 *BUFF. L. REV.* 81 (2016).

<sup>18</sup> Michael McCann, *How the Supreme Court Matters*, in *THE SUPREME COURT IN AMERICAN POLITICS* 63, 95 n.24 (Howard Gillman & Cornell Clayton eds., 1999). My usage of “normalization” includes both what McCann calls “legitimation” and “normalization.” Though the distinction may matter for some conceptual endeavors, McCann recognizes that “these processes . . . are often interrelated in practice.” *Id.*

<sup>19</sup> See Oren Gazal-Ayal & Avishalom Tor, *The Innocence Effect*, 62 *DUKE L.J.* 339, 341 (2012) (“Despite their ubiquity and key role in facilitating convictions, however, the desirability of plea bargains is hotly debated, not least because plea bargains can lead innocent defendants to plead guilty.”)

<sup>20</sup> See William Ortman, *Probable Cause Revisited*, 68 *STAN. L. REV.* 511, 558-68 (2016) [hereinafter Ortman, *Probable Cause Revisited*]; William Ortman, *Second-Best Criminal Justice*, 96 *WASH. U. L. REV.* 1061, 1063-66 (2019) [hereinafter Ortman, *Second-Best Criminal Justice*].

<sup>21</sup> Certain plea bargaining *tactics*, to be sure, are regarded as unethical. See, e.g., Albert W. Alschuler, *The Defense Attorney’s Role in Plea Bargaining*, 84 *YALE L.J.* 1179, 1278-79 (1975) [hereinafter Alschuler, *The Defense Attorney’s Role in Plea Bargaining*]; Joseph A. Colquitt, *Ad Hoc Plea Bargaining*, 75 *TUL. L. REV.* 695, 697-98 (2001); Andrew Shaver, *Ethical Lapses in Criminal Plea Bargaining: What Can Be Done About Them?*, 36 *J. LEGAL PROF.* 559, 560-62 (2012).

<sup>22</sup> See Lawrence M. Friedman, *Plea Bargaining in Historical Perspective*, 13 *LAW & SOC’Y* 247, 247 (1979); John H. Langbein, *Torture and Plea Bargaining*, 46 *U. CHI. L. REV.* 3, 9 (1978).

about plea bargaining's origins in the nineteenth century, the literature has a gap when it comes to the twentieth.

Most plea-bargaining historians agree that plea bargaining became pervasive in the United States in the second half of the nineteenth century.<sup>23</sup> In their canonical study of criminal justice in Alameda County, California, Professors Lawrence Friedman and Robert Percival found that 40% of criminal convictions between 1880 and 1910 resulted from guilty pleas, often to a crime less serious than the one initially charged.<sup>24</sup> Fisher tracked guilty plea rates in Middlesex County, Massachusetts. “[B]eginning in the 1870s,” he reported, “the rate of guilty pleas turned first mildly and then sharply upward.”<sup>25</sup> Likewise, in their study of plea bargaining in nineteenth-century New York City, Professors Mike McConville and Chester Mirsky discovered that, while some plea bargaining occurred prior to 1845, an “institutionalised guilty plea system” arose during the period from 1850 to 1865.<sup>26</sup>

Notwithstanding the widespread agreement about when plea bargaining emerged, the reasons for its rise are controversial. One theory is that plea bargaining was the result of rising caseloads.<sup>27</sup> The “caseload pressure” explanation comes in naïve and sophisticated versions. The naïve version holds that as the number of criminal cases grows, plea bargaining emerged to lessen the pressure on courts. This explanation has lots of intuitive appeal but not much evidentiary support. In a 1975 article, Professor Milton Heumann searched for a link between the size of Connecticut trial court dockets and their trial rates but found none.<sup>28</sup> Rather, the guilty plea rates were comparable regardless of the size of the trial court docket. It was “evident,” Heumann concluded, that “guilty pleas will be proffered and accepted for reasons other than case pressure.”<sup>29</sup> In a nearly contemporaneous study, also of Connecticut courts, Professor Malcolm Feeley likewise found no support for the thesis that heavy caseloads drove plea bargaining.<sup>30</sup>

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<sup>23</sup> Two studies, however, suggest that plea bargaining began in Boston's police court in the first half of the nineteenth century. See THEODORE FERDINAND, *BOSTON'S LOWER CRIMINAL COURTS, 1814-1850*, at 92 (1992); MARY E. VOGEL, *COERCION TO COMPROMISE: PLEA BARGAINING, THE COURTS, AND THE MAKING OF POLITICAL AUTHORITY* 93-102 (2007).

<sup>24</sup> LAWRENCE M. FRIEDMAN & ROBERT V. PERCIVAL, *THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY, CALIFORNIA, 1870-1910*, at 173, 176 (1981).

<sup>25</sup> FISHER, *supra* note 5, at 112-13.

<sup>26</sup> MIKE MCCONVILLE & CHESTER L. MIRSKY, *JURY TRIALS AND PLEA BARGAINING* 13 (2005).

<sup>27</sup> See Milton Heumann, *A Note on Plea Bargaining and Case Pressure*, 9 *LAW & SOC'Y REV.* 515, 516 (1975).

<sup>28</sup> *Id.* at 524.

<sup>29</sup> *Id.* at 527.

<sup>30</sup> See MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 252-64 (1979). To be sure, caseload pressures are not *irrelevant*.



More recently, Fisher has revived the caseload pressure theory of plea bargaining's rise in a more sophisticated form.<sup>31</sup> Fisher engrafted two important nuances onto the naïve version of the theory. First, Fisher pointed out that, while caseload pressure may give prosecutors and trial judges the incentive to engage in (or condone) plea bargaining, that makes it at most a necessary condition for bargaining, not a sufficient one.<sup>32</sup> Plea bargaining also requires legal tools. Fisher showed that when prosecutors and judges in Massachusetts during the last third of the nineteenth century acquired the relevant legal tools—most critically, indeterminate sentencing and the plea withdrawal rule—plea bargaining exploded.<sup>33</sup> Second, Fisher argued that caseload pressures do not come solely from the criminal side of judicial dockets.<sup>34</sup> Massachusetts judges in the nineteenth century were busy, and that surely contributed to their willingness to condone plea bargaining. But the major source of their busyness was not criminal dockets, which peaked in 1849.<sup>35</sup> It was a boom in civil cases brought on by the Industrial Revolution.<sup>36</sup>

Closely related to the caseload theory is the “trial complexity” theory, associated with Professors John Langbein, Albert Alschuler, and Malcolm Feeley.<sup>37</sup> Trials were common in the days before plea bargaining, but they were not trials that we would recognize. In the eighteenth and nineteenth centuries, Langbein explained, criminal trials were “rapid and efficient,” lacking procedural elements that we take for granted such as “extended voir dire, exclusionary rules and other evidentiary barriers, motions designed to provoke and preserve issues for appeal, [and] maneuvers and speeches of counsel.”<sup>38</sup> “[I]f there was a golden age of trials,” Alschuler remarked, “it was not one in which

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For instance, Alschuler observes that while caseload pressure cannot explain the rapid increase in plea bargaining in federal courts in the 1910s, once it was in place “a flood of cases under the federal prohibition laws seemed to preclude any retreat.” Alschuler, *Plea Bargaining and Its History*, *supra* note 11, at 27.

<sup>31</sup> See FISHER, *supra* note 5, at 13.

<sup>32</sup> *Cf. id.* at 44 (“That is not to say that caseload pressure is sufficient for prosecutors to engage in plea bargaining. . . . Nor is a big caseload a necessary condition of prosecutorial plea bargaining. . . . But . . . an increasing caseload obviously does *increase* pressure on prosecutors to plea bargain.”).

<sup>33</sup> *Id.* at 129-36, 182-94.

<sup>34</sup> *Id.* at 116.

<sup>35</sup> *Id.* at 117 tbl.5.2.

<sup>36</sup> *Id.* at 121-24.

<sup>37</sup> See Alschuler, *Plea Bargaining and Its History*, *supra* note 11, at 40-41; Malcolm M. Feeley, *Legal Complexity and the Transformation of the Criminal Process: The Origins of Plea Bargaining*, 31 *ISR. L. REV.* 183, 202-18 (1997); Malcolm M. Feeley, *Plea Bargaining and the Structure of the Criminal Process*, 7 *JUST. SYS. J.* 338, 348-49 (1982) [hereinafter Feeley, *Plea Bargaining and the Structure of the Criminal Process*]; Langbein, *supra* note 22, at 20.

<sup>38</sup> Langbein, *supra* note 22, at 10-11.

trials were golden.”<sup>39</sup> The procedural trappings of the modern trial emerged in the late nineteenth century, just as plea bargaining was making its ascent. For proponents of the trial complexity theory, this was no coincidence. The “vast transformation” of the criminal jury trial, Langbein reasoned, “render[ed] it absolutely unworkable as an ordinary dispositive procedure.”<sup>40</sup> Plea bargaining, on this account, thus emerged as the substitute for a trial procedure that had crumbled under its own weight.<sup>41</sup>

A third explanation ties the rise of plea bargaining to the contemporaneous professionalization of police and prosecutors. The nineteenth century saw the decline of part-time prosecutors and amateur police forces and the emergence of “full-time crime handlers” trained in modern investigative techniques.<sup>42</sup> Courtroom trials, Friedman and Percival argued, came to be seen as unnecessary when well-trained professionals “had already ‘tried’ the defendant.”<sup>43</sup> Defendants charged by these professional crime fighters were “obviously guilty,” so “[w]hy go through a long, expensive process” in court—or so, Friedman and Percival explained, the thinking must have gone.<sup>44</sup> On this explanation, plea bargaining emerged to avoid redundancy.

Beyond these three leading explanations—caseload pressure, trial complexity, and professionalization—“contextual” theories of plea bargaining’s rise have more recently appeared.<sup>45</sup> The two most significant contextual accounts are Professor Mary Vogel’s study of plea bargaining in the Boston Police Court and McConville and Mirsky’s study of plea bargaining in New York City’s General Sessions. Both looked beyond courtroom actors in an effort to connect plea bargaining’s rise with broader social and political contexts. According to Vogel, plea bargaining emerged in the Boston police court in the early decades of the nineteenth century as a strategy for maintaining social order.<sup>46</sup> Through plea bargaining, Vogel argued, the Boston Police Court

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<sup>39</sup> Alschuler, *Plea Bargaining and Its History*, *supra* note 11, at 40-41.

<sup>40</sup> Langbein, *supra* note 22, at 9; *see also* Alschuler, *Plea Bargaining and Its History*, *supra* note 11, at 40-41 (observing that “complexity of the trial process” had become “absurd”); Feeley, *Plea Bargaining and the Structure of the Criminal Process*, *supra* note 37, at 349.

<sup>41</sup> *See* Alschuler, *Plea Bargaining and Its History*, *supra* note 11, at 41; Langbein, *supra* note 22, at 9-10.

<sup>42</sup> *See* FRIEDMAN & PERCIVAL, *supra* note 24, at 194; *see also* Feeley, *Plea Bargaining and the Structure of the Criminal Process*, *supra* note 37, at 349-51.

<sup>43</sup> FRIEDMAN & PERCIVAL, *supra* note 24, at 194.

<sup>44</sup> *Id.*

<sup>45</sup> McConville and Mirsky coined the “contextual” label. McCONVILLE & MIRSKY, *supra* note 26, at 8.

<sup>46</sup> VOGEL, *supra* note 23, at 7 (“[T]he courts drew on a time-honored tradition of episodic leniency . . . from the British common law and adapted it into the practice of plea bargaining.”).

adapted a popular British tradition of “episodic leniency,” which consisted of “frequent but irregular pardons and grants of clemency.”<sup>47</sup> McConville and Mirsky told a complimentary story about the rise of plea bargaining in New York City. In the middle of the nineteenth century, McConville and Mirsky explained, New York City prosecutors faced a dilemma. On one hand, they needed high conviction rates to tout their crime-fighting prowess. On the other, the Tammany Hall-aligned prosecutors could not afford to “overpunish” the “immigrant underclass,” which constituted a sizeable portion of Tammany’s political base.<sup>48</sup> McConville and Mirsky argued that the prosecutors’ solution was to enter into lenient plea bargains that ensured convictions but did not alienate the base.<sup>49</sup>

The contextual accounts of plea bargaining’s rise add nuance to the historical discussion. Yet, as Fisher argues, they depend on the premise that the public was not only aware of plea bargaining but also that it approved.<sup>50</sup> Fisher reports, based on his exhaustive search of the available materials, that there is scant evidence that the public knew of plea bargaining in the nineteenth century and none at all that it approved of the practice.<sup>51</sup> The contextualists’ impulse to expand the historical focus beyond courtroom actors is commendable.<sup>52</sup> And there is a chapter in plea bargaining’s history that looks beyond the courtroom. But it is not a nineteenth-century chapter. Rather, it must await plea bargaining’s discovery in the 1920s.<sup>53</sup>

Aside from this critique of the existing contextual accounts, it is beyond my remit to adjudicate between the historical accounts of plea bargaining’s

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<sup>47</sup> *Id.*

<sup>48</sup> MCCONVILLE & MIRSKY, *supra* note 26, at 197.

<sup>49</sup> *Id.* at 197, 200-04.

<sup>50</sup> FISHER, *supra* note 5, at 148.

<sup>51</sup> *Id.* at 144-51. Fisher also persuasively addresses the counterargument that “plea bargaining could have won votes even without broad public approval so long as individual defendants left court gratified by their bargains and prepared to vote or to influence others who would.” *Id.* at 149. Drawing on Massachusetts liquor cases, Fisher writes that “[i]t is hard to believe that the liquor license defendants whom [prosecutors] snagged with one of their multicount indictment forms and who submitted to one or more charges to escape the full force of the district attorney’s volley left court eager to stump for him on election day.” *Id.*

<sup>52</sup> Fisher is sympathetic to the notion that “taking a broader focus” often or even usually “improves the telling of history,” though he concludes that the history of plea bargaining’s origins is not “one of those times.” *Id.* at 138. In a fascinating review, Dean Jennifer Mnookin criticizes Fisher’s “near-total rejection of both social and intellectual history” and suggests that “a still richer account of plea bargaining . . . would maintain Fisher’s sharp focus on institutions and the interests of repeat players and yet allow some space for ideas, shared attitudes, and intellectual developments as social forces.” Jennifer L. Mnookin, *Uncertain Bargains: The Rise of Plea Bargaining in America*, 57 STAN. L. REV. 1721, 1732-33 (2005) (reviewing FISHER, *supra* note 5).

<sup>53</sup> *See infra* Part II.

origins.<sup>54</sup> My concern is rather with a characteristic that they share. The major studies surveyed in this Part close at or before the discovery of plea bargaining in the 1920s.<sup>55</sup> On one level, that makes sense. If one's goal is to understand plea bargaining's origins, the nineteenth century is the place to look. But the scholarly focus on plea bargaining's nineteenth-century origins obscures another phase of its history—its reception in the twentieth century. The most sustained investigation of *that* development is in Alschuler's classic article on the history of plea bargaining.<sup>56</sup> Alschuler's discussion of the ideological development of plea bargaining in the twentieth century—part of his comprehensive survey of plea bargaining from the “earliest days of the common law”<sup>57</sup>—is enormously valuable, but it leaves plenty of room for further mining (and interpreting) of the historical record.<sup>58</sup> Near the end of his analysis, Alschuler observed that by the middle of the twentieth century, the legal profession had “apparently decided” that the “historic principle that a guilty plea should be entered . . . without ‘inducement’” had become “sour anyway.”<sup>59</sup> This Article undertakes to explain the souring.<sup>60</sup>

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<sup>54</sup> To be sure, the theories are not mutually exclusive. The “correct” answer could be a combination of two or more of them.

<sup>55</sup> Friedman and Percival collected data on Alameda County until 1910. See FRIEDMAN & PERCIVAL, *supra* note 24, at 3. McConville and Mirsky's study of New York City courts closes in 1865, while Vogel continues until 1920 with her study of the Boston Police Court. See MCCONVILLE & MIRSKY, *supra* note 26, at 11; VOGEL, *supra* note 23, at 30. Fisher traces continuing legal developments implicating plea bargaining into the twentieth century, but his data on Middlesex County are almost entirely confined to the nineteenth century, only occasionally continuing into the first decade of the twentieth century. See FISHER, *supra* note 5, at 183.

<sup>56</sup> Alschuler, *Plea Bargaining and Its History*, *supra* note 11, at 24-26. Alschuler describes the hostility of the crime commissions of the 1920s to plea bargaining, *id.* at 26-33, and traces the then-recent, mid-century acceptance of plea bargaining. *Id.* at 33-40. Fisher also analyzes the contributions of two of the key figures of the 1920s, Raymond Moley and Justin Miller. See FISHER, *supra* note 5, at 6-8.

<sup>57</sup> Alschuler, *Plea Bargaining and Its History*, *supra* note 11, at 7.

<sup>58</sup> Alschuler's and Fisher's discussions of plea bargaining's discovery inspired this research.

<sup>59</sup> Alschuler, *Plea Bargaining and Its History*, *supra* note 11, at 40.

<sup>60</sup> Beyond Alschuler and Fisher, one other study touching on the ideology of plea bargaining in the twentieth century bears noting. See John F. Padgett, *Plea Bargaining and Prohibition in the Federal Courts, 1908-1934*, 24 LAW & SOC'Y REV. 413, 413 (1990). Professor John Padgett advances the intriguing hypothesis that the hostility of elite lawyers towards explicit plea bargaining in the 1920s and 1930s led federal judges to adopt *implicit* bargaining by granting very large sentencing concessions to defendants who pled guilty. *Id.* at 444 (“[I]mplicit plea bargaining emerged as the hidden underside of elite lawyers' struggle to professionalize the courts.”). Padgett does not consider plea bargaining's subsequent ideological trajectory.

## II. THE DISCOVERY OF PLEA BARGAINING

This Part explores the discovery of plea bargaining by the crime commission movement of the 1920s. That plea bargaining was “discovered” in the 1920s does not mean, of course, that nobody knew until then that criminal defendants sometimes plead guilty in exchange for lenient treatment. Even before the 1920s, there were occasional rumblings of discontent about “bargains” in criminal cases among the elites<sup>61</sup> and even the general public.<sup>62</sup> Courts in the decades between the Civil War and the 1920s likewise expressed irritation with the practice.<sup>63</sup>

What was new in the 1920s was the realization that compromises in criminal cases were pervasive—that guilty pleas had replaced guilty verdicts as the primary pathway to criminal convictions in the United States. Lawyers actually

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<sup>61</sup> See, e.g., Bernard Glueck, President Am. Ass’n of Clinical Criminology, N.Y., Address Before the Annual Congress of the American Prison Association: The Concept of Treatment Versus That of Administration in Criminology (1919), in PROC. ANN. CONGRESS AM. PRISON ASS’N, 1919, at 96, 102-03 (noting “the vicious institution of ‘bargain day’”); BURDETTE G. LEWIS, THE OFFENDER AND HIS RELATIONS TO LAW AND SOCIETY 46 (1917); James Wilford Garner, *Immunity of Petty Criminals from Punishment*, 1 J. AM. INST. CRIM. L. & CRIMINOLOGY 638, 638-39 (1910); William N. Gemmill, *What is Wrong with the Administration of Our Criminal Laws?*, 4 J. AM. INST. CRIM. L. & CRIMINOLOGY 698, 703 (1914). Some early writers on public defense noted that a large share of criminal cases were resolved by guilty pleas. See Walton J. Wood, Pub. Def., L.A. Cty., Address Before the California Bar Association, Fifth Annual Convention (Nov. 19-21, 1914), in THE PLACE OF THE PUBLIC DEFENDER IN THE ADMINISTRATION OF JUSTICE 12 (2010) (“It has been our experience that almost half of the accused plead guilty.”); REGINALD HEBER SMITH, JUSTICE AND THE POOR 117-18 (3d ed. 1924) (noting statistics from Los Angeles and New York demonstrating prevalence of guilty pleas); see also William W. Clary, *The Public Defender*, 7 POMONA C. Q. MAG. 49, 55 (1918) (“A great deal of [the work of a public defender] consists in the defense of those who plead guilty.”).

<sup>62</sup> Pre-1920s press accounts often treated bargained pleas, especially in low-level cases, as the work of corrupt defense lawyers. “Shyster” defense lawyers, according to press accounts, extracted whatever fee they could from defendants before pushing them to plead guilty. An 1892 story in the Detroit Free Press tells of a “shyster” who collected the only fee his client had to give—his overcoat.

The shyster looked wise for a moment or two, and then, as if guided by an inspiration, exclaimed: “I have it. We will waive examination from the Police Court to the Recorder’s Court, and when our case is called in the Recorder’s Court we will plead guilty and throw ourselves on the mercy of the court.”

*Some Sketches*, DETROIT FREE PRESS, Apr. 28, 1892, at 4; see also George S. Dougherty, *A Word About Criminals*, OUTLOOK, Oct. 4, 1916, at 269, 273 (arguing that once the “shyster” lawyer “unconscionably extracts the last dollar the prisoner has,” he “persuades the prisoner to plead guilty, urging that he has a personal pull with the Judge and can secure the minimum sentence”).

<sup>63</sup> See Alschuler, *Plea Bargaining and Its History*, *supra* note 11, at 19-24 (collecting many cases between end of Civil War and 1920 in which courts repudiated what we would now identify as plea bargaining).

working in the lower criminal courts may have known that, but because they constituted a “distinct subculture” of the bar, as Alschuler observes, the discovery of ubiquitous plea bargaining “could and did produce a genuine sense of shock” in the world beyond the criminal courts.<sup>64</sup>

The age of plea bargaining’s discovery began in 1922 with the Cleveland Foundation’s publication of *Criminal Justice in Cleveland*, which painstakingly dissected the work of the two state criminal courts operating in the city.<sup>65</sup> The report revealed a surprising degree of reliance on guilty pleas.<sup>66</sup> Out of every one hundred defendants sentenced in the Cuyahoga County Court of Common Pleas in felony cases in 1919, seventy-six had pled guilty.<sup>67</sup> Reports coming in from other jurisdictions quickly confirmed that Cleveland was no outlier.<sup>68</sup> In 1928, Raymond Moley—one of the key figures behind the discovery of plea bargaining—published “The Vanishing Jury” in the *Southern California Law Review* and reported on the guilty plea rates in more than twenty major cities. Only three cities had rates below 60%, with ten between 70% and 79%, six between 80% and 89%, and five at 90% or above.<sup>69</sup> While *Criminal Justice in Cleveland* had been a bit hazy on the precise mechanisms producing guilty pleas, the subsequent reports and Moley’s article identified the culprit: compromises.

