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Plea Bargaining and the Supreme Court

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PLEA BARGAINING AND THE SUPREME COURT

*Loftus E. Becker, Jr.**

*He knows not the law who knows not the reason thereof; and the known certainty of the law is the safety of all.*¹

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1. See 3 E. COKE, A SYSTEMATIC ARRANGEMENT OF LORD COKE'S FIRST INSTITUTE OF THE LAWS OF ENGLAND: ON THE PLAN OF SIR MATTHEW HALE'S ANALYSIS; WITH THE ANNOTATIONS OF MR. HARGRAVE, LORD CHIEF JUSTICE HALE, AND LORD CHANCELLOR NOTTINGHAM; AND A NEW SERIES OF NOTES AND REFERENCES TO THE PRESENT TIME: INCLUDING TABLES OF PARALLEL REFERENCE, ANALYTICAL TABLES OF CONTENTS, AND A COPIOUS DIGESTED INDEX 574 (J. Thomas, ed. 1818) (epilogue).

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I. INTRODUCTION

This is a study in reasons. Since at least the time of Lord Coke, it has been received wisdom in Anglo-American law that courts should write opinions for the purpose, among others, of explaining and justifying their decisions. The reasons for decision serve both to legitimate the decision and to provide a principled basis for the decision of later cases that may differ in one or more ways from cases already decided.

My thesis in this Article is that reasons are entirely absent from the Supreme Court's decisions on the troublesome question of bargained guilty pleas. When the Supreme Court first dealt directly with bargained pleas in 1970, in the now-famous *Brady* Trilogy,² it had developed a sub-

2. *Brady v. United States*, 397 U.S. 742 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); *Parker v. North Carolina*, 397 U.S. 790 (1970) [hereinafter referred to as the Trilogy].

stantial body of doctrine in apparently analogous areas which did not compel any particular conclusion about the constitutionality of plea bargaining. Nevertheless, it did provide a framework for analysis and suggested the questions that would be relevant to decision.

In *Brady v. United States*³ and its companion cases, however, the Court denied the relevance not merely of some but of all prior doctrine. Having determined that plea bargaining was a topic *sui generis*, unconnected with any prior constitutional experience, the Court then announced its conclusion that plea bargaining was constitutional and disposed of the cases before it. Although the Court agreed that guilty pleas were invalid if not "voluntary," its treatment of voluntariness cut that concept loose from its moorings in the law. The opinions are analytically incoherent. They clearly affirm the legitimacy of plea bargaining. However, they do not provide any adequate explanation for jettisoning the prior law on voluntariness, nor do they present anything explicit to replace the jettisoned concept.

This is not of itself a criticism of the Trilogy. When a new legal principle first clamors for recognition, it may be enough that the Court recognize the principle—clear elucidation of its contours can wait for another day. The history of the Court is replete with instances of new, valuable and productive legal doctrine first announced in obscure and even incoherent opinions.⁴ However, in the seventeen years since *Brady*, the Court has dealt with bargained guilty pleas in a variety of contexts. There has been ample time for public and professional comment, reflection and explanation.⁵ If plea bargaining is truly *sui generis*, a coherent

The Trilogy was originally a tetralogy, but the fourth case, *North Carolina v. Alford*, 400 U.S. 25 (1970) was set for reargument and decided early the following term.

3. 397 U.S. 742 (1970).

4. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to autonomy in deciding whether to bear children); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (right against state-imposed segregation); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (variable standard of review in nonracial equal protection cases); *Brown v. Mississippi*, 297 U.S. 278 (1936) (inadmissibility of coerced confessions). Cf. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 349-52 (1974) (wittily and eloquently making a similar point).

5. Quite a few professionals have commented—far too many to cite in any Article not intended as a bibliography. Particularly provocative commentary includes: M. FEELEY, *THE PROCESS IS THE PUNISHMENT* (1979); M. HEUMANN, *PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS* (1978); Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931 (1983); Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652 (1981); Church, *In Defense of "Bargain Justice,"* 13 LAW & SOC'Y REV. 509 (1979); Enker, *Perspectives on Plea Bargaining*, in PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, TASK FORCE REPORT: THE COURTS 108 (1967); O'Brien, *Plea Bargaining and the Supreme Court: The Limits of Due Process and Substantive Justice*, 9 HASTINGS CONST. L.Q. 109 (1981); Philips, *The Question of Voluntariness in the Plea Bargaining Contro-*

and principled body of doctrine should have developed by now around this unique subject.

It has not. Since the Trilogy, the Supreme Court's cases move irregularly in different directions, like drunks scattering from a bar. Principles announced in one case are forgotten or ignored in the next. The result has been law without reason. Reason could be supplied, but it never has been. Looking back to the empty Trilogy for their foundations, instead of using the passage of time to develop something solid, the later cases build upon foundations of sand. They remain inconsistent and incoherent.

The result of all this, as I hope to demonstrate, has been to leave plea bargaining in a kind of constitutional black hole. I shall first survey the law on voluntariness as it had developed by 1970. Prior law had established that a guilty plea was valid only if it was "voluntary."⁶ The Supreme Court's cases on voluntariness in the guilty plea context were ambiguous about the precise meaning of the term. They did, however, strongly imply that the standards for voluntariness of guilty pleas were at least as strict as the standards of voluntariness applied in other contexts. By the late 1960's, those standards had crystallized—an individual's actions were not constitutionally "voluntary" if they were the product of unconstitutional pressure or inducement from the government. A related line of cases had established that an inducement or pressure was unconstitutional if its only purpose was to discourage the exercise, or encourage the waiver of a constitutional right. Even if a pressure or inducement had other, legitimate purposes, if it had the effect of discouraging the exercise or encouraging the waiver of constitutional rights, it was unconstitutional unless it was necessary to achieve a governmental purpose of substantial importance. Since plea bargaining consists of inducements that have the purpose and effect of encouraging defendants to waive their rights to trial, under these cases a plea entered in order to obtain a sentencing concession would be "voluntary" only if the induce-

versy: *A Philosophical Clarification*, 16 LAW & SOC'Y REV. 207 (1981-82); Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984). Most of the commentary has been unfavorable. See Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1320, 1357-58 (1977).

6. The language has varied; the Court has said that a guilty plea must have "the character of a voluntary act," *Machibroda v. United States*, 368 U.S. 487, 493 (1962); that it must be "voluntary and knowing," *McCarthy v. United States*, 394 U.S. 459, 466 (1969), and that it must be "voluntarily made," *Boykin v. Alabama*, 395 U.S. 238, 242 (1969).

I will generally use "voluntariness" in this Article to refer to concepts of this kind, including both the "voluntary" and the "knowing" or "intelligent" aspects of the concept.

ments were necessary to achieve some governmental purpose of substantial importance.

I will then analyze the Trilogy in some detail, concluding that the Court scrapped existing law on voluntariness without any analytically adequate justification—indeed, with virtually no attempt at justification whatsoever. In addition, I hope to show that the Court provided no coherent analytical foundation in the Trilogy upon which to build a body of doctrine by which bargained pleas could be judged.

Following my analysis of the Trilogy, I will examine the Court's subsequent cases on plea bargaining, all of which look back to the Trilogy for guidance. However, the Trilogy offers no guidance, and the later cases remain analytically inconsistent and incoherent. Finally, I will briefly discuss some implications of a hint contained in the Trilogy but never developed—that the government may not offer inducements of a kind that are likely to lead innocent defendants to plead guilty. I will conclude that this principle, if applied to judge the validity of bargained pleas, could lead to the development of a body of law governing plea bargaining that would at least eliminate some of the worst potential for abuse.

II. DOCTRINAL DEVELOPMENT TO 1970

A. *A Brief Summary*

In 1970, when the Supreme Court considered the constitutionality of plea bargaining, it had available to it the product of nearly a century of increasingly frequent exposure to the problems of the criminal process. Federal criminal cases had become a familiar staple of the Court's diet since 1889:⁷ State criminal cases, long a mere drop in the bucket,⁸ be-

7. Federal criminal cases were not originally within the Supreme Court's jurisdiction on writ of error, although in rare instances they could be reviewed on certification of a division of opinion in the circuit court. *United States v. More*, 7 U.S. (3 Cranch) 159 (1805). See B. CURTIS, JURISDICTION, PRACTICE, AND PECULIAR JURISPRUDENCE OF THE COURTS OF THE UNITED STATES 82 (1880). The Act of February 6, 1889, allowed appeals in all cases where the defendant was convicted of a capital crime. Act of February 6, 1889, ch. 113, 25 Stat. 655 (1889). In 1891, Congress, inadvertently, allowed appeals in all cases in which the accused might have been sentenced to the penitentiary. See F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 109-10 (1928). See also *In re Classen*, 140 U.S. 200 (1891) (interpreting Act of March 3, 1891, ch. 517, 26 Stat. 826 (1891)). Since then, notwithstanding jurisdictional modifications, federal criminal cases have been an important part of the Court's docket.