This Part tells the story of plea bargaining’s discovery. Section II.A describes the discoverers and their worldview, with particular attention to Moley and Roscoe Pound, the dean of Harvard Law School and director of *Criminal Justice in Cleveland*. These and other reformers of the era were products of the Progressive movement<sup>70</sup> as well as the criminal justice conditions of their day.

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<sup>64</sup> *Id.* at 26 n.139.

<sup>65</sup> See generally FOSDICK ET AL., *supra* note 6.

<sup>66</sup> See Alschuler, *Plea Bargaining and Its History*, *supra* note 11, at 26.

<sup>67</sup> Bettman & Burns, *supra* note 6, at 96. This Article uses “pled” rather “pleaded” as the past tense of plead. This grammatical choice is surprisingly controversial. See Preet Bharara (@PreetBharara), TWITTER (Feb. 15, 2019, 11:48 PM), <https://twitter.com/PreetBharara/status/1096632355618476032> [<https://perma.cc/KKJ4-BRXK>] (taking stance to use “pled” rather than “pleaded” and garnering more than one thousand replies debating which is correct).

<sup>68</sup> A 1925 report on the Georgia courts found guilty plea rates (expressed as the percentage of convictions that resulted from pleas) of 58% in superior courts and 81% in city courts in 1921. Ga. Dep’t of Pub. Welfare, *Crime and the Georgia Courts: A Statistical Analysis*, 16 J. AM. INST. CRIM. L. & CRIMINOLOGY 169, 185 (1925). Likewise the *Missouri Crime Survey of 1926* disclosed a guilty plea rate of about 80%. Arthur V. Lashly, *Preparation and Presentation of the State’s Case*, in MO. ASS’N FOR CRIMINAL JUSTICE, *supra* note 6, at 113, 126-27 [hereinafter Lashly, *Preparation and Presentation*].

<sup>69</sup> Raymond Moley, *The Vanishing Jury*, 2 S. CAL. L. REV. 97, 105 (1928).

<sup>70</sup> On the Progressive ideology of the crime commission movement, see WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, *CRIMINAL PROCEDURE* § 1.6(f) (4th ed. 2019) (ebook) (“One of the most influential factors bearing upon reform during this quarter century was an ‘information explosion’ that was largely the legacy of the

Section II.B takes a closer look at the evidence that they found of plea bargaining, providing a snapshot of how plea bargaining worked at the moment of its discovery. Section II.C describes their (mostly negative) reactions to that phenomenon. Finally, Section II.D considers an objection to plea bargaining that the Progressives mostly overlooked.

#### A. *The Discoverers*

Beginning with *Criminal Justice in Cleveland*, at least fourteen significant surveys of the criminal justice systems of American cities and states were conducted in the 1920s and early 1930s.<sup>71</sup> Some of the surveys were done by public bodies at the behest of a governor or legislature,<sup>72</sup> while others were prepared by universities or by private civic associations.<sup>73</sup> Some were well funded,<sup>74</sup> while others scraped by with almost no money at all.<sup>75</sup> Among the

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Progressives.”); Padgett, *supra* note 60, at 450 (“The coincidence of this institutionalization of implicit plea bargaining with Progressive crime commission and appellate assaults by the legal elite on lower municipal criminal courts was no accident.”).

<sup>71</sup> See, e.g., CAL. CRIME COMM’N, REPORT OF THE CALIFORNIA CRIME COMMISSION (1929); COMMONWEALTH OF PA. CRIME COMM’N, REPORT TO THE GENERAL ASSEMBLY MEETING IN 1929 (1929); GOVERNOR’S ADVISORY COMM. ON CRIME, REPORT OF GOVERNOR’S ADVISORY COMMITTEE ON CRIME (1931) (Hawaii); MINN. CRIME COMM’N, MINNESOTA CRIME COMMISSION REPORT (1926); HUGH N. FULLER, CRIMINAL JUSTICE IN VIRGINIA (1931); ILL. ASS’N FOR CRIMINAL JUSTICE, THE ILLINOIS CRIME SURVEY (1929); MO. ASS’N FOR CRIMINAL JUSTICE, *supra* note 6; WAYNE L. MORSE & RONALD H. BEATTIE, SURVEY OF THE ADMINISTRATION OF CRIMINAL JUSTICE IN OREGON (reprint ed. 1974); PHILA. BAR ASS’N CRIMES SURVEY COMM., REPORT OF THE CRIMES SURVEY COMMITTEE (1926); R.I. CRIMINAL LAW ADVISORY COMM’N, FIRST ANNUAL REPORT OF THE CRIMINAL LAW ADVISORY COMMISSION (1928); SUB-COMMISSION ON STATISTICS, REPORT TO THE COMMISSION OF THE SUB-COMMISSION ON STATISTICS: A STATISTICAL ANALYSIS OF THE CRIMINAL CASES IN THE COURTS OF THE STATE OF NEW YORK (1928) [hereinafter 1928 N.Y. REPORT]; SUB-COMMISSION ON STATISTICS, REPORT TO THE COMMISSION OF THE SUB-COMMISSION ON STATISTICS: A STATISTICAL ANALYSIS OF THE CRIMINAL CASES IN THE COURTS OF THE STATE OF NEW YORK FOR THE YEAR 1925, in CRIME COMM’N OF N.Y. STATE, REPORT OF THE CRIME COMMISSION (1927) [hereinafter 1927 N.Y. REPORT]; Ga. Dep’t of Pub. Welfare, *supra* note 68 (surveying Georgia courts); Florence L.C. Kitchelt & Tierra Farrow, *Minor Survey of the Administration of Criminal Justice in Hartford, New Haven and Bridgeport*, 17 J. AM. INST. CRIM. L. & CRIMINOLOGY 333 (1926).

<sup>72</sup> See, e.g., MINN. CRIME COMM’N, *supra* note 71, at 3-5; Ga. Dep’t of Pub. Welfare, *supra* note 68, at 169.

<sup>73</sup> See, e.g., FULLER, *supra* note 71, at vii; Thomas C. Hennings, *Introduction* to MO. ASS’N FOR CRIMINAL JUSTICE, *supra* note 6, at 7, 7-9; Arthur V. Lashly, *Director’s Introduction* to ILL. ASS’N FOR CRIMINAL JUSTICE, *supra* note 71, at 11, 11-12 [hereinafter Lashly, *Introduction*].

<sup>74</sup> See, e.g., Hennings, *supra* note 76, at 9; Lashly, *Introduction*, *supra* note 73, at 11.

<sup>75</sup> See, e.g., COMMONWEALTH OF PA. CRIME COMM’N, *supra* note 71, at 8; GOVERNOR’S ADVISORY COMM. ON CRIME, *supra* note 71, at 1-2.

private surveys, some relied on academics to do the work,<sup>76</sup> while others employed local judges and lawyers.<sup>77</sup> The reports varied dramatically in length, from the mammoth *Illinois Crime Survey* at more than eleven hundred pages<sup>78</sup> to the seventy-seven-page report of the Crime Commission of Minnesota.<sup>79</sup> These differences notwithstanding, in their scope, tone, and methods, the surveys bore the intellectual stamp of the original Cleveland report and thus of Roscoe Pound, its director and editor, and of Raymond Moley, who hired Pound and directed the Cleveland Foundation. Our story begins in Cleveland.

For all of *Criminal Justice in Cleveland's* influence, it nearly didn't happen. In 1919, the Cleveland Foundation, a private philanthropic society, hired Moley, a junior political scientist at Western Reserve University, as its first full-time director.<sup>80</sup> Before taking the helm, Moley had run the Foundation's survey of Cleveland's recreational services.<sup>81</sup> When that survey was done, Moley was interested in focusing the Foundation's efforts on the foreign-language press in Cleveland and its role in the "socialization of immigrants."<sup>82</sup> But then, as the Cleveland Foundation's biographer observes, "something incredible happened."<sup>83</sup>

In 1920, the Chief Judge of Cleveland's municipal court, William McGannon, was indicted for murder.<sup>84</sup> The criminal justice system in Cleveland was ill equipped to deal with the prosecution of one of its own highest-ranking officials.<sup>85</sup> When, after many delays, prosecutors eventually brought the case to trial, McGannon was acquitted.<sup>86</sup> Shortly thereafter, "new sensations filled the daily press" because, Moley later explained, "[t]here had been perjury" at the murder trial.<sup>87</sup> Indicted again, McGannon was convicted and sent to prison for perjury.<sup>88</sup> The matter, Moley observed, was a "forceful . . . illustration of official

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<sup>76</sup> See, e.g., FULLER, *supra* note 71, at vii; MO. ASS'N FOR CRIMINAL JUSTICE, *supra* note 6, at 8-10; MORSE & BEATTIE, *supra* note 71.

<sup>77</sup> See, e.g., Kitchelt & Farrow, *supra* note 71; PHILA BAR ASS'N CRIMES SURVEY COMM., *supra* note 71, at 1.

<sup>78</sup> ILL. ASS'N FOR CRIMINAL JUSTICE, *supra* note 71.

<sup>79</sup> MINN. CRIME COMM'N, *supra* note 71.

<sup>80</sup> DIANA TITTLE, *REBUILDING CLEVELAND: THE CLEVELAND FOUNDATION AND ITS EVOLVING URBAN STRATEGY* 53-55 (1992).

<sup>81</sup> *Id.* at 53-54.

<sup>82</sup> *Id.* at 56.

<sup>83</sup> *Id.* at 57.

<sup>84</sup> RAYMOND MOLEY, *POLITICS AND CRIMINAL PROSECUTION* 16-17, 21 (1929) [hereinafter MOLEY, *POLITICS AND CRIMINAL PROSECUTION*].

<sup>85</sup> *Id.* at 19.

<sup>86</sup> *Id.* at 22.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*



incompetence,”<sup>89</sup> which had the effect of galvanizing public interest in a survey of the conditions of the criminal justice machinery of Cleveland. As Moley noted, the case “made possible the Cleveland Crime Survey.”<sup>90</sup>

While the McGannon affair was perhaps the proximate cause of the Cleveland survey, there were deeper social and political causes as well. Pound’s co-director and Harvard Law School colleague, Felix Frankfurter, recounted these in the report’s preface. “For some time previous to [the] survey,” Frankfurter explained, “Cleveland had been restive under a growing feeling of insecurity of life and property.”<sup>91</sup> Crime was rising in Cleveland—as it was across American cities—and the extant criminal justice apparatus, built for the nineteenth century, was incapable of dealing with a modern crime wave.<sup>92</sup> The Foundation’s survey was meant to inform Clevelanders of the true conditions of the criminal justice institutions operating in their city.

As Moley knew before he hired him to run the Cleveland survey,<sup>93</sup> Pound was no newcomer to questions of criminal justice administration.<sup>94</sup> His most significant early work on criminal justice, “Inherent and Acquired Difficulties in the Administration of Punitive Justice,”<sup>95</sup> was a dense diagnosis of the many (to Pound’s thinking) reasons underlying the “general and well-grounded dissatisfaction with the administration of punitive justice in America.”<sup>96</sup> Pound’s

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 18 n.\*.

<sup>91</sup> Felix Frankfurter, *Preface to FOSDICK ET AL.*, *supra* note 6, at v, v.

<sup>92</sup> See generally James D. Calder, *Between Brain and State: Herbert C. Hoover, George W. Wickersham, and the Commission That Grounded Social Scientific Investigations of American Crime and Justice, 1929–1931 and Beyond*, 96 MARQ. L. REV. 1035, 1038 (2013).

<sup>93</sup> On Moley’s hiring of Pound and Frankfurter, see RAYMOND MOLEY, REALITIES AND ILLUSIONS, 1886-1931: THE AUTOBIOGRAPHY OF RAYMOND MOLEY 136-38 (Frank Freidel ed., 1980) [hereinafter MOLEY, REALITIES AND ILLUSIONS]; TITTLE, *supra* note 80, at 57-58. Pound was not Moley’s first choice for the directorship. Moley wanted to hire John Wigmore, the dean of the Northwestern University Law School. MOLEY, REALITIES AND ILLUSIONS, *supra*, at 136. Wigmore took himself out of the running because, he told Moley, “[h]e was needed . . . to raise money for his Law School.” *Id.*

<sup>94</sup> Pound’s earliest significant foray into criminal jurisprudence was published in 1905. See Roscoe Pound, *Do We Need a Philosophy of Law?*, 5 COLUM. L. REV. 339 (1905); see also THOMAS ANDREW GREEN, FREEDOM AND CRIMINAL RESPONSIBILITY IN AMERICAN LEGAL THOUGHT 68 (2014).

<sup>95</sup> Roscoe Pound, *Inherent and Acquired Difficulties in the Administration of Punitive Justice*, 4 PROC. AM. POL. SCI. ASS’N 222 (1908) [hereinafter Pound, *Inherent and Acquired Difficulties*]; see also GREEN, *supra* note 94, at 68 (describing article as Pound’s “most comprehensive prewar study of criminal administration”).

<sup>96</sup> Pound, *Inherent and Acquired Difficulties*, *supra* note 95, at 222. Pound’s article covers a wide range of topics, from criminal law’s close connection to politics, to the inadequacy of imprisonment as a deterrent, to the incoherence of sporadic criminal legislation, with other stops along the way. Many elements would look familiar to contemporary criminal justice

dominant theme was the existence of a gap between “scientific” thinking about criminal law and the landscape of lay and juridical ideas on the same topic. Two social scientific fields figured prominently: sociology and criminology. The science of criminology, Pound explained, “has shown the necessity of special institutions with expert management for many classes of delinquents.”<sup>97</sup> For its part, sociology contends that the “true purpose of punishment is protection of society,” which “ought to be borne in mind continually . . . [by] study of the actual criminal.”<sup>98</sup>

The progress of these sciences, Pound believed, was stymied by the juridical traditions of the common law and public sentiment. Against the criminologists’ desire for expert, individualized treatment of offenders, a legal preoccupation with “equality before the law” resulted in “consign[ing] all offenders to a common prison.”<sup>99</sup> And in contrast to the utilitarian aims of sociology, both law and popular opinion justified punishment as revenge. Pound laid a portion of the blame for criminal law’s disfavor at the feet of the common law itself, with its inefficient “sporting-theory of justice.”<sup>100</sup> “[T]he common-law polity,” he explained, “through jealousy of arbitrary executive action and fear for individual liberty, restricts administration within the narrowest limits possible and imposes on the courts work that is really administrative, which they cannot do effectively under industrial conditions of today.”<sup>101</sup>

Pound’s criticism of criminal law administration was part of the broader Progressive project of “sociological jurisprudence,” of which Pound himself was the central figure.<sup>102</sup> Sociological jurisprudence was a reaction against the “mechanical jurisprudence” (Pound’s phrase) that dominated the late nineteenth century.<sup>103</sup> On the mechanical approach, legal conclusions were thought to flow logically from high-level definitions that judges regarded as “axiomatic.”<sup>104</sup> Progressives insisted that legal decision-making—judging and legislating

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critics. For example, Pound describes the practice later called “testilying.” *Compare id.* at 228 (“Moreover, in criminal law the inherent unreliability of evidence is aggravated by police *esprit de corps*.”), with Christopher Slobogin, *Testilying: Police Perjury and What To Do About It*, 67 U. COLO. L. REV. 1037, 1041-42 (1996).

<sup>97</sup> Pound, *Inherent and Acquired Difficulties*, *supra* note 95, at 222.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 234.

<sup>101</sup> *Id.* at 233.

<sup>102</sup> See Roscoe Pound, *The Need of a Sociological Jurisprudence*, 19 GREEN BAG 607, 615 (1907) [hereinafter Pound, *The Need of a Sociological Jurisprudence*]; see also GREEN, *supra* note 94, at 63.

<sup>103</sup> See Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 608-09 (1908); G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999, 1000-04 (1972).

<sup>104</sup> See White, *supra* note 103, at 1001.

alike—must be based on empirical investigation, not on dogmatic axioms, and that it must embrace the lessons of burgeoning social science domains.<sup>105</sup> As Professor Frederick Schauer has explained, Pound “wanted both legal scholarship and judicial practice to incorporate the full toolbox of social science and policy analysis.”<sup>106</sup> In this way, Pound believed that law could serve as a site for the technocratic social engineering that was central to the Progressive political vision.<sup>107</sup>

“It ought to be someone’s duty,” Pound wrote in 1907, “to gather and preserve statistics of the administration of justice and to apply thereto or deduce therefrom the proper principles of judicial administration.”<sup>108</sup> In Moley’s invitation to lead the Cleveland survey, Pound found the opportunity to put these empirical ambitions into motion.<sup>109</sup> Given the demands of Pound’s day job running Harvard Law School, however, he and Moley agreed that he would be the “nominal” director of the survey, working on plans, reviewing the draft reports,

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<sup>105</sup> See Fred P. Bosselman & A. Dan Tarlock, *The Influence of Ecological Science on American Law: An Introduction*, 69 CHI.-KENT L. REV. 847, 853 (1994); Anne C. Dailey, *Developing Citizens*, 91 IOWA L. REV. 431, 445 (2006). To be sure, Pound’s relationship with empirical legal scholarship was complicated. See Martin P. Golding, *Jurisprudence and Legal Philosophy in Twentieth-Century America—Major Themes and Developments*, 36 J. LEGAL EDUC. 441, 449 (1986); Thomas A. Green, *Freedom and Criminal Responsibility in the Age of Pound: An Essay on Criminal Justice*, 93 MICH. L. REV. 1915, 2012 (1995).

<sup>106</sup> Frederick Schauer, *Law’s Boundaries*, 130 HARV. L. REV. 2434, 2445 (2017).

<sup>107</sup> See ROSCOE POUND, *CRIMINAL JUSTICE IN AMERICA* 3 (1930) (“But the immediate task of social control, of which law is only one item, is a task of adjusting or harmonizing conflicting or overlapping human desires and human claims founded thereon.”); Roscoe Pound, *Criminal Justice and the American City*, in FOSDICK ET AL., *supra* note 6, at 559, 563 (“Thus we may think of the legal order as a piece of social engineering; as a human attempt to conserve values and eliminate friction and preclude waste in the process of satisfying human wants.”); see also White, *supra* note 103, at 1003-04. This does not necessarily mean that Pound *admired* adjudication by administrative agencies. He would clarify later in his career that he did not. See Roscoe Pound, Dean Emeritus, Harvard Law School, For the “Minority Report,” Address Before the American Bar Association (Sept. 29, 1941), in 27 A.B.A. J. 664 (1941); see also Kenneth Culp Davis, *Dean Pound and Administrative Law*, 42 COLUM. L. REV. 89 (1942).

<sup>108</sup> Pound, *The Need of a Sociological Jurisprudence*, *supra* note 102, at 608.

<sup>109</sup> DAVID WIGDOR, *ROSCOE POUND* 242-45 (1974). As Moley wrote in his autobiography a half-century later, “Pound was most interested in the idea of the survey, for he saw it as a way to confirm his ideas about the problem of law administration in large urban communities.” MOLEY, *REALITIES AND ILLUSIONS*, *supra* note 93, at 137. The Cleveland Foundation was not the first organization that sought to implement the empirical program of sociological jurisprudence in criminal justice. The American Institute of Criminal Law and Criminology was organized in 1909 along similar lines, and Pound played a role. See GREEN, *supra* note 94, at 55-60.

and writing one of them.<sup>110</sup> Frankfurter would handle the day-to-day management.<sup>111</sup>

So what did Pound, Frankfurter, Moley, and their team of researchers find in Cleveland? Below we will consider in some detail the evidence they discovered about guilty pleas in Cleveland's criminal courts.<sup>112</sup> More generally, they found criminal justice institutions in disarray. In itself, that may not have been a great surprise. Frankfurter observed in his preface that "to a considerable extent, the survey proved what was already suspected by many and known to a few."<sup>113</sup> "The point," Frankfurter explained, "is that the survey *proved* it."<sup>114</sup>

The problems, the survey revealed, began with the police. The Cleveland Police Department was rigid and unimaginative, reactive and unequipped to prevent crime.<sup>115</sup> Things got no better when the survey moved from the police to the courts. The Municipal Court of Cleveland, which handled misdemeanor cases and preliminary examinations for felonies, was revealed to be chaotic and incomprehensible. One of the authors of the chapter on prosecution reflected on a day he spent observing the Municipal Court in person:

From the beginning to end the whole proceeding seemed to me one calculated to impress the spectator with at least the suspicion that the main influence at work was not the evidence or judicial procedure as we know it, but either strange influences not audible in the court-room or things that were whispered into the ear of the judge.<sup>116</sup>

The Court of Common Pleas (the felony court) was at least more orderly.<sup>117</sup> But even there, the prosecutors from the office of the Cuyahoga County Prosecuting Attorney typically knew nothing of their cases until trial was about to start.<sup>118</sup> A split of authority between the County Attorney and the Cleveland City Prosecutor—whose lawyers were responsible for felony cases at the preliminary examination stage in Municipal Court—made it impossible to allot accountability when a case was botched.<sup>119</sup>

The report was particularly concerned by—even obsessed with—the "mortality" of criminal cases. The term, which originated here and was carried

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<sup>110</sup> MOLEY, REALITIES AND ILLUSIONS, *supra* note 93, at 137.

<sup>111</sup> *Id.* Frankfurter and Moley had a testy relationship. In his autobiography, Moley refers to Frankfurter as a "snob" with "cosmic pretensions." *Id.* at 139-40.

<sup>112</sup> See *infra* Section II.B.

<sup>113</sup> Frankfurter, *supra* note 91, at v.

<sup>114</sup> *Id.*

<sup>115</sup> Raymond B. Fosdick, *Police Administration*, in FOSDICK ET AL., *supra* note 6, at 3, 3-82.