8. Jurisdiction to review state court judgments has never depended on characterization of the judgment as "civil" or "criminal." E.g., *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821). But these cases became a substantial part of the Court's docket only after the growth of a body of law which made the Constitution relevant to a significant number of state criminal cases.

came a trickle after 1936 and became a substantial river by 1969.⁹

1. Guilty pleas

Nevertheless, the Court had given relatively little judicial consideration to pleas of guilty.¹⁰ Like convictions after trial, convictions on pleas of guilty may be directly appealed—but they rarely are.¹¹ Collateral at-

9. The Supreme Court had reviewed (and even reversed) occasional state criminal cases before 1936. But in that year, the Court decided *Brown v. Mississippi*, 297 U.S. 278, 287 (1936) and held that state criminal convictions were reviewable under the due process clause when they involved coerced confessions. *Brown* became a fertile source of claims of error. See generally Amsterdam, *The Rights of Suspects*, in *THE RIGHTS OF AMERICANS: WHAT THEY ARE—WHAT THEY SHOULD BE* 419-24 (N. Dorsen ed. 1971). As the Supreme Court gradually held the various provisions of the Bill of Rights applicable to state criminal trials, and did so with increasing frequency after *Mapp v. Ohio*, 367 U.S. 643 (1961), the trickle became a river. At October Term, 1968, the Court decided 120 cases with full opinions. Fifty of these cases were criminal cases, 19 involving federal and 31 involving state defendants. Note, *Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 280-81 (1969).

10. The Court had, of course, from time to time promulgated and amended the Federal Rules of Criminal Procedure, and these Rules contained provisions relating to guilty pleas. However, there is good reason to believe that the Court gave very little attention to the Rules in the process of their promulgation. For example, in 1979, the Court amended the Rules of Civil Procedure to deal specifically with the problem of jurisdiction over appeals taken too early—typically, after the judge had stated his opinions but before judgment had been entered—and thereafter granted certiorari to consider just that question. When counsel brought the amendment to the Court's attention, certiorari was dismissed as improvidently granted. *Montgomery v. Century Laminating, Ltd.*, 444 U.S. 987 (1979); Respondent's Suggestion of Mootness *passim*, *Montgomery v. Century Laminating, Ltd.*, 444 U.S. 987 (1979). See also Amendment of Rules of Civil Procedure, 374 U.S. 865, 865-70 (1963) (Black, J., Douglas, J., opposing submission of Rules to Congress); Amendment of Federal Rules of Criminal Procedure, 406 U.S. 981, 982 (1972) (Douglas, J., dissenting) ("we are only a conduit for the Rules"). Since my concern here is with the development of constitutional doctrine, I shall not deal substantially with the rulemaking process in this Article.

11. The relevant statute defining appellate jurisdiction, 28 U.S.C. § 1291 (1976), does not distinguish between appeals of convictions based on pleas (of guilty or *nolo contendere*) and appeals of convictions after trial. Convictions based on guilty pleas are occasionally appealed, e.g., *McCarthy v. United States*, 394 U.S. 459 (1969). However, the Federal Rules of Criminal Procedure, since their promulgation, have distinguished between the two types of conviction in making provision for notifying the defendant of his right to appeal. The original Rules required the court to notify a defendant not represented by counsel of his right to appeal if he was sentenced "after trial." FED. R. CRIM. P. 37(a)(2), 327 U.S. 821, 857-58 (1946). The 1966 amendments transferred the provision to Rule 32(a)(2), and required that notice be given to all defendants sentenced after "trial on a plea of not guilty." Amendments to the Federal Rules of Criminal Procedure, 383 U.S. 1087, 1107 (1966). The 1975 amendments, presently in force, continue that provision and add that "[t]here shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or *nolo contendere*." FED. R. CRIM. P. 32(a)(2). A recent survey indicated that about a quarter of federal district judges explicitly misinform defendants by telling them that they do not have the right to appeal after a plea of guilty. Borman, *The Hidden Right to Direct Appeal from a Federal Plea Conviction*, 64 CORNELL L. REV. 319, 322, 374 (1979). It seems likely, therefore, that most federal criminal defendants are unaware of their right to appeal when they have