<sup>116</sup> Bettman & Burns, *supra* note 6, at 97-98.

<sup>117</sup> Reginald Heber Smith & Herbert B. Ehrmann, *The Criminal Courts*, in FOSDICK ET AL., *supra* note 6, at 229, 298.

<sup>118</sup> Bettman & Burns, *supra* note 6, at 161-62.

<sup>119</sup> Smith & Ehrmann, *supra* note 117, at 231.

forward to the other crime surveys of the era,<sup>120</sup> refers to the felony cases that did not ultimately result in a conviction and sentence.<sup>121</sup> The Cleveland report explained that for every one hundred felony cases commenced in the Municipal Court in 1919, only twenty-nine resulted in executed sentences.<sup>122</sup> Of the remaining cases, twelve were discharged by the Municipal Court after preliminary examination, four were otherwise dismissed by the Municipal Court (sometimes with a misdemeanor plea), ten were dismissed by the City Attorney, sixteen were "no billed" by the grand jury, nine were dismissed by the County Attorney, five were acquittals at trial, eight were convictions but the defendants received suspended sentences, and seven were disposed of by some other means.<sup>123</sup> The report's authors associated case mortality with inefficiency: "[A] high percentage of cases which fail at various stages," the authors of the chapter on prosecution wrote, "is an indication of something wrong in earlier stages."<sup>124</sup> The chapter on criminal courts put the point more forcefully: "With all these avenues of escape open, it is not surprising that Cleveland has had extreme difficulty in punishing its criminals or in restraining crime by swift and certain justice."<sup>125</sup>

In the survey's conclusion, Pound assessed what he saw as the central problem—the city's criminal justice institutions were designed for a mid-nineteenth-century world with a few hundred criminal statutes and a few dozen indictments a year.<sup>126</sup> While it may have served Cleveland well under those conditions, he argued, it was inadequate for an industrialized metropolis with a sprawling criminal code and forty-five times the number of indictments.<sup>127</sup> Ever the Progressive optimist, Pound prescribed modernization programs aimed at every level of the criminal justice system in Cleveland, from the police to the penal institutions.<sup>128</sup>

Unsurprisingly, considering the prominence of its editors, *Criminal Justice in Cleveland* made a splash.<sup>129</sup> "The best advice to those interested in the subject,

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<sup>120</sup> See Alfred Bettman, *Criminal Justice Surveys Analysis: Being an Analysis of the Surveys of the Administration of Criminal Justice Relating to the Subjects of Prosecution and Courts for National Commission on Law Observance and Enforcement*, in NAT'L COMM'N ON LAW OBSERVANCE & ENF'T, REPORT ON PROSECUTION 39, 53 (1931) ("The name 'mortality table' was first devised and applied in the report on prosecution in the Cleveland survey.").

<sup>121</sup> See, e.g., Bettman & Burns, *supra* note 6, at 89-93; Lashly, *Preparation and Presentation*, *supra* note 68, at 121-28; Smith & Ehrmann, *supra* note 117, at 234-48.

<sup>122</sup> Bettman & Burns, *supra* note 6, at 94.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 89.

<sup>125</sup> Smith & Ehrmann, *supra* note 117, at 238.

<sup>126</sup> Pound, *supra* note 107, at 620-21.

<sup>127</sup> *Id.* at 620.

<sup>128</sup> *Id.* at 614-48.

<sup>129</sup> MOLEY, REALITIES AND ILLUSIONS, *supra* note 93, at 141-42.

and everyone ought to be,” Alexander Kidd noted in the *California Law Review*, “is to get the book and read it.”<sup>130</sup> Writing in the *Harvard Law Review*, Harlan Stone, then dean of Columbia Law School, was even more effusive in his praise of the “epoch making” survey.<sup>131</sup> “For the first time,” Stone wrote, “there is presented . . . a thorough, painstaking, objective study and analysis, by experts, of the elements which enter into the problem of administration of criminal law in an American city.”<sup>132</sup>

The methods and goals of the Cleveland survey quickly spread to crime surveys in other jurisdictions. As Moley wrote with evident pride in his autobiography, “[w]herever, after [Cleveland], bar associations or other civic bodies sought to improve law enforcement, the studies they made were patterned after the Cleveland survey.”<sup>133</sup> In part, this was because Moley personally participated in several of the most significant post-Cleveland surveys. The next large-scale survey after Cleveland was in Missouri, and Moley was its research director.<sup>134</sup> He played the same role for the *Illinois Crime Survey*, published in 1929, and for the New York Crime Commission, which published important studies in 1927 and 1928.<sup>135</sup> Moley later served as Consultant for *Criminal Justice in Virginia*.<sup>136</sup> Even in those surveys where Moley was not directly involved, the intellectual influence of *Criminal Justice in Cleveland* is obvious. The crime surveys differ in numerous respects,<sup>137</sup> but many had a detailed statistical evaluation of the disposition of criminal cases as their centerpiece.<sup>138</sup> Like *Criminal Justice in Cleveland*, moreover, the surveys sought to highlight the systemic inadequacies—above all, the inefficiency—of local criminal justice institutions.<sup>139</sup> And, of particular importance here, they focused attention on the surprising prevalence of guilty pleas over trials. I turn to those findings now.

### B. *The Discovery*

Almost everywhere they looked, the crime commissions of the 1920s and early 1930s found that trials accounted for a small share of criminal convictions.

<sup>130</sup> A.M. Kidd, *Book Reviews: Criminal Justice in Cleveland*, 11 CALIF. L. REV. 59, 59 (1922) (reviewing FOSDICK ET AL., *supra* note 6).

<sup>131</sup> Harlan F. Stone, *Book Reviews: Criminal Justice in Cleveland*, 35 HARV. L. REV. 967, 968 (1922) (reviewing FOSDICK ET AL., *supra* note 6).

<sup>132</sup> *Id.* at 967.

<sup>133</sup> MOLEY, REALITIES AND ILLUSIONS, *supra* note 93, at 142.

<sup>134</sup> *Id.* at 158-59.

<sup>135</sup> *Id.* at 159.

<sup>136</sup> FULLER, *supra* note 71, at vii.

<sup>137</sup> See *supra* notes 71-79 and accompanying text.

<sup>138</sup> See, e.g., Ga. Dep’t of Pub. Welfare, *supra* note 68, at 181-93. See generally C.E. Gehlke, *Recorded Felonies: An Analysis and General Survey*, in ILL. ASS’N FOR CRIMINAL JUSTICE, *supra* note 71, at 31, 31-108 [hereinafter Gehlke, *Recorded Felonies*].

<sup>139</sup> Bettman, *supra* note 120, at 52-73.

In 1925, *Crime and the Georgia Courts* noted that the number of guilty pleas in Georgia's city courts had more than doubled in five years, while the number of trial convictions had decreased.<sup>140</sup> The Missouri Association for Criminal Justice observed in its report of the following year that the "large number of . . . pleas of guilty" was a "striking feature" of its investigation.<sup>141</sup> The year after that, the New York Crime Commission declared that "[t]here is no more significant fact present in the present day administration of criminal justice than the free use of the plea of guilty."<sup>142</sup> As the Georgia data insinuated, moreover, the rate of guilty pleas seemed to be increasing. The survey of Virginia's criminal courts revealed that the "percentage of cases disposed of by trial . . . decreased from 46 in 1917, to 35 in 1922, and to 29 in 1927."<sup>143</sup> Some evidence suggests that the trend was much older. Data collected in New York suggested that the share of convictions attributable to guilty pleas had been increasing, more or less unabated, since the middle of the nineteenth century.<sup>144</sup>

In 1928, Moley collected the then-available survey data and supplemented it with additional figures that he and his research associates excavated from the files of court clerks and prosecutors.<sup>145</sup> He assembled the information into a table reporting the guilty plea rates in more than twenty cities. Moley's table, reproduced below, powerfully evidenced the prevalence of guilty pleas in cities from coast to coast.

**Table 1.** Verdicts and Pleas of Guilty in Urban Jurisdictions.<sup>146</sup>

Cities	Year	Pleas of Guilty		Verdicts of Guilty	
		No.	%	No.	%
New York City	1925	3508	88	496	12
Chicago	1926	1142	85	200	15
Detroit	1926	1584	78	437	22
Cleveland	1927	888	86	145	14
St. Louis	1923-24	585	84	111	16

<sup>140</sup> Ga. Dep't of Pub. Welfare, *supra* note 68, at 182.

<sup>141</sup> Lashly, *Preparation and Presentation*, *supra* note 68, at 148.

<sup>142</sup> 1927 N.Y. REPORT, *supra* note 71, at 129.

<sup>143</sup> FULLER, *supra* note 71, at 78.

<sup>144</sup> Moley, *supra* note 69, at 108.

<sup>145</sup> *Id.* at 104. Moley's piece was the second law review article on the topic of plea bargaining. The first was Justin Miller, *The Compromise of Criminal Cases*, 1 S. CAL. L. REV. 1 (1927). Miller's article was based largely on correspondence he had exchanged with prosecutors in California. *See id.* at 1 n.1.

<sup>146</sup> The table in the text is reproduced from Moley, *supra* note 69, at 105 (footnote omitted). Some of the surveys observed that adjudication-by-guilty-plea was particularly pronounced in urban jurisdictions. *See infra* note 155. But it was by no means limited to the cities. Moley produced a second table showing high guilty plea rates in rural districts. *See Moley, supra* note 69, at 106.

**Table 1.** Verdicts and Pleas of Guilty in Urban Jurisdictions (continued).

Cities	Year	Pleas of Guilty		Verdicts of Guilty	
		No.	%	No.	%
Pittsburgh	1927	239	74	82	26
Los Angeles	1924-26	2366	81	538	19
Buffalo	1925	226	80	56	20
San Francisco	1924-25	346	33	710	67
Cincinnati	1925	165	59	112	41
Minneapolis	1925	608	90	71	10
Kansas City	1923-24	291	73	107	27
Rochester	1925	115	77	34	23
Denver	1926	247	76	71	24
St. Paul	1925	361	95	19	5
Oakland	1924	411	75	135	25
Atlanta	1921	299	47	341	53
Omaha	1926	245	91	25	9
Syracuse	1925	120	95	6	5
Dallas	1927	95	70	41	30
Scranton	1927	334	78	96	22
Des Moines	1926	116	79	31	21
Albany	1925	90	77	28	23
Yonkers	1925	30	91	3	9

How did the crime commissions account for the pervasiveness of guilty pleas? In the next subpart, I will consider their explanations of—and objections to—the phenomena of plea bargaining. But first, the crime commissions had to confront a more basic question. Why were so many defendants persuaded to plead guilty?

The commissions rejected the simplest explanation—that defendants plead guilty out of remorse or in search of repentance. Guilty plea rates were not increasing, the New York Crime Commission insisted, “because those accused of crime are becoming to a greater degree repentant of their misdeeds and anxious to ‘throw themselves upon the mercy of the court.’”<sup>147</sup> Moley acknowledged that this was a “point that the layman sometimes misses.”<sup>148</sup> But then what was driving defendants’ decisions? *Criminal Justice in Cleveland* left

<sup>147</sup> 1927 N.Y. REPORT, *supra* note 71, at 129. The *Illinois Crime Survey* similarly observed that the “tendency to plead guilty is no abject gesture of confession and renunciation; it is a type of defense strategy.” John J. Healy, *The Prosecutor (in Chicago) in Felony Cases*, in ILL. ASS’N FOR CRIMINAL JUSTICE, *supra* note 71, at 281, 310. So did the Virginia surveyors. See FULLER, *supra* note 71, at 152. The Georgia survey (a non-Moley survey) struck a different note. See Ga. Dep’t of Pub. Welfare, *supra* note 68, at 215 (“It is generally felt that a defendant who pleads guilty to a charge ought to be given somewhat more lenient treatment than if he pleads not guilty and is convicted.”).

<sup>148</sup> MOLEY, POLITICS AND CRIMINAL PROSECUTION, *supra* note 84, at 157.



the question to the reader's imagination. The next major report, the *Missouri Crime Survey*, was ready to answer it—guilty pleas represented *compromises* between prosecutors and defendants.<sup>149</sup> The crime commissions discovered evidence of compromise along two axes.

First, the commissions found that, in exchange for foregoing a trial, prosecutors allowed defendants to plead guilty to lesser offenses—known as charge bargaining in modern parlance.<sup>150</sup> It was a “common practice,” the survey of criminal justice in Multnomah County, Oregon (Portland) found, “to reduce charges by striking bargains with criminals whereby the latter agree to plead guilty to lesser offenses.”<sup>151</sup> The phenomenon was initially detected in Cleveland, where 26% of felony defendants who changed their original plea to guilty did so to a lesser offense.<sup>152</sup> Although Ohio law did not contemplate such pleas, *Criminal Justice in Cleveland* explained that in actual practice judges accepted them when prosecutors asked.<sup>153</sup> In some jurisdictions, the rates of pleas to lesser offenses were much higher than in Cleveland. In Cook County, Illinois, there were nearly four pleas to a lesser offense for every plea to the original charge.<sup>154</sup> In New York City, approximately 78% of the guilty pleas were to a crime other than what the prosecutor had initially charged.<sup>155</sup>

The crime commissions also discovered evidence that guilty pleas were secured, as Moley explained, by “the express or implied promise of leniency in sentencing”—a practice now known as sentence bargaining.<sup>156</sup> The proof of such promises lay in the differential punishments imposed on defendants depending on their mode of conviction. The *Missouri Crime Survey* reported that in Missouri's cities, “a plea of guilty upon arraignment reduces the chance

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<sup>149</sup> See Herbert S. Hadley & Jesse W. Barrett, *Necessary Changes in Criminal Procedure*, in MO. ASS'N FOR CRIMINAL JUSTICE, *supra* note 6, at 346, 369 (explaining that prosecutors are “disposed to compromise with defendants by accepting pleas of guilty rather than to risk . . . the danger of reversal” on appeal); see also Bettman, *supra* note 120, at 183; CAL. CRIME COMM'N, *supra* note 71, at 26-27.

<sup>150</sup> See Moley, *supra* note 69, at 109.

<sup>151</sup> MORSE & BEATTIE, *supra* note 71, at 37.

<sup>152</sup> Smith & Ehrmann, *supra* note 117, at 237.

<sup>153</sup> *Id.* at 181.

<sup>154</sup> Gehlke, *Recorded Felonies*, *supra* note 138, at 49. This includes both cases in which defendants pled to lesser felonies and cases in which defendants pled to misdemeanor crimes.

<sup>155</sup> 1927 N.Y. REPORT, *supra* note 71, at 130. As these high rates in Chicago and New York City suggest, pleas to lesser offenses were especially prevalent in urban jurisdictions. In Illinois and New York, lesser offense pleas were less common outside of Chicago and New York City. See *id.*; William D. Knight, *The Prosecutor (Outside of Chicago) in Felony Cases*, in ILL. ASS'N FOR CRIMINAL JUSTICE, *supra* note 71, at 245, 260; cf. Gehlke, *A Statistical Interpretation*, *supra* note 6, at 316-17 (noting similar trend in urban areas of Missouri).

<sup>156</sup> See Moley, *supra* note 69, at 109.

of a penitentiary sentence . . . by about one-half,” or from 80.28% to 41.99%.<sup>157</sup> In Georgia’s courts, defendants who pled guilty in 1921 had only a 13.5% chance of receiving a “straight” (i.e., unmitigated) sentence versus a 39% chance for defendants convicted at trial.<sup>158</sup> The differential—a trial penalty in the modern lingo—had almost doubled in the four years since 1916.<sup>159</sup>

The commissions also identified some specific mechanisms used to secure leniency for defendants who agreed to plead guilty. One mechanism was the suspended sentence.<sup>160</sup> In Virginia, for instance, a defendant was “six times as likely to succeed in getting his sentence suspended if he would plead guilty than if he stood trial.”<sup>161</sup> The *Illinois Crime Survey* discovered a similar, albeit more complex, relationship between lesser offense pleas and probation. If a defendant in Chicago was “willing to plead guilty to the offense charged he is granted probation in nearly forty per cent of the cases,” the Illinois survey reported, versus 17% of cases where the defendant was convicted at trial or pled guilty to a lesser offense.<sup>162</sup> For the *Illinois Crime Survey*, the “simple correlation of the various kinds of pleas and the proportion of cases which are placed on probation after pleading guilty” represented “[a]lmost conclusive evidence of the tendency [of] ‘bargaining’ for pleas of guilty.”<sup>163</sup>

### C. *The Reaction*

The crime commissions discovered that compromises were rampant in criminal cases, and they revealed some of the mechanisms driving the bargains. This Section explores their reactions. Section II.C.1 describes their two principal objections: that plea bargaining involves corruption by prosecutors and escape by criminals. Alongside the objections, the reformers introduced broader ideas about criminal justice that were surprisingly compatible with plea bargaining. Section II.C.2 investigates those ideas.

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<sup>157</sup> Lashly, *Preparation and Presentation*, *supra* note 68, at 149. Curiously, that trend did not apply outside of urban jurisdictions.

<sup>158</sup> Ga. Dep’t of Pub. Welfare, *supra* note 68, at 191.

<sup>159</sup> *Id.*; see also FULLER, *supra* note 71, at 152 (reporting that in 1927, sentences for defendants who pled guilty “were 29 per cent shorter than those standing trial”).

<sup>160</sup> See 1927 N.Y. REPORT, *supra* note 71, at 135 (“It is clear then that the plea of guilty is much more likely [than the plea of not guilty] to result in a suspended sentence.”).

<sup>161</sup> FULLER, *supra* note 71, at 152. The Oregon survey found an interesting relationship between suspended sentences and lesser offense pleas: “[S]entence was suspended in nearly half of the cases in which the defendants plead guilty to the crime charged, and in only 15% of those cases in which there was a plea of guilty to a lesser offense.” MORSE & BEATTIE, *supra* note 71, at 141. The authors surmised that this may be because cases in which the charges “have been reduced do not merit further leniency.” *Id.*

<sup>162</sup> Healy, *supra* note 147, at 314.

<sup>163</sup> *Id.*

## 1. Objections

We have already seen that the crime commissions rejected the simplistic lay view that guilty pleas were the product of defendants' remorse or repentance.<sup>164</sup> Beyond correcting that misunderstanding, the discoverers of plea bargaining had two major objections.

First, many reformers argued that compromise pleas allowed criminals to "escape" the criminal justice system without the punishment that was prescribed by law.<sup>165</sup> This, they feared, would undercut the law itself.<sup>166</sup> Thus, Pound complained in a 1923 lecture that 90% of criminal convictions were "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>167</sup>

The escape problem loomed especially large in the Progressive reformers' minds when it came to "lesser offense" pleas, where a defendant pled guilty to a crime less serious than what he had actually committed.<sup>168</sup> The *Illinois Crime Survey* posited that in Chicago, where charge bargaining was pervasive, either the state was "'bluffing' in the charges that are initially brought" or it was "permitting the strength of the defense and the complementary feebleness of prosecution to whittle down the force of law administration to a mere fragment of its basic seriousness."<sup>169</sup> Frank Loesch, the president of the Chicago Crime Commission, sounded the same alarm in a letter demanding that three judges

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<sup>164</sup> See *supra* notes 147-48 and accompanying text.

<sup>165</sup> The apprehension that criminals were "escaping" from justice is a central theme of the surveys. See, e.g., Lashly, *Preparation and Presentation*, *supra* note 68, at 149-50 (noting that by securing compromises with prosecutors, "many defendants escape with no punishment at all"); Smith & Ehrmann, *supra* note 117, at 237-38 (describing various methods of case disposition without guilty verdicts as "avenues of escape").

<sup>166</sup> See, e.g., MINN. CRIME COMM'N, *supra* note 71, at 38 ("[The defendant] is also led to believe that immunity can be procured for him in some way by his criminal lawyer. These practices cause distrust of, and disrespect for, the law and its administration."); MORSE & BEATTIE, *supra* note 71, at 40 n.12 ("Such a practice breeds disrespect for law on the part of the guilty who by compromising justice are thereby to an extent successful in 'beating the rap.'").

<sup>167</sup> POUND, *supra* note 107, at 184; see also Green, *supra* note 105, at 2002 ("[Pound] combined a well-informed critique of an outmoded and disorganized prosecutorial bureaucracy with a scathing attack on the politics that produced bargained pleas.").

<sup>168</sup> In Minnesota, for example, the acceptance of lesser offense pleas made it appear that first degree burglary was extinct. "It is significant that there have been very few convictions for [first degree] burglary . . . in recent years," the Minnesota Crime Commission reported. MINN. CRIME COMM'N, *supra* note 71, at 37. "[T]he crime was really committed," the report explained, but "the criminal was convicted of a lesser degree, or of a different crime." *Id.*

<sup>169</sup> Healy, *supra* note 147, at 310-11 (describing "most appalling difference[s] between the charges which are originally made against defendants and the crimes of which they are finally found guilty").

who had accepted lesser-offense pleas be removed from office.<sup>170</sup> The judges, Loesch later charged, had permitted “the accused [to] escape[] with less punishment (or none at all) than was prescribed by the statutes.”<sup>171</sup>

The New York Crime Commission went even further, suggesting that the practice of accepting pleas to lesser offenses had nullified entire sections of the state’s criminal code. “The alarming tendency toward lesser pleas,” it wrote, “means simply that the penalties fixed by legislative act for certain criminal acts have no binding force.”<sup>172</sup> The Commission’s alarm was at least in part a product of the failure of New York’s “Baumes Law.” The anti-recidivism statute enacted in 1926 provided for a mandatory life sentence upon a fourth felony conviction.<sup>173</sup> In his 1929 book *Politics and Criminal Prosecution*, Moley tallied up the dispositions in Baumes Law prosecutions in one year. He found that although 60% of the cases resulted in some sort of conviction, in about half of the cases resulting in conviction, the defendant was allowed to plead or stand trial on a less serious charge, thereby avoiding the automatic sentence.<sup>174</sup> Moley summed up the situation: “Through the subterfuge of a lesser plea they were permitted to escape the legislators’ well made plans.”<sup>175</sup>

Related to the problem of “escape,” many reformers also objected that compromise pleas manifested prosecutorial corruption or, at the very least, incompetence. From their perspective, it was emphatically the prosecutor’s duty to *prevent* criminals from escaping without their legally due punishment. “The prosecutor is to the public,” *The Missouri Crime Survey* noted with apparent

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<sup>170</sup> See Moley, *supra* note 69, at 120-21; see also Mark H. Haller, *Urban Crime and Criminal Justice: The Chicago Case*, 57 J. AM. HIST. 619, 633-34 (1970).

<sup>171</sup> See *In re Investigation of Charges of the Chicago Crime Commission* 4 (Crim. Ct. Cook County 1928) (quoting from Loesch’s “bill of particulars”). The judges were not removed. An investigation by a panel of six Chicago judges, Alschuler explains, “cast primary responsibility for the reduction of felony charges upon the State’s Attorney.” Alschuler, *Plea Bargaining and Its History*, *supra* note 11, at 29.

<sup>172</sup> 1928 N.Y. REPORT, *supra* note 71, at 15-16.

<sup>173</sup> See Lawrence M. Friedman, *Dead Hands: Past and Present in Criminal Justice Policy*, 27 CUMB. L. REV. 903, 910 (1997) (“This was the age of New York’s infamous Baumes law, which might be summed up as ‘four strikes and you’re out,’ since a fourth felony conviction brought a mandatory life sentence.”); Adam J. Levitin, *Hydraulic Regulation: Regulating Credit Markets Upstream*, 26 YALE J. ON REG. 143, 202 n.287 (2009).

<sup>174</sup> MOLEY, POLITICS AND CRIMINAL PROSECUTION, *supra* note 84, at 171.

<sup>175</sup> *Id.* at 172. New York’s Appellate Division seems to have agreed, writing that by accepting guilty pleas that did not trigger the Baumes Law’s automatic life sentences, prosecutors had permitted defendants to receive “punishment all too inadequate for the crime committed.” *People v. Gowasky*, 219 N.Y.S. 373, 379 (App. Div. 1926), *aff’d*, 155 N.E. 737 (N.Y. 1927).

approval, “a person who must prosecute all who fall into the toils of the criminal process.”<sup>176</sup>

As the reformers saw it, if prosecutors were doing their jobs the *right* way, they would be throwing the book at most defendants.<sup>177</sup> This was, as the leading treatise of criminal procedure explains, the age of “the full enforcement statute,” an “innovation of the Progressive Era” that “seemingly took away police and prosecutor discretion not to enforce a particular criminal prohibition.”<sup>178</sup> But the surveys revealed that prosecutors were not fully enforcing the law—they were dismissing cases and cutting deals. For the reformers, that was evidence of corruption. A few dismissals or lesser offense pleas here and there would be fine, but, as *Criminal Justice in Cleveland* complained, “[t]he high percentage of mitigations and suspensions . . . indicates an abuse or mistaken practice somewhere.”<sup>179</sup>

The specter of corruption in plea bargaining went beyond prosecutors’ failure to fully enforce the law. Moley tied plea bargaining to electoral politics, noting that guilty pleas allowed prosecutors to pad their statistics: “[A] plea of guilty of any sort is counted as a conviction. When [the prosecutor] goes before the voters for reelection he can talk in big figures about the number of convictions secured.”<sup>180</sup> And then, of course, there was the menace of corrupt favoritism.<sup>181</sup> *Criminal Justice in Cleveland* suggested that some compromises were the result of “‘underground’ connections” between prosecutors and shady defense lawyers.<sup>182</sup> Even if rumors of such connections were false, the report explained, they “greatly damage respect for the courts in the minds of the unfortunate and

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<sup>176</sup> Lashly, *Preparation and Presentation*, *supra* note 68, at 125. The survey explained ruefully that this traditional, public “conception” of the prosecutor’s role was “far from correct” as a matter of practice. *Id.*

<sup>177</sup> Not all, of course. The *Missouri Crime Survey* recognized that it was inappropriate to blame prosecutors for all declinations because “[w]arrants are properly refused and cases dismissed when the prosecutor believes the defendants to be innocent or conviction impossible.” *Id.* at 122. Notably, this list of instances in which it is appropriate for a prosecutor to dismiss does not include cases where the prosecutor determines that a conviction would be *normatively* inappropriate. See generally Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655 (2010).

<sup>178</sup> LAFAYE ET AL., *supra* note 70, at § 1.6(e) n.308. The treatise recognizes that the full enforcement statutes “failed in achieving that end.” *Id.*

<sup>179</sup> Bettman & Burns, *supra* note 6, at 150; see also Lashly, *Preparation and Presentation*, *supra* note 68, at 122.

<sup>180</sup> MOLEY, POLITICS AND CRIMINAL PROSECUTION, *supra* note 84, at 158; see also POUND, *supra* note 107, at 183-84 (“‘Making a record’ for political purposes bears no necessary relation to effective prosecution of the everyday work of his office.”).

<sup>181</sup> See Bettman & Burns, *supra* note 6, at 192 (“[C]urrent methods and practices tend to avoidable delays [and] give avoidable opportunities for favoritism and other forms of corruption . . .”).

<sup>182</sup> Smith & Ehrmann, *supra* note 117, at 287.

their friends.”<sup>183</sup> And the report’s authors plainly didn’t think that the rumors were *entirely* false. They tell the story of Charles McCormack, who was convicted of pickpocketing, a misdemeanor, in 1921.<sup>184</sup> The facts, however, appeared to indicate that Mr. McCormack had committed the more serious felony of petit larceny. Although the official records “contain no statement of reasons for or justification of this reduction,” there *was* an explanation: “McCormack’s attorney was X, closely related to a well-known, influential Republican ‘politician.’”<sup>185</sup>

Beyond outright corruption, reformers interpreted prosecutors’ willingness to compromise as a sign of “weakness.” Compromising a criminal case, the *Illinois Crime Survey* observed, “may be perfectly justified in many cases, but it may also be used to excuse weak and careless prosecution.”<sup>186</sup> This proved too great a temptation for many prosecutors, as “[i]t is easier to bargain away the rights of the state in cases of this sort than to go through the effort of trying the case.”<sup>187</sup> *The Missouri Crime Survey* concurred, explaining that “[m]any prosecutors have an inordinate fear of trying a weak case” and adding that “the case may be weak because the prosecutor himself is weak, or (as is more often true) conscious of lack of preparation.”<sup>188</sup>

## 2. Seeds of Normalization

We have seen that plea bargaining received a frosty reception from many of the reformers who discovered it. Far from a normal way of doing criminal justice, they regarded plea bargaining as a corruption of the prosecutorial function that impeded the criminal law’s effectiveness. Still, alongside these misgivings about plea bargaining, the reformers introduced two broader claims about criminal justice: that it should be, above all, efficient and that it should be oriented towards dealing with criminals, not crimes. Today, these ideas are cornerstones of our plea-fueled system of criminal justice, but their affinity with

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<sup>183</sup> *Id.*; see also CAL. CRIME COMM’N, *supra* note 71, at 26-27.

<sup>184</sup> Bettman & Burns, *supra* note 6, at 149 n.1.

<sup>185</sup> *Id.*

<sup>186</sup> Knight, *supra* note 155, at 262.

<sup>187</sup> *Id.*

<sup>188</sup> Lashly, *supra* note 68, at 150. The Missouri survey further reasoned that because guilty plea rates were much higher in urban than in rural jurisdictions, “the country prosecutor has a sterner sense of duty and justice than the prosecutor of the city.” *Id.* at 149. Moley also drew a line from prosecutorial “weakness” to plea bargaining, writing that “the strong, well poised, confident prosecutor will probably more wisely exercise his discretion than the weak one who, unable to win cases on their merits, under public pressure and fearful of his ‘record,’ will easily fall into the most questionable practices.” MOLEY, POLITICS AND CRIMINAL PROSECUTION, *supra* note 84, at 229. Nor did Moley think that prosecutors would be “any less lenient” if pro-defendant trial procedures were relaxed. See RAYMOND MOLEY, OUR CRIMINAL COURTS 101 (1930) [hereinafter MOLEY, OUR CRIMINAL COURTS].

plea bargaining was becoming apparent even during the period of plea bargaining's discovery. But for their concerns about prosecutorial corruption and upholding the criminal law, these broader ideas *could* have even led reformers of the era to cheer plea bargaining rather than condemn it. Thus, even while their objections erected roadblocks, the discoverers of plea bargaining planted the seeds of its eventual normalization.

First, consider the reformers' take on efficiency. We saw in Section II.A that the efficiency of the criminal process was a major concern for Pound even before he directed the Cleveland survey.<sup>189</sup> He pined for a more "administrative" (and less common law) system for dealing with matters of crime and punishment.<sup>190</sup> Unsurprisingly, the Pound-influenced criminal justice surveys were shot through with the complaint that the criminal process had become woefully inefficient.<sup>191</sup> This was the point of the surveys' obsession over the "mortality" of criminal cases.<sup>192</sup> In his preface to the *Illinois Crime Survey*, Dean John Wigmore of Northwestern Law School captured the general mood of the surveys when he observed that the "main feature" of what was wrong with the machinery of criminal justice "may be put into one word,—Inefficiency."<sup>193</sup>

The reformers also argued that the criminal process should individualize punishment and that it should focus more on criminals than on crimes. Pound emphasized that these were shifts from nineteenth-century thinking. In the late nineteenth century, he explained, an "[a]ttempt was made to exclude all individualization and to confine the magistrate to strict observance of minute and detailed precepts, or to a mechanical process of application of law through logical deduction from fixed principles."<sup>194</sup> The consequence, Pound wrote, was a "hypertrophy" of procedural restrictions.<sup>195</sup> Fortunately, to Pound, the "hypertrophy" had abated by the beginning of the twentieth century, making way for more individualized criminal justice.

Reformers recognized—to a degree—that a criminal justice system based upon compromised pleas could further both their efficiency and their individualization projects. Moley was open to the argument made by prosecutors

<sup>189</sup> See *supra* notes 100-01 and accompanying text.

<sup>190</sup> ROSCOE POUND AND CRIMINAL JUSTICE 110 (Sheldon Glueck ed., 1965). Part of the blame, Pound believed, was with the organization of the criminal bar. "As the bar is unorganized," he wrote, "without discipline and easygoing, there is no check upon the sporting-theory of justice, no check on the disposition to fight in every way to save a client." *Id.* at 112.

<sup>191</sup> See, e.g., MORSE & BEATTIE, *supra* note 71, at 40 n.12; Bettman & Burns, *supra* note 6, at 192; Hennings, *supra* note 73, at 16; Smith & Ehrmann, *supra* note 117, at 248-50.

<sup>192</sup> See *supra* note 120 and accompanying text.

<sup>193</sup> John H. Wigmore, *Editor's Preface* to ILL. ASS'N FOR CRIMINAL JUSTICE, *supra* note 71, at 5, 5.

<sup>194</sup> POUND, *supra* note 107, at 39.

<sup>195</sup> *Id.* at 164-65.

and judges of the time that (as he summarized it): “[T]he burden of criminal litigation is so great that instead of observing the forms of judicial trials it is necessary to devise a more expeditious method of disposing of cases through some type of administrative discretion.”<sup>196</sup> For “certain litigation,” Moley reckoned, “this is true.”<sup>197</sup> He also connected plea bargaining to individualized punishment, observing that “[t]he whole tendency [of compromising cases] represents a drift in the direction of individualizing the treatment of offenders.”<sup>198</sup> He reasoned that because the “task of dealing with crime is not one for which the traditional processes of law are suitable,” the “practice of accepting pleas to a lesser offense”—i.e., charge bargaining—“is in part made necessary by the need for individualizing—making the punishment fit the criminal rather than the crime.”<sup>199</sup>

Moley was not alone in linking plea bargaining to the broader projects of efficiency and individualization. Two of the final surveys published during this period sounded similar themes. In their 1932 survey of criminal justice in Multnomah County, Oregon, Ronald Beattie and Wayne Morse—then the dean of University of Oregon Law School and later a United States Senator—touched on both points in perhaps the most energetic defense of plea bargaining we have yet seen:

The cost of a public trial is saved whenever a defendant pleads guilty. As the statutory distinctions between crimes are sometimes very technical and arbitrary, substantial justice is often done by accepting a plea of guilty to a charge which involves the essential elements, if not the technical statutory elements, of the criminal act. . . . Many times the acceptance of a plea of guilty to a lesser charge or the imposing of a light sentence after a plea of guilty has a favorable effect on a defendant, making him more receptive to individualized treatment which seeks to change his attitude toward society and awaken in him a realization of his present maladjustment to life.<sup>200</sup>

Though less willing to endorse it, Hugh Fuller, author of *Criminal Justice in Virginia*, similarly recognized plea bargaining’s efficiency when he characterized the state’s criminal justice machinery as “administrative justice, with the prosecuting officer supplanting the judge as the most important official in the judicial system.”<sup>201</sup> That may be good or it may be bad, Fuller observed, but he was more worried about truth-in-advertising—“if we foolishly believe we

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<sup>196</sup> Moley, *supra* note 69, at 124.

<sup>197</sup> *Id.*

<sup>198</sup> MOLEY, POLITICS AND CRIMINAL PROSECUTION, *supra* note 84, at 187.

<sup>199</sup> *Id.* at 236.

<sup>200</sup> MORSE & BEATTIE, *supra* note 71, at 138.

<sup>201</sup> FULLER, *supra* note 71, at 156.



are getting court trials when we are, in fact, receiving administrative justice, that is quite another thing."<sup>202</sup>

In the end, plea bargaining exposed tensions in the Progressive approach to criminal justice.<sup>203</sup> On one hand, plea bargaining's efficiency and its opportunity for individualized punishment were, on Progressive principles, attractive. On the other hand, plea bargaining appeared to many of its discoverers as a corruption of the prosecutorial function that permitted criminals to escape the punishment provided by law, and on these grounds, they decried it.

#### D. *Whither Coercion*

Before we trace the Progressives' views on plea bargaining into the Realist period, one question about plea bargaining's discovery remains. We have seen that many of the reformers who discovered plea bargaining were deeply concerned about its impact on what Professor Herbert Packer would later call the Crime Control Model of the criminal process.<sup>204</sup> That is, they were worried that because "corrupt" prosecutors were letting defendants "escape" punishment, plea bargaining would degrade the system's ability to prevent crime.<sup>205</sup> Missing from the discussion so far has been the Crime Control Model's counterpart, the Due Process Model.<sup>206</sup> That's because the discoverers of plea bargaining were not especially worried about whether the new system was fair *to defendants*. They only rarely considered whether plea bargaining was or could become coercive.<sup>207</sup>

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<sup>202</sup> *Id.*

<sup>203</sup> This is not, to be sure, the *only* tension lurking within Progressive thought in the field of criminal law. See Green, *supra* note 105, at 1963 ("Pound's criminal law jurisprudence — as it evolved across the Progressive Era — reveals those understandings of history, politics, and society which reflected the tensions that one of the most influential and widely read early-twentieth-century academic common lawyers experienced regarding the interrelated problems of political liberty and human free will.").

<sup>204</sup> HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 158 (1968) ("The value system that underlies the Crime Control Model is based on the proposition that the repression of criminal conduct is by far the most important function to be performed by the criminal process.").

<sup>205</sup> See *supra* Section II.C.1.

<sup>206</sup> PACKER, *supra* note 204, at 163 ("If the Crime Control Model resembles an assembly line, the Due Process Model looks very much like an obstacle course. Each of its successive stages is designed to present formidable impediments to carrying the accused any further along in the process.").

<sup>207</sup> Bettman and Burns allude to this possibility, without much elaboration, in *Criminal Justice in Cleveland*: "The whirligig too often snatches up the innocent or those who merit leniency and hurls them into punishment without giving them the time or opportunity to demonstrate their innocence or grounds for dealing leniently with them." Bettman & Burns, *supra* note 6, at 193. In *Politics and Criminal Prosecution*, moreover, Moley notes several

Because the coerciveness of plea bargaining is a major theme of its academic critics today, I interrupt the historical narrative for a brief explanation.<sup>208</sup> Defendants plead guilty because they know that they will receive a more lenient punishment if they plead guilty than if they are convicted after a trial. Plea bargaining is coercive, according to its contemporary critics, because prosecutors (by their charging decisions), judges (by the sentences they impose), and legislators (by enacting criminal statutes with extreme maximum penalties) inflate post-trial punishments to make plea offers look attractive in comparison.<sup>209</sup> When post-trial sentences are more severe than our normative theories of punishment (e.g., utilitarianism or retributivism) can justify, defendants who stubbornly insist on trial and lose pay a heavy price.<sup>210</sup> Accordingly, most do not insist on trial. In a 1979 article, Professor John Langbein famously analogized the coerciveness of plea bargaining to the coerciveness of the medieval continental procedure in which criminal suspects were induced to “voluntarily confess” to avoid torture. “There is, of course, a difference,” he recognized, “between having your limbs crushed if you refuse to confess, or suffering some extra years of imprisonment if you refuse to confess, but the difference is of degree, not kind.”<sup>211</sup>

For all the moral and rhetorical power of Langbein’s analogy, neither it nor the steady criticism of plea bargaining’s coerciveness in modern scholarship has

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justifications that he had seen prosecutors and judges offer for plea bargaining. One such justification is that

[o]ftentimes the charge fixed in the indictment is not a true measure of the seriousness of the case as the prosecutor sees it. A more serious charge than is justified may be made for the specific purpose of frightening the defendant into offering a plea to a lesser offense, which may be the real measure of the crime.

MOLEY, POLITICS AND CRIMINAL PROSECUTION, *supra* note 84, at 185-86. Moley “briefly dismissed” this argument and had little to say other than that it “deserves nothing but condemnation.” *Id.* at 186. Despite the suggestion that overcharging (to use the modern term) happens “oftentimes,” Moley appears to have remained fixed in his judgment (or assumption) that defendants who plead guilty are guilty. *See id.* at 172; *see also* MORSE & BEATTIE, *supra* note 71, at 40 n.12 (“It is socially dangerous to permit a practice which persuades men into pleading guilty to offenses they never committed.”); Alfred W. Herzog, *Bargaining by the District Attorney for Pleas of Guilty*, 47 MEDICO-LEGAL J. 4, 4-5 (1930); Miller, *supra* note 145, at 21.

<sup>208</sup> *See, e.g.,* Ortman, *Probable Cause Revisited*, *supra* note 20, at 555-56.

<sup>209</sup> *See* Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1034 (2006) (“[T]hose who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes.”).

<sup>210</sup> *See* Langbein, *supra* note 22, at 12 (“This sentencing differential is what makes plea bargaining coercive.”).

<sup>211</sup> *Id.* at 12-13.

slowed plea bargaining's pace.<sup>212</sup> That's not surprising: by the time Langbein was writing, plea bargaining was already fully normal.<sup>213</sup> For the discoverers of plea bargaining in the 1920s, on the other hand, it seemed brand new. In *Federalist No. 83*, Alexander Hamilton observed that support for jury trials was a rare spot of agreement during ratification, with disagreement limited to whether trials were a "valuable safeguard to liberty" or "the very palladium of free government."<sup>214</sup> The Progressive reformers discovered that criminal trials had "vanished" before their eyes.<sup>215</sup> Yet, while they were worried about plea bargaining for other reasons, due process barely registered. Can we account for the one-sidedness of their objections to plea bargaining? Not with any certainty, but we can offer some possibilities.

One is that the reformers simply did not perceive plea bargaining's coercive potential. That is unlikely. The condition precedent for coercive plea bargaining—large trial penalties—was evident on the face of the criminal justice surveys.<sup>216</sup> Even more to the point, state appellate courts had been discouraging negotiated guilty pleas since the middle of the nineteenth century, often expressing concerns along these very lines.<sup>217</sup> In a 1904 case, for example, the Louisiana Supreme Court reckoned that pleading guilty to a "minor offense" is "what an innocent man might do who found that appearances were against him, and that he might be convicted notwithstanding his innocence."<sup>218</sup> It is unlikely that legal scholars like Roscoe Pound weren't aware of these cases or the concerns that they raised.

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<sup>212</sup> See Gregory M. Gilchrist, *Plea Bargains, Convictions and Legitimacy*, 48 AM. CRIM. L. REV. 143, 148 (2011); Ortman, *Second-Best Criminal Justice*, *supra* note 20, at 1070.

<sup>213</sup> See *infra* note 331.

<sup>214</sup> THE FEDERALIST NO. 83 (Alexander Hamilton).

<sup>215</sup> See, e.g., MOLEY, OUR CRIMINAL COURTS, *supra* note 188, at xi.

<sup>216</sup> Both *The Missouri Crime Survey* and the *Illinois Crime Survey* recognized that defendants who pled guilty were given *substantially* more lenient treatment than those who insisted on trial. See Alschuler, *Plea Bargaining and Its History*, *supra* note 11, at 28-29; Gehlke, *A Statistical Interpretation*, *supra* note 6, at 317 ("An original plea of guilty reduces the probability of the penitentiary by just about one-half (80.28 to 41.99)."); Healy, *supra* note 147, at 314 ("These figures indicate conclusively that a defendant's chances of probation are enormously increased if he pleads guilty to the offense charged. Presumably, probation will not be granted when the state has already permitted a reduction of the charge which is, of course, in line with the logic of events; but if he is willing to plead guilty to the offense charged he is granted probation in nearly forty per cent of the cases."); Lashly, *Preparation and Presentation*, *supra* note 68, at 149 ("The facts show that in the cities a penitentiary sentence follows a conviction by the jury in a much higher percentage of cases than where sentence is imposed upon a plea of guilty, and that a plea of guilty upon arraignment reduces the chances of a penitentiary sentence in the cities by about one-half.").

<sup>217</sup> See Alschuler, *Plea Bargaining and Its History*, *supra* note 11, at 19-24.

<sup>218</sup> *Id.* at 21 (quoting *State v. Coston*, 37 So. 619, 620 (La. 1904)).

A more plausible explanation is that in the ebb and flow between the ideology of crime control and the ideology of due process,<sup>219</sup> the reformers were simply committed to the former.<sup>220</sup> Their affinity for crime control, moreover, may have been inflected by racial, nativist, and class prejudices.<sup>221</sup> Such prejudices were certainly not uncommon within Progressive-era thought.<sup>222</sup> Perhaps the strongest textual evidence that racism in particular explains the surveys' inattention to the coerciveness of plea bargaining comes from Andrew A. Bruce's introduction to the section of the *Illinois Crime Survey* on organized crime in Chicago.<sup>223</sup> Bruce, the president of the Institute of Criminal Law and Criminology, was a familiar figure in elite legal circles.<sup>224</sup> He blamed Chicago's crime woes in part on Black people who, he claimed, were ill-equipped for urban life:

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<sup>219</sup> PACKER, *supra* note 204, at 149-58.

<sup>220</sup> See SAMUEL WALKER, *POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE* 157-58 (2d ed. 1998).

<sup>221</sup> This hypothesis depends, of course, on the premise that reformers perceived that criminal defendants were often racial minorities, immigrants, or poor. There is reason to believe that they did. Justin Miller wrote in the first law review article on plea bargaining that "the poor, friendless, helpless man is most apt to become the one who helps to swell the record of convictions." Miller, *supra* note 145, at 21. Some of the criminal justice surveys, moreover, alluded to the demographics of defendants. An observer for the Cleveland Foundation described what he saw when he arrived at a courtroom on the morning of April 22, 1921: "[T]here were five colored people waiting for the court to open, including three women, one man, and one child. There were six white women, all of whom looked to be of foreign extraction, and apparently all were engaged upon the same errand." Bettman & Burns, *supra* note 6, at 105. The *Illinois Crime Survey* took a more quantitative approach to describing racial disparities in murder prosecutions and sentencing patterns. Arthur v. Lashly, *Homicide (in Cook County)*, in ILL. ASS'N FOR CRIMINAL JUSTICE, *supra* note 71, at 589, 628.

<sup>222</sup> See, e.g., MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 62-69 (2004) (describing race relations during the Progressive era); Geoffrey Heeren, *Crimmigration in Gangland: Race, Crime, and Removal During the Prohibition Era*, 16 OHIO ST. J. CRIM. L. 65, 68 (2018) (noting that "belief that immigration increased crime" was "ubiquitous" in the 1920s); Barbara Bennett Woodhouse, *Home Visiting and Family Values: The Powers of Conversation, Touching, and Soap*, 143 U. PA. L. REV. 253, 256 (1994) (noting Progressives' "well-documented class prejudice").

<sup>223</sup> Andrew A. Bruce, *Introduction to Survey of Organized Crime*, in ILL. ASS'N FOR CRIMINAL JUSTICE, *supra* note 71, at 813, 815-21.

<sup>224</sup> See SIMON BALTO, *OCCUPIED TERRITORY: POLICING BLACK CHICAGO FROM RED SUMMER TO BLACK POWER* 54 (Heather Ann Thompson & Rhonda Y. Williams eds., 2019). In 1926, Felix Frankfurter included Bruce in the same breath as Ernst Freund and Roscoe Pound in a list of prominent constitutional law teachers. Felix Frankfurter, *The Business of the Supreme Court of the United States — A Study in the Federal Judicial System*, 39 HARV. L. REV. 1046, 1052-53 (1926).

Now, too, that freedom has come and the gospel of opportunity has everywhere been preached, thousands of Negroes have come to us from the rural centers of the south and have given to us a rapidly increasing population, whose natural home is in the fields and not in the streets and congested quarters of a great city, and who lack the guardianship and advice of their white masters and friends.<sup>225</sup>

That this jarringly racist screed was deemed fit to include in one of the leading crime surveys supports the hypothesis that Bruce's contemporaries—at least those sharing these views—were indifferent to the plight of Black defendants coerced into guilty pleas.<sup>226</sup>

Closely related to migration and immigration, a final potential explanation for the reformers' inattention to coercion centers on the uncertainties brought on by urbanization and industrialization. Professor G. Edward White describes some of the changes to American society between 1870 and the early 1930s:

The external appearance of American society became discernibly more urban and industrial. This appearance reflected several underlying material changes. For example, the proportion of the population living in urban centers increased from about 16% to about 49%. The total value of manufactured products increased twentyfold. The miles of railroad track went from less than 40,000 to more than 260,000. At the same time, an established theory of causal attribution in the universe — one that located causes in phenomena independent of human actors, such as religion, nature, universalistic “laws” of political economy, a preordained status system, or the inevitably cyclical pattern of change over time — gradually was replaced as epistemological orthodoxy by a theory that identified human consciousness and human will as the central causal agent.<sup>227</sup>

The reformers of the 1920s were aware of these changes and concerned about their consequences. Pound observed that by 1920, “the homogenous rural communities, presupposed by the legal institutions devised in the latter part of the eighteenth century and the first decades of the nineteenth century, had ceased to be the dominant type.”<sup>228</sup> A consequence, Pound believed, was moral dissensus. “One rule may run counter to the individual interests of a majority or a dominant class,” he suggested, while “[a]nother may run counter to the moral

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<sup>225</sup> Bruce, *supra* note 223, at 819.

<sup>226</sup> Professor Simon Balto describes Bruce's words as a “prism of racial mastery.” BALTO, *supra* note 224, at 54. For a contemporaneous analysis of racial discrimination in American criminal justice, see Thorsten Sellin, *The Negro Criminal: A Statistical Note*, 140 ANNALS AM. ACAD. POL. & SOC. SCI. 52, 54-56 (1928); see also KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* 2-3 (2010) (contextualizing Sellin's article).

<sup>227</sup> G. Edward White, *Cabining the Constitutional History of the New Deal in Time*, 94 MICH. L. REV. 1392, 1418-19 (1996) (book review) (footnote omitted).

<sup>228</sup> POUND, *supra* note 107, at 22.

ideas of individuals or of an obstinate minority.”<sup>229</sup> The substantive reach of the criminal law, moreover, was extending beyond the traditional crimes that everyone could recognize and understand, most notably with the prohibition of alcohol. Pound observed that “out 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>230</sup> *Criminal Justice in Cleveland* struck a similar tone when it noted that the causes of crime included the “lack of homogeneity in our population and its increasing instability, [and] the absence of settled habits and traditions of order.”<sup>231</sup>

On this account, the context for the crime surveys was economic, political, and even moral uncertainty. Now enter plea bargaining. One feature of a system of pleas is that it provides the *appearance*—though not necessarily the reality—of certainty about outcomes.<sup>232</sup> Plea bargaining is tailor-made to look certain because, in nearly every case, the defendant solemnly declares that he is guilty of a crime.<sup>233</sup> Trials, on the other hand, with their contested proceedings and not guilty verdicts, yield uncertainty. Acquittals raise the specter that the guilty party is “still out there,” while guilty verdicts are sullied by defendants’ continuing denials of guilt. The inherent uncertainty of trials, moreover, was likely magnified in the Progressive reformers’ minds by their deep mistrust of “lawless” juries.<sup>234</sup> Against that background, only guilty pleas offered uncontroverted certainty.

In trying to understand why the Progressive reformers *did not* make a particular argument, we are necessarily in the realm of speculation. With that said, the apparent certainty of guilty pleas may have been attractive to them. The allure of certainty was not enough for them to endorse plea bargaining, but it might have helped shape their opposition.

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<sup>229</sup> *Id.* at 23.

<sup>230</sup> *Id.*

<sup>231</sup> Fosdick, *supra* note 115, at 5.

<sup>232</sup> See FISHER, *supra* note 5, at 178-80.

<sup>233</sup> See Ortman, *Probable Cause Revisited*, *supra* note 20, at 564. I say “nearly every” because, in an *Alford* plea, a defendant accepts “the imposition of a prison sentence even if he is unwilling or unable to admit his participating in the acts constituting the crime.” See *North Carolina v. Alford*, 400 U.S. 25, 37 (1970).

<sup>234</sup> See Pound, *Inherent and Acquired Difficulties*, *supra* note 95, at 236 (“[Jurors] will be lawless enough without encouragement; they will be certain enough to confuse their function with that of the court, unless the court has the power to set them right.”); see also Green, *supra* note 105, at 1981 (“Between 1909 and 1911, Pound came to view the criminal trial jury with increasing skepticism.”); Andrew Kent, *The Jury and Empire: The Insular Cases and the Anti-Jury Movement in the Gilded Age and Progressive Era*, 91 S. CAL. L. REV. 375, 401 (2018) (“Elite American lawyers and progressive reformers routinely criticized American jurors for, in the words of George Alger of the New York Bar, ‘lack of respect for [the] law as law.’” (alteration in original) (quoting George W. Alger, *American Discontent with Criminal Law*, OUTLOOK, June 15, 1907, at 321)).

## III. REALISM AND PLEA BARGAINING

As we exit plea bargaining's age of discovery, its ideological hold on criminal justice seems fraught. Some reformers intimated, perhaps naively, that shining light on the practice might cleanse it. The chapter of *Criminal Justice in Cleveland* on courts begins with the optimistic note that: "[T]he success of the democratic experiment in America requires that no community shall tolerate conditions found to exist in this city once the facts are known."<sup>235</sup>

Of course, the discovery of plea bargaining did not herald its demise. To the contrary, in the decades that followed the crime surveys, plea bargaining, now out of the shadows, became the normal, accepted way of doing criminal justice.<sup>236</sup> But what became of the Progressive reformers' objections? It is possible, of course, that the objections were just ignored. Perhaps the powerful incentives of criminal justice insiders made reformers' concerns immaterial. This Part offers a different hypothesis.

In legal theory, the sociological jurisprudence of the Progressive Era was succeeded by the Legal Realist movement of the 1920s and 1930s.<sup>237</sup> Centered at Yale University, Columbia University, and (in a short, failed experiment) Johns Hopkins University, Realist scholars built on and, in a sense, completed the Progressive takedown of the mechanical jurisprudence that had dominated American law in the late nineteenth century and into the first decades of the twentieth.<sup>238</sup> Below I will consider some of the distinctive features of Realist thought.<sup>239</sup>

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<sup>235</sup> Smith & Ehrmann, *supra* note 117, at 229.

<sup>236</sup> See *infra* Part IV.

<sup>237</sup> See White, *supra* note 103, at 999.

<sup>238</sup> There is no universally accepted definition of Legal Realism. Professor Morton Horwitz devotes a full chapter of *The Transformation of American Law, 1870-1960* to defining it. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, at 169-92 (1992). These difficulties notwithstanding, here are explanations set out by some of Realism's leading analysts. See HORWITZ, *supra*, at 169 ("[Realism] expressed more an intellectual mood than a clear body of tenets, more a set of sometimes contradictory tendencies than a rigorous set of methodologies or propositions about legal theory."); William W. Fisher III, Morton J. Horwitz & Thomas A. Reed, *Introduction to AMERICAN LEGAL REALISM* xiii-xiv (William W. Fisher, Morton J. Horwitz & Thomas A. Reed eds., 1993) ("The heart of the movement was an effort to define and discredit classical legal theory and practice and to offer in their place a more philosophically and politically enlightened jurisprudence."); Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 269 (1997) (locating the "'Core Claim' of Realism": "in deciding cases, judges respond primarily to the stimulus of the facts"); see also JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* 1-3 (1995) (rejecting conceptual definitions and arguing that "Realism" is what the Realists did—"empirical legal research").

<sup>239</sup> See *infra* Section III.B.

While many Realists were not interested in criminal law,<sup>240</sup> those who were had a surprisingly different reaction to plea bargaining than their Progressive forbearers (or in some cases, contemporaries) on the crime commissions had. They embraced plea bargaining enthusiastically, answering, in one case explicitly and in the other implicitly, the Progressive reformers' two major objections. The Realists' positive reception of plea bargaining was thus an important step on the road to plea bargaining becoming the normal way of doing criminal justice. Section III.A describes the principal Realist work on plea bargaining. Section III.B then mines Realist thought for an explanation of *why* they reacted to plea bargaining so differently than the Progressives.<sup>241</sup>

#### A. *The Realist Reception*

The most important Realist investigation of plea bargaining was conducted by a team led by Charles Clark, then the dean of Yale Law School, with assistance from Thurman Arnold, then a member of the Yale Law faculty. As Raymond Moley and Roscoe Pound were the central characters in plea bargaining's initial discovery and reception, Clark and Arnold—both prominent Realists—are the protagonists of its Realist turn.<sup>242</sup> As we shall see, their research program was methodologically aligned with Moley and Pound's investigation of criminal justice in Cleveland but with a broader scope—criminal justice throughout the federal courts. Like Moley and Pound, Clark and Arnold found that guilty pleas dominated the criminal process. But whereas Pound and Moley sounded an alarm, Clark and Arnold sounded the trumpets.

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<sup>240</sup> See sources cited *supra* note 13. This likely has to do with the legal academy of the early twentieth century holding criminal law in low regard. As Professor Alice Ristroph has observed, criminal law in this period was “an ‘intellectual backwater,’ an ugly stepsister in the law school curriculum and among leading legal scholars.” Alice Ristroph, *An Intellectual History of Mass Incarceration*, 60 B.C. L. REV. 1949, 1973-74 (2019) (quoting David Wolitz, Herbert Wechsler, *Legal Progress, and the Jurisprudential Roots of the Model Penal Code*, 51 TULSA L. REV. 633, 642 (2016)).

<sup>241</sup> The trend in recent decades has been to emphasize continuities between Progressive and Realist thought. See HORWITZ, *supra* note 238, at 169 (“The first problem with [the traditional] definition is that it draws too sharp a distinction between the Progressive legal thought that began to crystallize after the *Lochner* decision in 1905 and later post-World War I legal thought.”); G. Edward White, *Transforming History in the Postmodern Era*, 91 MICH. L. REV. 1315, 1342 n.34 (1993) (reviewing HORWITZ, *supra* note 238). I am agnostic about the relationship between Progressive and Realist thought in general, but I do claim that in the area of criminal law—and specifically on the question of plea bargaining—differences between Progressives and Realists are both real and important.

<sup>242</sup> On Clark's status as a leading Realist, see SCHLEGEL, *supra* note 238, at 81-98. On Arnold's, see generally Neil Duxbury, *Some Radicalism About Realism? Thurman Arnold and the Politics of Modern Jurisprudence*, 10 OXFORD J. LEGAL STUD. 11 (1990); Fenster, *supra* note 13.



Clark was among the Realists interested in applying “modern” methods of empirical research to legal studies.<sup>243</sup> His technique was to collect data—the more the better—on how cases proceed through the courts.<sup>244</sup> He began with a study of civil justice in the Connecticut state courts that was, at least in part, modeled on *Criminal Justice in Cleveland*.<sup>245</sup> In early 1929, Clark and Robert Hutchins—then finishing his term as Dean of Yale Law before handing the reins to Clark—met with the newly inaugurated Herbert Hoover to propose a large-scale study that would apply the methods of the Connecticut study to the federal courts as a whole.<sup>246</sup> Although, as Professor John Henry Schlegel notes in his essential history of Realist empirical research, President Hoover’s specific response has been lost, he must have liked the idea because by January 1930 Clark was hired as a “consultant” to Hoover’s recently formed National Commission on Law Observance and Enforcement (commonly known as the Wickersham Commission).<sup>247</sup>

The Wickersham Commission was not in a position to fund the massive national study that Clark and Hutchins had imagined.<sup>248</sup> Clark and his research associates—including future Supreme Court Justice William O. Douglas—scaled back the research design.<sup>249</sup> They decided to enlist help from law schools around the country to collect data on civil and criminal cases in thirteen federal districts.<sup>250</sup> Even with the geographic ambition of the study reduced, however, Clark’s team was still unable to analyze the data in the time available before the end of the Wickersham Commission in July of 1931.<sup>251</sup> The group, now including Thurman Arnold, decided to examine criminal cases in a single federal district—the conveniently located District of Connecticut—and to publish its findings in a “Progress Report.”<sup>252</sup>

The 1931 Progress Report’s verdict on federal criminal justice in Connecticut was unambiguous. The system operated, Clark’s team concluded, magnificently.

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<sup>243</sup> See SCHLEGEL, *supra* note 238, at 83; Charles E. Clark, *Fact Research in Law Administration*, 1 MISS. L.J. 324, 325 (1929).

<sup>244</sup> See NAT’L COMM’N ON LAW OBSERVANCE AND ENF’T, PROGRESS REPORT ON THE STUDY OF THE FEDERAL COURTS 3-6 (1931). Clark explained that such data “furnish much valuable information to students of government and of courts, and to all those interested in the processes of law administration and in its improvement.” *Id.* at 4.

<sup>245</sup> See SCHLEGEL, *supra* note 238, at 84-85.

<sup>246</sup> See NAT’L COMM’N ON LAW OBSERVANCE AND ENF’T, *supra* note 244, at iii-v; SCHLEGEL, *supra* note 238, at 86.

<sup>247</sup> SCHLEGEL, *supra* note 238, at 86-87.

<sup>248</sup> See *id.* at 87-88.

<sup>249</sup> *Id.* at 88.

<sup>250</sup> See NAT’L COMM’N ON LAW OBSERVANCE AND ENF’T, *supra* note 244, at iii-iv; SCHLEGEL, *supra* note 238, at 87-88.

<sup>251</sup> See SCHLEGEL, *supra* note 238, at 90.

<sup>252</sup> NAT’L COMM’N ON LAW OBSERVANCE AND ENF’T, *supra* note 244, at 3.

The report's analysis began with five "tentative" conclusions.<sup>253</sup> First among these, Clark and his team found "a complete absence of procedural delays and difficulties which commonly are thought to be inherent in and peculiar to the system."<sup>254</sup> In large part, they maintained, the system's efficiency was attributable to the careful work done by prosecutors in selecting cases.<sup>255</sup> Clark and his team recognized that the system's efficiency was possible only because "[a] vast majority of the pleas [were] guilty pleas."<sup>256</sup> As they would make explicit in their final report three years later, they saw this as a feature, not a bug, of federal criminal justice in Connecticut.

Though the Progress Report's remarks about "bargained justice" were fairly limited, Arnold went much further in an essay he wrote for the American Bar Association ("ABA") Journal.<sup>257</sup> Arnold's essay began slowly, calling for more attention on trial courts and digressing on the virtues of the "Hollerith Punch Card System," which researchers had used to assemble case data.<sup>258</sup> Arnold then delivered a powerful defense of the "bargain" system of justice that the Progress Report had revealed in the District of Connecticut.<sup>259</sup> Alluding to the crime surveys of the previous decade, Arnold wrote that the Progress Report's positive characterization of bargain justice was "rather surprising."

Current literature and thought would lead us to expect that the serious obstacles to criminal law enforcement consisted of technicalities, delays and continuances, irrational juries, a cumbersome grand jury system, long trials, appeals on obsolete doctrinal points, and in general the widely

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<sup>253</sup> *Id.* at 18.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* ("The process of choosing cases for prosecution is so selective that the time required for disposition is negligible.")

<sup>256</sup> *Id.* at 22.

<sup>257</sup> Thurman W. Arnold, *Progress Report on Study of the Federal Courts—No. 7*, 17 A.B.A. J. 799, 801 (1931) [hereinafter Arnold, *Progress Report*]. Some of Arnold's article appears to be text that was originally in the Progress Report itself. Schlegel reports that Clark agreed to remove some language from a draft of the Progress Report at the demand of the Commission, likely at the behest of Pound, who served as a commissioner. See SCHLEGEL, *supra* note 238, at 89. Some of the language from that draft survives in Arnold's essay. Compare *id.* at 88-89 (quoting from draft progress report: "technicalities, delays and continuances, irrational juries, a cumbersome grand jury system, long trials, appeals on obsolete doctrinal points, and in general, the widely advertised results of what is generally called 'the sporting theory of justice'"), with Arnold, *Progress Report, supra*, at 801 (writing: "technicalities, delays and continuances, irrational juries, a cumbersome grand jury system, long trials, appeals on obsolete doctrinal points, and in general the widely advertised results of what is generally called 'the sporting theory of justice'").

<sup>258</sup> Arnold, *Progress Report, supra* note 257, at 799-800.

<sup>259</sup> *Id.* at 801-02.

advertised results of what is generally called “the sporting theory of justice.”<sup>260</sup>

But none of that, Arnold reckoned, was found in Connecticut federal court. Enough of Pound and his obsession with delay and excess procedure, Arnold seemed to be saying. The only puzzle was *why* the system was so efficient.<sup>261</sup>

Because the Wickersham Commission closed before Clark’s group could finish its analysis, Clark was forced to seek private funding to complete the work. That came in the form of a grant from the Rockefeller Foundation to the American Law Institute (“ALI”).<sup>262</sup> Working under the ALI’s supervision, Clark’s team published its final report, *A Study of the Business of the Federal Courts*, in 1934.<sup>263</sup> After some introductory remarks, the report opened with the group’s “General Conclusions,” delivering an almost point-by-point rebuttal to the crime commissions’ concerns about bargained justice.<sup>264</sup>

The General Conclusions began by liberally quoting (without attribution) key passages from Arnold’s ABA Journal essay.<sup>265</sup> It then offered several glowing assessments of federal criminal justice. “The federal criminal courts present a smoothly working system,” the first assessment declared, “unburdened by the supposed technicalities of a criminal law, which reaches results quickly and efficiently.”<sup>266</sup> The third assessment connected this “smoothly working system” to guilty pleas:

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<sup>260</sup> *Id.* at 801; see also Pound, *Inherent and Acquired Difficulties*, *supra* note 95, at 234-35 (discussing “sporting-theory of justice”).

<sup>261</sup> Arnold, *Progress Report*, *supra* note 257, at 801 (“The proceedings are so expeditious, untechnical, and uncontested that it becomes important to find where the selective process which produces such results can be concealed.”). As we will see when we consider the detailed findings of Clark’s final report, to some extent, Arnold’s differences with the “current literature and thought” are explained by disparities between the ground facts of the Connecticut federal court and those of the crowded, underfunded state criminal courts studied by the crime commissions. The differences were also interpretive. This was nowhere more true than where Arnold wrote against the idea that plea bargaining was a mark of corruption. “Though [bargaining] offers opportunities for corruption,” Arnold contended, “it is doubtful whether any method exists which could succeed in tying the hands of a corrupt prosecuting attorney.” *Id.* This argument is considered below. See *infra* note 310 and accompanying text.

<sup>262</sup> George W. Wickersham, *Foreword to AM. LAW INST., A STUDY OF THE BUSINESS OF THE FEDERAL COURTS, PART I: CRIMINAL CASES 1, 2* (1934).

<sup>263</sup> *Id.* Schlegel observes that “[c]ounting from the Hutchins and Clark meeting with Hoover, it had taken over five years to publish about one year’s worth of research.” SCHLEGEL, *supra* note 238, at 90. Still, for anyone interested in a mature Realist analysis of plea bargaining, the Final Report was well worth the wait.

<sup>264</sup> AM. LAW INST., *supra* note 262, at 11-12. The General Conclusions were added to the document after a 1933 draft was circulated, apparently in response to concerns that the draft was a bloodless collection of numbers and tables. See SCHLEGEL, *supra* note 238, at 94-95.

<sup>265</sup> AM. LAW INST., *supra* note 262, at 12.

<sup>266</sup> *Id.*

A method of handling cases which may be referred to as the guilty plea technique came into extensive use in 1916 and is responsible for the prompt and efficient disposition of business. This method has been condemned as “bargaining” but it shows no signs of disappearance. It is doubtful if the system could operate without it. Since it anticipated the great influx of cases under the Prohibition Amendment by several years, there is no reason to suppose that it will not survive the repeal of that constitutional provision.<sup>267</sup>

Aside from some brief comments on research methodology,<sup>268</sup> the balance of the General Conclusions went on to justify and amplify these assessments. While recognizing that there is a “feeling that in those cases, which for historical or accidental reason appear on the criminal side of the docket instead of the civil side, there must be no ‘compromise’ once the matter is before the court,” Clark and his team insisted that this “feeling” arises from an “ideal of law enforcement” that “has in practice been superseded by the practical necessity of dealing with the individual offender in as informal a way as is consistent with public safety.”<sup>269</sup> Clark defended plea bargains as the normal—and perhaps inevitable—way of doing criminal justice under modern conditions.<sup>270</sup> Without naming Pound, he criticized those, like Pound, who believed that the criminal justice system suffered under a surplus of technicalities. “Once an idea of criminal reform has been formulated,” Clark quipped, “it is almost as difficult to change as the procedure which it attempts to reform.”<sup>271</sup> The report did, however, offer one procedural reform of its own: “[W]e think that legislation permitting and perhaps regulating the open compromise of criminal cases would be desirable.”<sup>272</sup>

As Schlegel observes, there is a wide gulf between Clark’s treatment of plea bargaining and Pound and Frankfurter’s treatment of it in *Criminal Justice in Cleveland*.<sup>273</sup> Some of the differences arise from the fact that Pound, Moley, and their colleagues were examining busy city and county courts, while Clark and his team analyzed federal court data.<sup>274</sup> Indeed, *A Study of the Business of the Federal Courts* took pains to show that federal conviction rates were higher than

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<sup>267</sup> *Id.*

<sup>268</sup> *Id.* at 15-16.

<sup>269</sup> *Id.* at 13.

<sup>270</sup> *Id.* (“[The guilty plea technique] has become a settled and recognized custom in handling criminal business, and it has attained this position in spite of a general public atmosphere of disapproval.”).

<sup>271</sup> *Id.*

<sup>272</sup> *Id.* at 14. The Report recognized that this was “not a new idea,” tracing it to a law review article written by Justin Miller. *Id.* (citing Miller, *supra* note 145).

<sup>273</sup> SCHLEGEL, *supra* note 238, at 95.

<sup>274</sup> Schlegel recognizes this as well. *Id.*

the conviction rates reported in some of the major surveys.<sup>275</sup> Nonetheless, differences between the ways Clark's report and the crime surveys *interpreted* facts are at least as important as differences in the facts themselves. Consider Clark's statistics on the length of carceral sentences imposed on nonliquor defendants.<sup>276</sup> More than 70% of defendants who pled guilty received sentences of fewer than two years, whereas only about 48% of defendants who went to trial received such lenient treatment.<sup>277</sup> For the state and municipal crime commissions, such a differential would have been strong evidence that defendants were escaping the criminal justice system without the legally due punishment.<sup>278</sup> For Clark and his team, this was just how the sausage is made.

The reports that came out of Clark's research project (including Arnold's essay) are the core Realist texts on plea bargaining. Two other Realist works can be addressed more quickly. Following his essay on the Progress Report in the ABA Journal, Arnold returned to the topic of plea bargaining in his polemical 1932 article "Law Enforcement—An Attempt at Social Dissection."<sup>279</sup> Arnold theorized that a "vague abstraction of Law Enforcement" had "penetrated the public consciousness and moulded the administration of the criminal law."<sup>280</sup> "Law Enforcement," he explained, "represents a reverently held ideal which has had its value in inducing a feeling that criminal justice is both impartial and impersonal—that principles instead of personal discretion control the actions of judges and prosecutors."<sup>281</sup> Arnold did not question that the "ideal of Law

<sup>275</sup> AM. LAW. INST., *supra* note 262, at 53-55. It is not clear that Clark compared apples to apples in this regard. He did not collect or report on cases dismissed by U.S. Commissioners, the forerunners to today's magistrate judges. As one study explains the role of Commissioners,

the commissioner performs judicial functions for the federal government that are somewhat analagous [sic] to those performed by local magistrates or justices of the peace for the states. Serving in the front-line of the judicial process, a United States Commissioner often represents an individual's first contact with the administration of federal justice.

Charles A. Lindquist, *The Origin and Development of the United States Commissioner System*, 14 AM. J. LEGAL HIST. 1, 1 (1970). Clark collected data on cases dismissed at the Commissioner stage for the District of Connecticut in the Progress Report and found a fairly high mortality rate of 53.5%. See NAT'L COMM'N ON LAW OBSERVANCE AND ENF'T, *supra* note 244, at 41. Incorporating these dismissals by Commissioners may have thus brought the overall federal conviction rate closer to parity with the state conviction rates reported by the crime surveys.

<sup>276</sup> AM. LAW. INST., *supra* note 262, at 90.

<sup>277</sup> *Id.*

<sup>278</sup> See *supra* notes 165-75 and accompanying text.

<sup>279</sup> Thurman W. Arnold, *Law Enforcement—An Attempt at Social Dissection*, 42 YALE L.J. 1, 9 (1932) [hereinafter Arnold, *Law Enforcement*].

<sup>280</sup> *Id.* at 6.

<sup>281</sup> *Id.*

Enforcement” had symbolic and emotional value, but he denied that it reflected the way that law enforcement works in the real world.<sup>282</sup>

Opposition to plea bargaining, Arnold argued, was bound up with this ideal of Law Enforcement. He wrote that the disconnect between the ideal and the reality of law enforcement generates contradictions, one of which was about plea bargaining. The ideal of Law Enforcement assumes that “[t]he bargaining process by which guilty pleas are induced in exchange for smaller sentences is one to be condemned as contrary to our ideals of criminal justice.”<sup>283</sup> The reality of law enforcement, on the other hand, means that “[c]riminal cases should be frankly compromised in the discretion of the prosecution.”<sup>284</sup>

Writing a year after publication of *A Study of the Business of the Federal Courts*, Jerome Hall offered another sophisticated Realist take on plea bargaining.<sup>285</sup> Substantive criminal law, Hall observed, has always been overbroad. “Between a legal structure and the social problems with reference to which it was designed,” he wrote, “gaps open,” and “[t]he changes called for are too frequent and varied for legislation.”<sup>286</sup> Hall explained that justice is administered in particular cases by way of procedural devices that circumvent the substantive law’s overbreadth. In an earlier era, the benefit of clergy performed that function.<sup>287</sup> Hall found plea bargaining to be the preeminent modern example of such a practice. Like Arnold, he defended the prosecutorial discretion inherent in a system of widespread plea bargaining, insisting that “there is no doubt that this is the mark of an advanced system.”<sup>288</sup> Also like Arnold, Hall forcefully denied that plea bargaining was associated with prosecutorial corruption. Taking an apparent shot at the crime commissions’ fixation with corruption, Hall found it “obvious that such a particularistic explanation” for plea bargaining “is superficial.”<sup>289</sup>

I leave it to the reader to judge the fairness of Hall’s characterization of the Progressives’ corruption objection as superficial. For now, it is enough to say that the Realists who trained their attention on the administration of criminal justice evaluated plea bargaining very differently than the crime commissions had. The question is why.

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<sup>282</sup> See *id.* (“Yet even the ordinary human mind is quite capable of recognizing both that an ideal has no objective truth and yet that it does have emotional value.”).

<sup>283</sup> *Id.* at 18.

<sup>284</sup> *Id.*

<sup>285</sup> JEROME HALL, *THEFT, LAW AND SOCIETY* (1935) [hereinafter HALL, *THEFT, LAW AND SOCIETY*]. Unlike Clark and Arnold, Hall is not exactly a core figure of Legal Realism. Hall himself, however, characterized *Theft, Law and Society* as a piece of Realist scholarship. JEROME HALL, *STUDIES IN JURISPRUDENCE AND CRIMINAL THEORY* 137 (1958).

<sup>286</sup> HALL, *THEFT, LAW AND SOCIETY*, *supra* note 285, at 68.

<sup>287</sup> *Id.* at 68-70.

<sup>288</sup> *Id.* at 120.

<sup>289</sup> *Id.* at 117.

### B. *Understanding the Realist Reception*

To understand the Realists' warm response to plea bargaining, we will need to dig into Realist thought. The Realists were not, in the main, academic philosophers.<sup>290</sup> Professor Brian Leiter points out that they were "often badly confused about philosophical matters."<sup>291</sup> Yet they had a philosophical agenda: the pragmatism of John Dewey and William James.<sup>292</sup> Dewey's influence on the Realists was especially direct. As Schlegel explains, Dewey's series of lectures on pragmatism at Columbia Law School in 1922 started the intellectual engines of two important Realists, Charles Wheeler Cook and Underhill Moore.<sup>293</sup> "There is no God and Dewey is his prophet," Moore wrote to a friend in Columbia's math department.<sup>294</sup>

What was the philosophical pragmatism of James and Dewey? A full description would require a separate paper. For my purposes, it suffices to say that pragmatism had both destructive and reconstructive phases. In its destructive posture, pragmatism rejected formal (or "Aristotelian") logic, especially syllogistic reasoning, as the pathway to truth.<sup>295</sup> Pragmatism's reconstructive side reconceived truth as an empirical *process*.<sup>296</sup> An idea is "true" when it has been validated as true by experience—when it proves to have

<sup>290</sup> Indeed, the typical list of significant Realists includes only two professionally trained philosophers: Morris Cohen and his son Felix Cohen. See Joel R. Cornwell, *From Hedonism to Human Rights: Felix Cohen's Alternative to Nihilism*, 68 TEMP. L. REV. 197, 198 n.4 (1995). For (likely) the first attempt to generate a list of significant Realists, see generally Karl N. Llewellyn, *Some Realism About Realism — Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931). For a more recent list (which excludes Morris Cohen), see Leiter, *supra* note 238, at 269.

<sup>291</sup> Leiter, *supra* note 238, at 275.

<sup>292</sup> See WILFRID E. RUMBLE, JR., AMERICAN LEGAL REALISM 4-8 (1968); ROBERT SAMUEL SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 19-37 (1982); Roberta Kevelson, *Semiotics and Methods of Legal Inquiry: Interpretation and Discovery in Law from the Perspective of Peirce's Speculative Rhetoric*, 61 IND. L.J. 355, 357 (1986) ("James and Dewey are most often cited as the philosophical forebears of [the Realist movement] in American law . . .").

<sup>293</sup> SCHLEGEL, *supra* note 238, at 23-25.

<sup>294</sup> *Id.* at 25 (quoting Letter from Underhill Moore, Professor, Columbia Law Sch., to Cassius J. Keyser, Professor, Columbia Univ. (Feb. 6, 1924) (on file with Columbia University Rare Book and Manuscript Library)). Dewey's 1924 paper "Logical Method and Law" is an urtext for the Realist developments of the next decade and a half. See generally John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17 (1924).

<sup>295</sup> See William James, *The Present Dilemma in Philosophy*, in PRAGMATISM 3, 13-32 (1907); Dewey, *supra* note 294, at 21-22; see also SCHLEGEL, *supra* note 238, at 68-69.

<sup>296</sup> William James, *Pragmatism's Conception of Truth*, in PRAGMATISM, *supra* note 295, at 197, 201 ("Truth happens to an idea. . . Its verity is in fact an event, a process: the process namely of its verifying itself, its veri-fication.").

“cash value,” according to James’s famous phrase. This concept of truth allied pragmatism with the empirical aims of the natural sciences.<sup>297</sup>

As an applied pragmatism, Legal Realism likewise combined destructive and reconstructive phases.<sup>298</sup> The destructive phase of Realism attacked the formalism of “classical” or “mechanical” legal thought on the same grounds that philosophical pragmatism attacked formal logic—that it was, in the end, empty.<sup>299</sup> This is the Realism that bequeathed the principle of legal indeterminacy.<sup>300</sup> It is the Realism that, with Felix Cohen, rejected that the “vivid fictions and metaphors of traditional jurisprudence” were the genuine “reasons for [judicial] decisions, rather than poetical or mnemonic devices for formulating decisions reached on other grounds.”<sup>301</sup> The reconstructive phase of Realism can be seen in the empirical research projects of scholars who sought to discover how, when, and where the law actually works in the world.<sup>302</sup> We have already seen a principal example of Realism in this reconstructive mode: Clark’s study of trial court case processing.<sup>303</sup> Additional examples include Underhill Moore’s study of New Haven traffic patterns<sup>304</sup> and Karl Llewellyn’s work on Cheyenne law.<sup>305</sup>

As this Section explores, both phases of Realism contributed to the Realists’ warm reception of plea bargaining. Answers to the Progressives’ objections about “corruption” and “escape” come from the destructive side. Both objections, we will see, are premised on latent formalisms. With those objections set aside, plea bargaining’s efficiency loomed large in the pragmatic Realist mind.

<sup>297</sup> See Richard Rorty, *Dewey and Posner on Pragmatism and Moral Progress*, 74 U. CHI. L. REV. 915, 917 (2007); cf. Brian Leiter, *Science and Morality: Pragmatic Reflections on Rorty’s “Pragmatism,”* 74 U. CHI. L. REV. 929, 937 (2007) (responding to Rorty).

<sup>298</sup> These correspond to what Horwitz calls Realism’s two “faces.” See HORWITZ, *supra* note 238, at 209.

<sup>299</sup> See Robert W. Gordon, *American Law Through English Eyes: A Century of Nightmares and Noble Dreams*, 84 GEO. L.J. 2215, 2224 (1996) (book review).

<sup>300</sup> See *infra* notes 317-19 and accompanying text.

<sup>301</sup> See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 812 (1935).

<sup>302</sup> See generally, e.g., SCHLEGEL, *supra* note 238.

<sup>303</sup> See *supra* notes 246-78 and accompanying text.

<sup>304</sup> Underhill Moore & Charles C. Callahan, *Law and Learning Theory: A Study in Legal Control*, 53 YALE L.J. 1, 3 (1943); see also SCHLEGEL, *supra* note 238, at 115-46.

<sup>305</sup> K.N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* 20-29 (1941).



### 1. Answering Objections

We have seen that the authors of the crime surveys worried that plea bargaining meant corruption (by prosecutors) and escape (by criminals).<sup>306</sup> We have also seen that the Realists did not share these concerns.<sup>307</sup> We come finally to the reason for divergence. From the Realist perspective, both Progressive objections are rooted in latent formalisms.<sup>308</sup>

Take first the Progressive concern about prosecutorial corruption. For the Progressives reformers, statistics indicating that prosecutors habitually accepted pleas to "lesser offenses" evidenced that they were discharging their duties corruptly or (at least) weakly.<sup>309</sup> The premise underlying this objection is that a prosecutor's duty is to pursue criminal activity to the full extent authorized by law. The Realists rejected the premise. For Arnold, the notion that prosecutors must prosecute crime mechanistically is the "ideal of Law Enforcement," which is useless as a guide for prosecutors. He quipped that telling prosecutors to prosecute all crime they encounter is akin to "directing a general to attack the enemy on all fronts at once."<sup>310</sup> Clark's *A Study of the Business of the Federal Courts*, for its part, lamented that there remained a "pretense that prosecuting attorneys are enforcing all laws impartially, instead of a recognition of the fact that they are concerned with the problem of public order, which is best served by concentrating on dangerous individuals."<sup>311</sup>

In place of the formalism of "full enforcement," the Realists offered what seemed to them a more modern normative principle: prosecutorial discretion. Extolling the rise of prosecutorial discretion at the expense of lay jurors, Hall wrote that discretion in criminal matters "is exercised . . . by men who, by virtue of their experience, are better qualified than laymen to function wisely."<sup>312</sup> Further trumpeting the virtues of prosecutorial discretion, Arnold argued that prosecutors "must look at the criminal law, not as something to be enforced because it governs society, but as an arsenal of weapons with which to incarcerate certain dangerous individuals who are bothering society."<sup>313</sup> Making deals with some of them is not just acceptable, but essential to avoid "clog[ging]

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<sup>306</sup> See *supra* Section II.C.

<sup>307</sup> See *supra* Section III.A.

<sup>308</sup> To be sure, the Progressives of the crime commissions were also fierce critics of classical legal theory. Pound was an early and important critic of *Lochner v. New York*, 198 U.S. 45 (1905), perhaps the high-water mark of the era of mechanical jurisprudence. See Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 479-81 (1909); see also HORWITZ, *supra* note 238, at 33-35. If my diagnosis of their objections to plea bargaining as rooted in formalism is right, it suggests that formalism is a difficult dragon to slay.

<sup>309</sup> See *supra* notes 176-88 and accompanying text.

<sup>310</sup> Arnold, *Law Enforcement*, *supra* note 279, at 9.

<sup>311</sup> AM. LAW INST., *supra* note 262, at 13-14.

<sup>312</sup> HALL, THEFT, LAW AND SOCIETY, *supra* note 285, at 119.

<sup>313</sup> Arnold, *Law Enforcement*, *supra* note 279, at 9.

the machinery with relentless prosecution of comparatively harmless persons.”<sup>314</sup>

Through Arnold, Hall, and Clark, the Realist answer to the objection of plea bargaining as corruption becomes clear: Plea bargaining means less than full enforcement by prosecutors. Where the Progressive reformers saw selective prosecution as evidence of corruption, the Realists saw it as prosecutorial discretion aimed, ironically enough, at goals the Progressives could have endorsed—individuating punishment and addressing criminals rather than crimes.<sup>315</sup>

What of the Progressives’ other concern—that plea bargaining allowed criminals to escape from the criminal justice system with less than their due punishment? The Realist answer here is subtler than the response to the corruption argument and sits not at but beneath the surface of the Realist commentary.

Like the corruption objection, the escape objection depends on a hidden premise—that there is a legally “correct” punishment. That is, the objection presumes that given the necessary inputs—the severity of the crime, the goals of punishment, the defendant’s history and characteristics, etc.—the “law,” like a mathematical function, will tell us what punishment this defendant should receive.<sup>316</sup> The Progressive complaint was that plea bargaining enabled criminals to dodge that legally indicated punishment.

This is precisely the sort of legal determinism that Realists rejected. As Leiter has shown, Realists’ claims about the “indeterminacy” of law are often overstated.<sup>317</sup> They did not, as is sometimes imagined, believe that judges decide cases based exclusively on their mood or their naked political preferences.<sup>318</sup> But Realists were committed to the view that in a range of cases, “legal” sources and methods cannot justify a “unique” decision.<sup>319</sup> That does not mean that legal sources and methods don’t matter—they do, by confining the judge to a limited range of options. What they often cannot do is narrow the judge’s decision set to a single, legally correct choice.

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<sup>314</sup> *Id.*

<sup>315</sup> *See supra* Section II.C.2.

<sup>316</sup> As we saw in Section II.C.2, the Progressives strongly favored “individualizing” punishment. *See supra* note 194 and accompanying text. That is not inconsistent with my claim in the text that a latent formalism lurked in their criticism of plea bargaining. The Progressives’ demand for individualized punishment can be understood as criticism of overly simplistic punishment functions that failed to account for important variables about a defendant and his circumstances.

<sup>317</sup> Leiter, *supra* note 238, at 268-69, 279-81.

<sup>318</sup> Jerome Frank is arguably an exception on this point. *See id.* at 269-70, 269 n.13. *See generally* JEROME FRANK, *LAW AND THE MODERN MIND* (1930).

<sup>319</sup> *See* Leiter, *supra* note 238, at 295.

Indeterminacy in this sense has implications for plea bargaining. As the reformers of the 1920s were beginning to understand—but as modern scholarship amply demonstrates—persuading defendants to forego trial depends on the existence of two distinct punishment regimes: a “lenient” regime for defendants who plead guilty and a “severe” regime for defendants convicted at trial.<sup>320</sup> If the “law” prescribes a “correct” level of punishment, as pre-Realist thought implicitly held, then a system of pleas is irreconcilable with law. Either the “severe” level has to be more severe than the “law” authorizes, or the “lenient” level has to be more lenient.

Indeterminacy opens another possibility—that *both* regimes are legally justifiable. The recidivist shoplifter might deserve a felony sentence in the state penitentiary, or he might deserve probation—either result can be justified and the “law” cannot definitively choose. When “lenient” and “severe” punishment can simultaneously be legitimate, the objection that plea bargaining necessarily means less-than-legitimate punishment falls away. That is, the lenient punishment given to a defendant who pleads guilty is just as “correct” as the severe sentence given to a defendant who stands trial and loses. There is no longer any contradiction between the sentencing concessions on which plea bargaining depends and the punishment the law demands.

## 2. Plea Bargaining and Experience

Having slayed the formalist objections to plea bargaining, it was uncomplicated for Realists to embrace its sheer efficiency. Plea bargaining does very well on that most important pragmatic criteria—it works. Criminals are convicted; dockets are decongested.<sup>321</sup> Recall Clark’s overall assessment of federal criminal justice: “The federal criminal courts present a smoothly working system . . . which reaches results quickly and efficiently.”<sup>322</sup> Thus, while the Realists parted ways with the Progressives over the latter’s objections to plea bargaining, the camps converged regarding plea bargaining’s upside.<sup>323</sup>

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<sup>320</sup> See, e.g., Albert W. Alschuler, Lafler and Frye: *Two Small Band-Aids for a Festering Wound*, 51 DUQ. L. REV. 673, 696-704 (2013).

<sup>321</sup> It was not lost on Realists that practicing lawyers, in contrast to the elite members of crime commissions, did not get worked up about bargaining. A survey sent to more than two hundred bar associations in the early 1930s tells the story. See Will Shafroth, *The Bar Reports on Some Phases of Criminal Law*, 20 A.B.A. J. 463, 463 (1934). Jerome Hall explained its findings: “[I]n great contrast with many evils in criminal law administration, [t]he policy of bargaining with the offender for a plea of guilty of a lesser offense is abused in scarcely more than one community out of ten.” HALL, THEFT, LAW AND SOCIETY, *supra* note 285, at 117 n.82 (quoting Shafroth, *supra*, at 463).

<sup>322</sup> AM. LAW INST., *supra* note 262, at 12; see also Arnold, *Law Enforcement*, *supra* note 279, at 18.

<sup>323</sup> See *supra* Section II.C.2. Beyond plea bargaining’s efficiency, Arnold praised the opportunities it offered for the “individualization of punishment.” Arnold, *Progress Report*, *supra* note 257, at 801.

As we saw when we considered *A Study of the Business of the Federal Courts*, the disagreement between the Progressives and Realists was interpretive, not (just) factual.<sup>324</sup> It was the difference in attitudes between “it works, but” and “it works!” At a higher level of abstraction, the disagreement reflects two ways to respond to a gap between the “law on the books” and the “law in action.” For Pound, a deviation between the law as written and the law on the ground signifies pathology that must be repaired.<sup>325</sup> “It is the work of lawyers,” Pound wrote, “to make the law in action conform to the law in the books . . . by making the law in the books such that the law in action can conform to it . . . .”<sup>326</sup> Criminal justice provides a ready example. The Progressives saw an enormous chasm between the criminal law on the books—a law of trials and legislatively determined punishment—and the criminal law in action—a law of pleas and prosecutor-determined punishment.<sup>327</sup> For them, the gap meant that the criminal justice system was fundamentally unsound.

The Realists saw the same chasm between the criminal law on the books and the criminal law in action, but a different response was available to them. If the law on the books and the law in action don’t match, a Realist could say, stop worrying so much about what the books say.<sup>328</sup> Just so in criminal justice. Clark, Arnold, and Hall were far less worried than Pound and Moley were that plea bargaining produced a different criminal process than anyone had previously understood. It worked. For them, that was enough.

#### IV. PLEA BARGAINING AS NEW NORMAL

We have seen two very different reactions to plea bargaining. The first reaction—that of many of the Progressive reformers who led the crime commissions that discovered the phenomenon in the first place—was apprehension. They feared that plea bargaining reflected corruption by prosecutors and permitted offenders to escape with less punishment than the law prescribed. The second reaction—that of the Realists—was basically the opposite. Rejecting the latent, formalist assumptions upon which the Progressives’ objections depended, they embraced plea bargaining’s efficient disposal of criminal cases.

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<sup>324</sup> See *supra* notes 276-78 and accompanying text.

<sup>325</sup> See generally Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).

<sup>326</sup> *Id.* at 36.

<sup>327</sup> See *supra* Section II.A-II.B; see also Miller, *supra* note 145, at 1.

<sup>328</sup> Cf. HORWITZ, *supra* note 238, at 174 (“Pound’s attachment to the law in the books, Llewellyn wrote” in his exchange with Pound in the *Harvard Law Review* “was ‘central to his thinking about law’ and showed ‘a tendency toward idealization of some portion of the *status quo* at any given time.”) (quoting Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 434 (1930)); Fenster, *supra* note 13, at 517 (concluding that Arnold argued for “trust[ing] the law in action rather than the law on the books”).

The question that remains is simple: Which reaction prevailed? The answer will come as no surprise. The normalization of plea bargaining in the decades after the 1930s implies that the Realists' views carried the day. "To some extent," the adage goes, "we are all realists now."<sup>329</sup> While the adage is perhaps oversimplified,<sup>330</sup> it is not wrong.

This Part explores the legal profession's attitude towards plea bargaining in the middle decades of the twentieth century. I end this Part, and the story as a whole, in the late 1960s (and in the case of the Supreme Court, 1970). I choose this ending point not only because plea bargaining had become normal but also because it marks the transition to modern plea bargaining scholarship.<sup>331</sup> Section IV.A introduces the principal mid-century work on plea bargaining and argues that it was infused more with the Realists' rebuttals to the Progressive objections than with the objections themselves. Section IV.B returns to the

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<sup>329</sup> Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 467 (1988) (book review).

<sup>330</sup> See Michael Steven Green, *Legal Realism As Theory of Law*, 46 WM. & MARY L. REV. 1915, 1917 (2005); Leiter, *supra* note 238, at 267.

<sup>331</sup> There is obviously no sharp cut-off between "modern" plea bargaining scholarship and what came before. An arguable starting point for modern scholarship is Donald Newman's book, *Conviction*. See generally DONALD J. NEWMAN, *CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL* (Frank J. Remington ed., 1966). Samuel Walker argues that *Conviction* "launched serious discussion of the subject." Samuel Walker, *Origins of the Contemporary Criminal Justice Paradigm: The American Bar Foundation Survey, 1953-1969*, 9 JUST. Q. 47, 68 (1992). Another potential starting point is Alschuler's series of articles beginning in 1968 that reported on interviews he conducted with defense lawyers, prosecutors, and trial judges. See generally Alschuler, *The Defense Attorney's Role in Plea Bargaining*, *supra* note 21; Alschuler, *The Prosecutor's Role in Plea Bargaining*, *supra* note 9; Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059 (1976) [hereinafter Alschuler, *The Trial Judge's Role in Plea Bargaining*]. Alschuler's articles made the reality of plea bargaining visible for all to see. Richard Lippke describes them (along with Alschuler's other work) as the "bible" of plea bargaining scholarship. RICHARD L. LIPPKE, *THE ETHICS OF PLEA BARGAINING*, at vii (2011). Since the 1970s, academic output on plea bargaining has exploded. See, e.g., Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 36 (2002). Scholars in and outside of law schools have praised plea bargaining, see Frank H. Easterbrook, *Criminal Procedure As a Market System*, 12 J. LEGAL STUD. 289, 289 (1983); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2121 (1998); Scott & Stuntz, *supra* note 2, at 1910-11; condemned it, see Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 937-48 (1983); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1037 (1984); offered proposals to reform it, see Ortman, *Second-Best Criminal Justice*, *supra* note 20 (reviewing a variety of recent plea bargaining reform proposals); and applied a plethora of interdisciplinary techniques to better understand it, see Wright & Miller, *supra*, at 36 n.15 (noting that plea bargaining scholarship has drawn on "history, moral philosophy, economic theory, journalism, and other disciplines").

objection that the Progressives had (largely) missed—that plea bargaining is coercive. That objection *was* robustly asserted in these decades, but it was too late.

#### A. *The Mid-Century View of Plea Bargaining*

In 1968, Albert Alschuler wrote that while “observers recognize that the guilty-plea system is in need of reform,” nonetheless the “legal profession now seems as united in its defense of plea negotiation as it was unified in opposition” when it was discovered in the 1920s.<sup>332</sup> Though elite legal opinion about plea bargaining was not monolithic, the attitude that Alschuler described—that plea bargaining is *mostly* a force for good—dominated mid-century discourse.<sup>333</sup>

This upbeat (but with reservations) attitude towards plea bargaining is reflected in the work of the two major criminal justice surveys completed in this era. The first was conducted in the mid-1950s by the American Bar Foundation, a research offshoot of the ABA,<sup>334</sup> though the results were not published until they became the foundation for Donald Newman’s 1966 book, *Conviction: The Determination of Guilt or Innocence Without Trial*.<sup>335</sup> The second survey, *The Challenge of Crime in a Free Society*, was published in 1967 by the President’s Commission on Law Enforcement and Administration of Justice (commonly known as the “Katzenbach Commission”).<sup>336</sup> Both spoke favorably of plea bargaining. In *Conviction*, Newman contended that the plea bargaining process, while in need of reforms around the edges, produced accurate results and was “necessary to administration if a steady flow of guilty pleas is to be maintained.”<sup>337</sup> The Katzenbach Commission likewise expressed that the “negotiated guilty plea serves important functions,” though it acknowledged that it “can be subject to serious abuses.”<sup>338</sup>

How did writers in this period explain their generally positive outlook on plea bargaining? In part, they frankly recognized that negotiated pleas serve the

<sup>332</sup> Alschuler, *The Prosecutor’s Role in Plea Bargaining*, *supra* note 9, at 51.

<sup>333</sup> See, e.g., Donald J. Newman, *Pleading Guilty for Considerations: A Study of Bargain Justice*, 46 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 780, 788 (1956) (observing “generally favorable attitude toward bargaining processes on the part of the lawyers” in jurisdictions that he had studied); Harold Cohen, Note, *The Nolle Prosequi and the Lesser Plea*, 33 CORNELL L.Q. 407, 409 (1948) (“[I]t is generally agreed among those concerned with the enforcement of laws governing criminals that [plea bargaining] is necessary and desirable.”).

<sup>334</sup> The impetus for the survey was the ABA’s belief that the report of the Wickersham Commission was out of date. See Lloyd Ohlin, *Surveying Discretion by Criminal Justice Decision Makers*, in DISCRETION IN CRIMINAL JUSTICE 1, 5 (Lloyd E. Ohlin & Frank J. Remington eds., 1993).

<sup>335</sup> NEWMAN, *supra* note 331.

<sup>336</sup> KATZENBACH COMMISSION, *supra* note 7.

<sup>337</sup> NEWMAN, *supra* note 331, at 39.

<sup>338</sup> KATZENBACH COMMISSION, *supra* note 7, at 135.

private interests of both sides in criminal litigation. The Katzenbach Commission summarized this perspective when it wrote that the guilty plea system

relieves both the defendant and the prosecution of the inevitable risks and uncertainties of trial. It imports a degree of certainty and flexibility into a rigid, yet frequently erratic system. The guilty plea is used to mitigate the harshness of mandatory sentencing provisions and to fix a punishment that more accurately reflects the specific circumstances of the case than otherwise would be possible under inadequate penal codes.<sup>339</sup>

When it came to justifying plea bargaining's usefulness to *society*, as distinct from its usefulness to litigants, mid-century writers argued that plea bargaining is necessary lest the criminal justice system collapse under its own weight. "It is a reasonable speculation," Murray Schwartz wrote in a 1961 casebook, "that if every defendant elected to stand trial, the judicial process would quickly break down as a result of the clogged calendar and inordinate expense."<sup>340</sup> Comparing the number of felony indictments in New York County each year (four thousand) to the number of judges available to hear those cases (seven), lawyer Robert Polstein observed in 1962 that it is a "physical impossibility . . . to try each case."<sup>341</sup> The staff of the Katzenbach Commission appears to have agreed that plea bargaining had achieved necessity status, writing in a Task Force Report that "[o]ur system of criminal justice has come to depend upon a steady flow of guilty pleas."<sup>342</sup>

Charles Breitell, a New York judge, wrote in 1960 that while the practice of "accepting lesser pleas" was "almost universally used," it was also "much-maligned."<sup>343</sup> The reservations were of two main types. One was a growing concern that the practice of inducing guilty pleas might not be fully voluntary; that issue is taken up in the next Section. The other was a lingering nervousness that plea bargaining might entail undue leniency for criminals. As the Katzenbach Commission's Task Force Report noted, "[f]ew practices in the

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<sup>339</sup> *Id.*; see NEWMAN, *supra* note 331, at 29; LESTER BERNHARDT ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* 300 (1947).

<sup>340</sup> MURRAY L. SCHWARTZ, *CASES AND MATERIALS ON PROFESSIONAL RESPONSIBILITY AND THE ADMINISTRATION OF CRIMINAL JUSTICE* 27 (1961).

<sup>341</sup> Robert Polstein, *How to "Settle" a Criminal Case*, 8 *PRAC. LAW.* 35, 36 (1962).

<sup>342</sup> TASK FORCE ON THE ADMIN. OF JUSTICE, *THE PRESIDENT'S COMM'N ON LAW ENF'T & THE ADMIN. OF JUSTICE, TASK FORCE REPORT: THE COURTS* 10 (1967); see also ERNST W. PUTTKAMMER, *ADMINISTRATION OF CRIMINAL LAW* 171 (1953) ("To permit this procedure has certain practical advantages so great that it can hardly be forbidden."). The Katzenbach Commission itself concurred, observing that the "quality of justice in all cases would suffer if overloaded courts were faced with a great increase in the number of trials." KATZENBACH COMMISSION, *supra* note 7, at 135. ,

<sup>343</sup> Charles D. Breitell, *Controls in Criminal Law Enforcement*, 27 *U. CHI. L. REV.* 427, 432 (1960).

system of criminal justice create a greater sense of unease and suspicion than the negotiated plea of guilty” because the “correctional needs of the offender and legislative policies reflected in the criminal law appear to be sacrificed to the need for tactical accommodations between the prosecutor and defense counsel.”<sup>344</sup> Yet while this “unease” apparently lingered in the minds of the general public,<sup>345</sup> contemporaneous work on plea bargaining showed that it was an illusion. *The Challenge of Crime in a Free Society* explained that plea bargaining “imports a degree of certainty and flexibility into a rigid, yet frequently erratic system” by “mitigat[ing] the harshness of mandatory sentencing provisions” and “fix[ing] a punishment that more accurately reflects the specific circumstances of the case than otherwise would be possible under inadequate penal codes.”<sup>346</sup> What the layman saw as “leniency,” the Katzenbach Commission suggested, was actually just the system adapting inflexible statutes to fit particular cases.

The persistent unease about leniency notwithstanding, there was no significant resurgence of the Progressive hostility to plea bargaining.<sup>347</sup> That is because the Realists’ rebuttals to the Progressives’ objections to plea bargaining not only held, but became entrenched. Take first the Progressives’ objection that plea bargaining reflects prosecutorial corruption because accepting a plea to a lesser offense is something less than full enforcement of the criminal law.<sup>348</sup> The Realists’ rebuttal, as we saw in Part III, was to attack the “ideal of law enforcement” as an empty formalism.<sup>349</sup> A prosecutor’s job, the Realists insisted, is not to prosecute all technical “crime” that comes to his attention without exercising judgment or discretion; it is to prevent and correct social disorder.

The Realists’ rejection of “full enforcement” as an ideal was sustained in the mid-twentieth century. Consider then—Attorney General Robert Jackson’s famous 1940 speech to United States Attorneys: “Law enforcement is not automatic,” he told the prosecutors.<sup>350</sup> “[N]o prosecutor,” the future Justice went

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<sup>344</sup> TASK FORCE ON THE ADMIN. OF JUSTICE, *supra* note 342, at 9.

<sup>345</sup> Though slightly outside our time period, a 1975 public opinion survey in Michigan revealed that 21% of the public approved of plea bargaining, 70% disapproved, and 9% lacked an opinion. See DAVID FOGEL, “. . . WE ARE THE LIVING PROOF . . .”: THE JUSTICE MODEL FOR CORRECTIONS, app. III, at 310 (Anderson Publ’g Co. 1979) (1975).

<sup>346</sup> KATZENBACH COMMISSION, *supra* note 7, at 135.

<sup>347</sup> To be sure, exceptions do exist. *E.g.*, ORFIELD, *supra* note 339, at 299 (“The common criticism has ascribed the waivers to political and corrupt influences.”). Such objections, however, carried far less weight than they had in the earlier time period.

<sup>348</sup> See *supra* notes 176-88 and accompanying text.

<sup>349</sup> See *supra* note 315 and accompanying text.

<sup>350</sup> Robert H. Jackson, Att’y Gen., U.S. Dep’t of Justice, Address at the Second Annual Conference of United States Attorneys: The Federal Prosecutor 4 (Apr. 1, 1940),



on, “can even investigate all of the cases in which he receives complaints.”<sup>351</sup> Jackson’s point was echoed by the Task Force Report by the Katzenbach Commission staff. “[I]n many cases,” the staff observed, “effective law enforcement does not require punishment or attachment of criminal status, and community attitudes do not demand it.”<sup>352</sup> On the academic side too, the American Bar Foundation’s crime survey explicitly distinguished its working assumption about the prosecutorial function and the assumption of the surveys of the 1920s. “Unlike the early crime surveys,” the American Bar Foundation’s research director explained years later, “the ABF research did not start with an assumption that prosecutors ought to charge to the full extent of the law . . . .”<sup>353</sup> Because the “ideal of Law Enforcement” did not make a comeback, neither did the Progressive objection that plea bargaining is evidence of prosecutorial corruption.

The other major Progressive objection was that plea bargains depart from the level of punishment that the “law” prescribes.<sup>354</sup> We saw in Part III that this objection runs into the Realist insight that there is no rule of decision that can take the legally relevant inputs—here, the defendant’s crime, his criminal history, his prospects for rehabilitation, etc.—and derive a uniquely correct punishment.<sup>355</sup> This insight, I argued in Part III, helped to legitimate the practice of sentencing defendants who plead guilty differently than defendants convicted at trial.

The perception that it is appropriate to sentence defendants differently depending on their mode of conviction became thoroughly entrenched in the middle decades of the century. This can be seen in the fiction that people—and on this point judges are key—relied on to justify “lenient” sentences for defendants who pled guilty. Many mid-century judges believed that a defendant who pleads guilty deserves less punishment than one who stands trial because, as Judge John King of Connecticut wrote in 1951, he shows “an appreciation of his obligations as a member of society and his consideration for the public, in contrast to the antisocial attitude necessarily manifested by the commission of a crime.”<sup>356</sup> By pleading guilty, that is, he signals remorse for the crime and begins his repentance. In 1956, the *Yale Law Journal* published the results of a survey

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<https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf>  
[<https://perma.cc/J7MP-BSR8>].

<sup>351</sup> *Id.*

<sup>352</sup> TASK FORCE ON THE ADMIN. OF JUSTICE, *supra* note 342, at 5.

<sup>353</sup> Frank J. Remington, *The Decision to Charge, the Decision to Convict on a Plea of Guilty, and the Impact of Sentence Structure on Prosecution Practices*, in DISCRETION IN CRIMINAL JUSTICE, *supra* note 334, at 73, 85-86.

<sup>354</sup> See *supra* notes 165-75 and accompanying text.

<sup>355</sup> See *supra* notes 316-20 and accompanying text.

<sup>356</sup> John H. King, *Criminal Procedure from the Viewpoint of the Trial Judge*, 25 CONN. B.J. 202, 205 (1951).

sent to federal district judges seeking their views on sentencing concessions for guilty pleas.<sup>357</sup> Two-thirds of the respondents acknowledged that a defendant's plea was a relevant consideration in passing sentence.<sup>358</sup> The "predominant basis" for taking a guilty plea into account, according to these federal judges, was that a "guilty plea demonstrates the readiness of the accused to accept responsibility for his criminal acts."<sup>359</sup>

The problem with this justification for "reduced" punishment is that it is a transparent fiction, as the Progressives had explained decades earlier.<sup>360</sup> Moley had seen through it, writing (as quoted above) that this was a "point that the layman sometimes misses."<sup>361</sup> Apparently, mid-century judges had joined Moley's laymen. Some defendants might plead guilty out of remorse, but in a system that offered sentencing inducements for guilty pleas, there was no reason to believe that remorse was the norm.<sup>362</sup>

Judges could justify lenient punishment for defendants who plead guilty, but some could also justify increased punishment for defendants who insisted on trial. The logic here was that putting the court, the prosecution, the witnesses, and the jury through the time-consuming ordeal of trial was, for a defendant who knew that he was guilty all along, *itself* worth punishing.<sup>363</sup> Judge Irving Kaufman, then of the Southern District of New York (later elevated to the Second Circuit), explained this view at a judicial conference on sentencing in

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<sup>357</sup> Comment, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L.J. 204, 204 (1956).

<sup>358</sup> *Id.* at 206.

<sup>359</sup> *Id.* at 209. The remorse justification was not limited to judges. The ABA Advisory Committee on the Criminal Trial cited it in its Draft Standards Relating to Pleas of Guilty in 1967: "In addition, the plea provides a means by which the defendant may acknowledge his guilt and manifest a willingness to assume responsibility for his conduct." AM. BAR ASS'N PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY 2 (Tentative Draft 1967).

<sup>360</sup> See *supra* notes 147-48 and accompanying text; see also Alschuler, *The Prosecutor's Role in Plea Bargaining*, *supra* note 9, at 57 ("The defenders of the guilty plea process have therefore devised penological rationales—such as the notion that a guilty plea evidences a defendant's repentance—for treating defendants who plead guilty more leniently than defendants who go to trial.").

<sup>361</sup> MOLEY, POLITICS AND CRIMINAL PROSECUTION, *supra* note 84, at 157.

<sup>362</sup> The *Yale Law Journal* editors had no trouble picking apart the position of their survey respondents. See Comment, *supra* note 357, at 210 ("[T]he very fact that a defendant realizes a guilty plea may mitigate punishment impairs the value of the plea as a gauge of character.").

<sup>363</sup> See NEWMAN, *supra* note 331, at 29 ("[T]here is indication that many judges do feel that greater leniency should be shown the guilty plea defendant than one who has put the state to the time and expense of full proof at trial."); Comment, *supra* note 357, at 217-18 ("Some judges reported that a defendant pleading not guilty was awarded a more severe sentence than a defendant pleading guilty only if the court felt that the demand for trial was not made in good faith but was essentially a dilatory tactic.").

1959.<sup>364</sup> “[W]hy should the defendant who . . . gambles on a jury verdict,” Kaufman asked rhetorically, “be given the same treatment as the defendant who does not gamble, who does not take his chance, who does not attempt to confuse the jury, but rather stands up and admits his guilt?”<sup>365</sup> An unnamed Chicago trial judge was more explicit. After telling a defense lawyer that his client would receive a twenty-year prison sentence if he was convicted at trial (versus a two-to-five-year sentence if he pled), the judge explained: “He takes some of my time—I take some of his. That’s the way it works.”<sup>366</sup> For these judges, exercising the right to trial was, at least under certain conditions, a punishable act.<sup>367</sup> Their attitude is strong evidence that the pre-Realist ideal—that a defendant’s proper sentence was a determinable function of the nature of his crime, his criminal history, and his prospect for rehabilitation—was not coming back.

### B. *Whither Coercion (Reprise)*

In the last Section, we saw that the Progressives’ objections to plea bargaining did not rematerialize in a significant way during the middle decades of the twentieth century. The Realist rebuttal had held. But that does not mean that the commentators of the mid-twentieth century saw plea bargaining as an unmitigated boon. Recall Judge Breitel’s assertion that plea bargaining was “much-maligned” even as it was “almost universally used.”<sup>368</sup> If mid-century observers were not particularly worried about the Progressives’ objections, what was their hang up?

The middle decades of the twentieth century saw the emergence of a different concern with plea bargaining—that guilty pleas induced by sentencing concessions might not be voluntary.<sup>369</sup> To be sure, this concern was not entirely new.<sup>370</sup> But it was in the mid-twentieth century that worries about the voluntariness of plea bargaining were finally advanced in a vigorous—though, we will see, ineffectual—manner.

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<sup>364</sup> Pilot Institute on Sentencing, Proceedings, 26 F.R.D. 231, 288 (1959).

<sup>365</sup> *Id.*

<sup>366</sup> Alschuler, *The Trial Judge’s Role in Plea Bargaining*, *supra* note 331, at 1089.

<sup>367</sup> For a contemporaneous critique of this view, see Comment, *supra* note 357, at 218 (“It is questionable whether a not guilty plea can ever be fairly deemed ‘dilatatory,’ since it accords with the presumption of innocence which the prosecution must rebut beyond a reasonable doubt.”).

<sup>368</sup> Breitel, *supra* note 343, at 432.

<sup>369</sup> *E.g.*, PUTTKAMMER, *supra* note 342, at 171 (“[Plea bargaining] may even be used to coerce a plea of guilty to a small offense out of a defendant conscious of his innocence but still afraid of the possibility of an unjust conviction on the larger charge.”); Comment, *supra* note 357, at 220 (“The greatest danger inherent in the policy of utilizing the plea as a factor in sentencing is that innocent men will be influenced to plead guilty.”).

<sup>370</sup> See *supra* notes 207, 216-18 and accompanying text.

Both of the major mid-century criminal justice surveys recognized that sentencing inducements might coerce defendants—including innocent defendants—to plead guilty, and they identified that as a concern.<sup>371</sup> But perhaps the most robust attack on the coerciveness of induced guilty pleas during these years was written in 1951 by Samuel Dash.<sup>372</sup> Dash, then a young lawyer fresh out of Harvard Law School, would later become famous as chief counsel to the Senate Watergate Committee.<sup>373</sup> Dash spent five months watching the daily proceedings of the criminal branch of the Chicago Municipal Court.<sup>374</sup> He was shocked by what he saw. “Today, in the criminal courts, and particularly in the lower criminal courts,” Dash wrote, “there is bungling, and as a result, there is very little justice.”<sup>375</sup> Plea bargaining, he declared, was the “most important contributor to injustice in the Municipal Court today.”<sup>376</sup> This was in large measure because prosecutors and judges extracted pleas from often unrepresented defendants. “The methods used by the prosecutor and the judge to obtain a plea of guilty to a lesser charge from an unrepresented defendant,” Dash explained, “often amount to downright coercion performed in open court.”<sup>377</sup> Dash recounted one case he observed where the prosecutor had browbeaten the defendant. “Don’t be a fool,” the prosecutor told the defendant, “if you buck us you will wait six months in jail for your trial. Now if you take a plea, you’ll get six months and at the end of that time you will be a free man.”<sup>378</sup> The defendant took the deal.<sup>379</sup> Dash thought that “[u]nquestionably there are innocent men who have pleaded guilty to a misdemeanor from fear of being ‘railroaded’ to the penitentiary for a long period of years.”<sup>380</sup>

With Dash, we at last have a forceful criticism of plea bargaining’s coerciveness. The criticism implicates legal questions in addition to obvious moral and policy ones. Since at least 1927, the Supreme Court had made it clear that “a plea of guilty shall not be accepted unless made voluntarily.”<sup>381</sup> Were

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<sup>371</sup> See KATZENBACH COMMISSION, *supra* note 7, at 135 (“There are . . . real dangers that excessive rewards will be offered to induce pleas or that prosecutors will threaten to seek a harsh sentence if the defendant does not plead guilty.”); NEWMAN, *supra* note 331, 22-31 (devoting full chapter to the “Concern for Consent” in plea bargaining).

<sup>372</sup> Samuel Dash, *Cracks in the Foundation of Criminal Justice*, 46 ILL. L. REV. 385, 392-405 (1951).

<sup>373</sup> See Warren E. Leary, *Samuel Dash, Chief Counsel for Senate Watergate Committee, Dies at 79*, N.Y. TIMES, May 30, 2004, at 33.

<sup>374</sup> Dash, *supra* note 372, at 385 n.\*.

<sup>375</sup> *Id.* at 386.

<sup>376</sup> *Id.* at 392.

<sup>377</sup> *Id.* at 393.

<sup>378</sup> *Id.*

<sup>379</sup> *Id.*

<sup>380</sup> *Id.*

<sup>381</sup> *Kercheval v. United States*, 274 U.S. 220, 223 (1927).

guilty pleas induced by sentencing differentials “voluntary” in the relevant sense? In the middle decades of the twentieth century, there was reason to think that maybe they were not. In areas outside of criminal procedure, the unconstitutional conditions doctrine prohibits governments from offering benefits in exchange for waivers of constitutional rights.<sup>382</sup> Even more to the point, in an 1897 case, *Bram v. United States*,<sup>383</sup> the Supreme Court ruled that a confession is not voluntary if it was “extracted by any sort of threats” or “obtained by any direct or implied promises, however slight.”<sup>384</sup>

The unconstitutional conditions doctrine and the *Bram* holding cast a legal shadow over guilty pleas induced by sentencing differentials.<sup>385</sup> In 1957, a Fifth Circuit panel followed the constitutional logic to its natural conclusion in *Shelton v. United States*,<sup>386</sup> ruling that guilty pleas induced by promises of lenient sentences are indeed involuntary and adding for good measure that “[j]ustice and liberty are not the subjects of bargaining and barter.”<sup>387</sup> The panel’s ruling, with its sweeping implications for the practice of plea bargaining, was quickly reversed by the Fifth Circuit sitting en banc.<sup>388</sup> When Mr. Shelton asked the Supreme Court to grant certiorari, the Solicitor General, who could easily have seen that this was a dangerous case, confessed error on a narrow technical issue.<sup>389</sup>

Of course, the Solicitor General’s confession of error in *Shelton* could not forestall the legal question forever. Nor could it evade the moral and policy questions that Dash (among others) had raised. We have seen that commentators of this era generally approved of plea bargaining.<sup>390</sup> How, then, did they deal with these questions?

They papered them over. In this they were joined by the Supreme Court, which in its 1970 decision in *Brady v. United States*<sup>391</sup> eliminated, in substance

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<sup>382</sup> See generally Jason Mazzone, *The Waiver Paradox*, 97 NW. L. REV. 801, 801 (2003).

<sup>383</sup> 168 U.S. 532 (1897).

<sup>384</sup> *Id.* at 542-43 (quoting 3 RUSSELL ON CRIME 478 (Horace Smith & A.P. Perceval Keep eds., 6th ed. 1896)).

<sup>385</sup> See *In re Buccheri*, 431 P.2d 91, 99 (Ariz. Ct. App. 1967) (“If pleas of guilty are to be equated with confessions insofar as ‘coercion’ is concerned, then pleas of guilty involving plea-bargaining in any degree cannot stand the test.”).

<sup>386</sup> 242 F.2d 101 (5th Cir. 1957), *rev’d en banc*, 246 F.2d 571, *rev’d*, 356 U.S. 26 (1958).

<sup>387</sup> *Id.* at 113.

<sup>388</sup> *Shelton v. United States*, 246 F.2d 571, 573 (5th Cir. 1957) (en banc).

<sup>389</sup> See *Shelton v. United States*, 356 U.S. 26, 26 (1958) (per curiam); see also Alschuler, *Plea Bargaining and Its History*, *supra* note 11, at 35-37 (explaining that Solicitor General confessed that the trial court erred by “fail[ing] to conduct an adequate inquiry when it accepted the defendant’s plea of guilty”).

<sup>390</sup> See *supra* Section IV.A and accompanying text.

<sup>391</sup> 397 U.S. 742 (1970).

but not in name, the voluntariness requirement for in-court confessions.<sup>392</sup> After *Brady* and the cases that followed it, a guilty plea would be considered “voluntary” so long as the defendant was represented by counsel, understood the plea’s consequences, and was not threatened with physical force (aside from the force inherent in incarceration).<sup>393</sup>

Commentators and the Court adopted a multipronged rationalization strategy. Part of it was to devolve the question of voluntariness to trial judges. Thus the Court in *Brady* noted its “expectation[] that courts will satisfy themselves that pleas of guilty are voluntarily and intelligently made.”<sup>394</sup> The Katzenbach Commission likewise wrote that a trial judge “must decide whether undue pressure has been put on the defendant to plead guilty.”<sup>395</sup> The Commission’s report recognized that the “decision is admittedly an extremely difficult one to make,” but that comment understates the degree of difficulty.<sup>396</sup> Considering that, after *Brady*, voluntariness was no longer a meaningful prerequisite for a guilty plea (absent evidence of extrajudicial threats of violence), what exactly was a trial judge supposed to be on the lookout for?<sup>397</sup>

But the paramount element of the rationalization strategy was to conjure a distinction between “promises” of leniency for guilty pleas, which were permissible, from “threats” of severity for trials, which—for some—were not.<sup>398</sup> Newman articulated the “distinction” crisply: “While threats, force, or other forms of coercion are clearly improper at all stages of the criminal justice process, inducement by a promise of leniency is a common administrative practice throughout the criminal justice system . . . .”<sup>399</sup> The Supreme Court in *Brady* struck a similar note, writing that it “cannot hold that it is unconstitutional

<sup>392</sup> See *id.* at 758 (holding that guilty plea made to avoid the death penalty was voluntary); see also Albert W. Alschuler, *The Supreme Court, the Defense Attorney, and the Guilty Plea*, 47 U. COLO. L. REV. 1, 55 (1975) [hereinafter Alschuler, *The Supreme Court, the Defense Attorney, and the Guilty Plea*]. *Bram* was eventually repudiated in *Arizona v. Fulminante*, 499 U.S. 279, 285 (1991).

<sup>393</sup> See Bowers, *supra* note 3, at 1086-87.

<sup>394</sup> *Brady*, 397 U.S. at 758.

<sup>395</sup> TASK FORCE ON THE ADMIN. OF JUSTICE, *supra* note 344, at 13.

<sup>396</sup> *Id.*

<sup>397</sup> Given the obvious parallel between out-of-court confessions and guilty pleas, it was particularly important to the Court in *Brady* to distinguish *Bram*. The Court purported to do so, insisting that “*Brady*’s situation bears no resemblance to *Bram*’s.” *Brady*, 397 U.S. at 754. According to the Court, this was true in part because, unlike *Bram*, *Brady* was represented by counsel. *Id.* at 754-55. As Alschuler has explained, this is a distinction without a difference. Alschuler, *The Supreme Court, the Defense Attorney, and the Guilty Plea*, *supra* note 392, at 55 (“A guilty plea entered at gunpoint is no less involuntary because an attorney is present to explain how the gun works.”).

<sup>398</sup> *But see supra* notes 363-67 and accompanying text (discussing practice of judges decreasing sentences when defendant avoided need for trial by pleading guilty).

<sup>399</sup> NEWMAN, *supra* note 331, at 28.

for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State.”<sup>400</sup>

There are sophisticated arguments to be had about whether there is a difference between threats and promises in plea bargaining, and more generally about whether (or under what conditions) plea bargaining is coercive.<sup>401</sup> Those are not found in the mid-century crime surveys or in the Court’s opinion in *Brady*. A meaningful distinction between threats and promises exists only when there is a normative baseline against which to evaluate departures.<sup>402</sup> If a defendant’s “proper” sentence is ten years, then we can say that any sentence of less than ten years is a concession, while any sentence of more than ten years is a penalty. Given the Court’s conclusion that plea offers represent promises and not threats, we can infer that it viewed the maximum sentence to which a defendant would be exposed at trial as the normative baseline.<sup>403</sup> Hence its assertion that plea bargaining is “inherent in the criminal law . . . because both the State and the defendant often find it advantageous to preclude the possibility of the maximum penalty authorized by law.”<sup>404</sup>

If one looks to *Brady* for an explanation of *why* the maximum sentence is the correct baseline, they will be disappointed. The normativity of post-trial sentences was the Court’s assumption, not the result of any careful reasoning.<sup>405</sup> If guilty pleas were the exception and trials were the rule, perhaps the assumption would have been justified. But in a system dominated by pleas—the Court estimated in *Brady* that between 90% and 95% of convictions were then by plea<sup>406</sup>—the normativity of post-trial sentences can hardly be assumed.<sup>407</sup> It was, moreover, a far-reaching assumption. Because criminal statutes often make extreme punishments theoretically available, the *Brady* baseline meant that there would effectively be no limit to the pressure a prosecutor could put on a defendant to plead guilty. So *Brady* did not *just* render the “voluntariness” of pleas substantively moot. By embracing the mid-century rationalizations, *Brady*

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<sup>400</sup> *Brady*, 397 U.S. at 753.

<sup>401</sup> See, e.g., ALAN WERTHEIMER, COERCION 122-43 (1987); Bowers, *supra* note 3, at 1091-113; Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 233-34 (2006); see also Albert W. Alschuler, *Constraint and Confession*, 74 DENV. U. L. REV. 957, 962-63 (1997).

<sup>402</sup> See Bowers, *supra* note 3, at 1092 (“Of course, this reasoning is all circular. . . . The determination of whether a proposal promises sticks or carrots depends upon the baseline against which benefits and threats are measured.”).

<sup>403</sup> *Brady*, 397 U.S. at 753; see also Bowers, *supra* note 3, at 1091.

<sup>404</sup> *Brady*, 397 U.S. at 751-52.

<sup>405</sup> See Bowers, *supra* note 3, at 1099.

<sup>406</sup> *Brady*, 397 U.S. at 752 n.10.

<sup>407</sup> See Bowers, *supra* note 3, at 1107-13.

took the courts completely out of the business of guarding against coercion in plea bargaining.<sup>408</sup>

The interesting question is thus not whether the mid-century surveys and the Court papered over plea bargaining's voluntariness problem, but *why* they did. They likely thought that there was no other choice. By 1966 (when *Conviction* was published) or 1970 (when the Court ruled in *Brady*), plea bargaining had existed for at least a century and had been widely known for almost half that time. It was, for the Court and commentators, too late for a wholesale challenge.<sup>409</sup> The criminal justice system was addicted to plea bargaining.<sup>410</sup>

Plea bargaining's perceived necessity—not a careful distinction between threats and promises—was the true principle surmounting the voluntariness problem.<sup>411</sup> Writers were sometimes candid on this point. Consider again the staff-authored Task Force Report of the Katzenbach Commission. The report explained the tension between induced pleas and the voluntariness requirement.<sup>412</sup> In the very next paragraph, it swept these concerns aside with the observation that “[o]ur system of criminal justice has come to depend upon a steady flow of guilty pleas.”<sup>413</sup> Newman was even more explicit. “The promise of leniency raises a difficult conceptual issue for the trial judge,” he wrote, because “an innocent defendant may accept leniency rather than risk conviction and a severe sentence.”<sup>414</sup> Without missing a beat, he continued: “Nevertheless, in the guilty plea process there is common use of charge and sentencing concessions in exchange for the plea of guilty.”<sup>415</sup>

For these writers, like for the Court in *Brady*, the *is* of plea bargaining justified the *ought*. The system could not work, they had concluded, without plea bargaining. But the system *must* work. That imperative justified clearing

<sup>408</sup> See *id.* at 1086 (explaining that, using *Brady*'s approach, “a charge supported by probable cause can never be coercive”).

<sup>409</sup> Alschuler, *Plea Bargaining and Its History*, *supra* note 11, at 40 (explaining that the Supreme Court upheld plea bargaining in a “series of decisions,” including *Brady*, “which implied that any other course would be unthinkable”).

<sup>410</sup> Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1119 (2011).

<sup>411</sup> The *Harvard Law Review*'s case note on *Brady* captured this point perfectly, observing that

[t]he Court seems unlikely to be able to distinguish on a principled basis those pressures inherent in plea bargaining from those pressures declared impermissible in earlier cases. *Brady* . . . can be reconciled with these earlier self-incrimination holdings only by candid recognition that the Court is willing to honor administrative needs to the detriment of constitutional rights if those needs seem compelling enough.

*The Supreme Court, 1969 Term*, 84 HARV. L. REV. 32, 152-53 (1970).

<sup>412</sup> TASK FORCE ON THE ADMIN. OF JUSTICE, *supra* note 342, at 10.

<sup>413</sup> *Id.*

<sup>414</sup> NEWMAN, *supra* note 331, at 28.

<sup>415</sup> *Id.*



obstacles in plea bargaining's path by whatever means necessary.<sup>416</sup> Plea bargaining's normalization was complete.<sup>417</sup>

#### CONCLUSION

Plea bargaining—and more to the point, ideas about plea bargaining—traveled a long way between the 1920s and the 1960s. A practice that came to the legal profession's attention as a dangerous deviation had become normal. What, in the end, does that transformation tell us about our criminal justice system? I conclude by offering three answers to that question.

First, if my interpretation of plea bargaining's normalization is correct, it means that the Legal Realists had a hand in shaping the ideology of American criminal justice. At the very least, it means that Realist ideas can be applied post hoc to *rationalize* the shape of our criminal justice system.<sup>418</sup> Either way, it is surprising that the Realists have any important place in this story.<sup>419</sup> Criminal procedure should be added to the list of legal fields stamped (for good or for ill) by Realist influence.

Second, the history identifies that in at least one respect, the process by which plea bargaining became normal was shockingly superficial.<sup>420</sup> The objections to plea bargaining posed by the Progressive reformers were not strong. That is not necessarily a criticism; they were, after all, the first to grapple with the phenomenon. Regardless, their objections were handled easily by the intellectual tools of Realism. The Progressive reformers mostly ignored the more forceful objection—that systemic plea bargaining depends on coerced guilty pleas.<sup>421</sup> By the time that objection was raised aggressively in the 1950s and 1960s, the sophisticated Realist defenders of plea bargaining had moved on. The objection was thus “answered” in the middle of the twentieth century by papering over concerns of voluntariness and coercion. That “answer,” moreover, cemented plea bargaining's status as the normal way of doing American criminal justice.

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<sup>416</sup> See generally Bowers, *supra* note 3, at 1143 (“In some cases the prosecutor wins; in other cases the defendant wins; but in all cases plea bargaining wins.”).

<sup>417</sup> See generally RACHEL ELISE BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* 130 (2019) (observing that in this period “the Supreme Court explicitly accepted plea bargaining as the new normal, even if it stood in sharp tension with the rest of the Court’s unconstitutional conditions jurisprudence and seemed to put an unlawful price on the exercise of the jury trial right”).

<sup>418</sup> See *supra* note 17.

<sup>419</sup> See *supra* note 13 and accompanying text.

<sup>420</sup> Barzun, *supra* note 17, at 88 (“The point of [some critical historical] accounts is to show that the historical factors that actually led to our current practice are much more sinister—or, at the very least, less well-reasoned—than we had thought.”).

<sup>421</sup> See *supra* Section II.D.

Finally, and most simply, the history is a reminder of the contingency of normalized plea bargaining.<sup>422</sup> It was not that long ago that the elite legal profession looked at plea bargaining and was repulsed. Because plea bargaining is taken for granted today, it's easy to forget that relatively recently it *was not* the normal way of doing criminal justice. Plea bargaining is less venerable than its current position atop American criminal justice implies.<sup>423</sup>

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<sup>422</sup> See Barzun, *supra* note 17, at 86 (“By what line of reasoning does the historical account offered undermine or challenge the status quo? . . . The most common answer is that historical accounts expose the *contingency* of the unexamined assumptions of legal practice.”).

<sup>423</sup> While counterfactuals are inherently speculative, it is interesting to consider what might have happened if the Progressive reformers *had* pressed an objection that plea bargaining is coercive. It seems unlikely that such an objection would have stopped plea bargaining's institutional momentum. See FISHER, *supra* note 5, at 1 (“[The battle for plea bargaining] was lost at least by the time prominent observers of the 1920s first lamented our ‘vanishing jury,’ and in some places it was lost decades before then.”). But it might have set plea bargaining on a different course. It would have fallen to the Realists to answer it in the first instance. Unlike the mid-century writers, it is doubtful that they would have regarded a defendant's maximum *theoretical* sentence as the appropriate baseline against which to distinguish threats from promises. That kind of formalistic thinking was not to their liking. Instead, the Realists might have adopted the empirically *typical* punishment for a crime as the baseline. That would have opened the door to what Professor Josh Bowers calls a “proportionality” approach to coercion. See Bowers, *supra* note 3, at 1118-23. A plea is coerced, according to this approach, when it is induced by a threat (or promise, if you will) of *atypical* punishment. *Id.* In a world governed by such a rule, prosecutors would be unable to threaten defendants with severe punishment in order to secure their guilty pleas. Back in our world—where Progressives did not push a coercion objection and the Realists did not respond to one—the door to proportionality stayed shut.

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