tack on convictions that are based on guilty pleas was practically impossible until the expansion of federal habeas corpus in the 1930's, and difficult thereafter.¹² The difficulty was exacerbated when the attack was on a bargained plea, for until recently, bargains were almost always *dehors* the record and thus particularly difficult to attack.¹³ Nevertheless, by 1969 the Court had considered the requirements for a valid plea of guilty in about half a dozen cases.¹⁴ In consequence there existed a small body of law, generally vague and frequently dicta, stating that a plea of guilty must be "voluntary and knowing."¹⁵

2. Self-incrimination and coerced confessions

The guilty plea cases themselves gave little content to this vague standard. They did, however, suggest that the terms could be elucidated by reference to the law governing confessions of guilt under the fifth and fourteenth amendments. The fifth amendment provides, in part, that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . ."¹⁶ Several of the guilty plea cases intimated that a plea of guilty should be looked upon as the *ne plus ultra* of self-incrimination.¹⁷ One could therefore look to cases construing this constitutional

pleaded guilty. Cf. FED. R. CRIM. P. 11(c)(4) (requiring the court to tell a pleading defendant that if he pleads guilty or nolo contendere, "there will not be a further trial of any kind"). Although many defendants who plead guilty do not know they can appeal their conviction, failure to do so is still mentioned as a reason for limiting the claims available on collateral attack. *E.g.*, *United States v. Benchimol*, 471 U.S. 453 (1985) (Stevens, J., concurring); *United States v. Timmreck*, 441 U.S. 780, 784 (1979).

State practice varies. Appeals are occasionally taken following conviction on a guilty plea, *e.g.*, *Boykin v. Alabama*, 395 U.S. 238, 241 (1969) (five death sentences imposed on petitioner after he pleaded guilty to five indictments for armed robbery), but no state appears to notify pleading defendants of a right to appeal as a matter of course. The rarity of such appeals presumably represents both general satisfaction with (or at least resignation to) the consequences of the plea, at least initially, and lack of knowledge that such an appeal can be taken.

12. The Court first considered a federal collateral attack on a guilty plea in *Walker v. Johnston*, 312 U.S. 275 (1941). For a history of the expansion of habeas corpus through the 1960's, see *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1045-72 (1970).

13. Typically, although the plea was the result of an agreement between the prosecution and the defense, the defendant would be called upon to state in open court that his plea was not the result of any promises by the prosecutor. See A. AMSTERDAM, B. SEGAL & M. MILLER, *TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES* § 216 (2d ed. 1971). A typical plea-taking procedure of this kind is reproduced in *Blackledge v. Allison*, 431 U.S. 63, 66 n.1 (1977).

14. See *infra* notes 31-90 and accompanying text.

15. See *supra* note 6.

16. U.S. CONST. amend. V.

17. *E.g.*, *Boykin*, 395 U.S. at 242; *McCarthy*, 394 U.S. at 466; *Kercheval v. United States*, 274 U.S. 220, 223 (1927).

provision for guidelines to determine when a guilty plea had been improperly "compelled." If relevant, this body of law might be particularly useful in considering plea bargaining. For the guilty plea cases had considered only one side of the problem—that presented by defendants who had pleaded guilty and later wanted to undo the plea. The self-incrimination cases sometimes dealt with people who had talked, and later wished they had not. However, they also considered the problem of penalties imposed on individuals who *resisted* pressures to talk. In a functioning system of plea bargaining, defendants who refuse to plead guilty (and who therefore receive harsher treatment if they are convicted) may be thought situated similarly to individuals who had resisted pressure to speak.¹⁸ If so, the second prong of self-incrimination law could prove immensely useful.

A second and closely related body of doctrine had developed under the due process clause of the fourteenth amendment. Until 1964, the Supreme Court consistently refused to hold the privilege against self-incrimination applicable against the states.¹⁹ However, since 1936, the Court had held that the due process clause of the fourteenth amendment was violated when a state criminal defendant was convicted by use of a "coerced" confession.²⁰ "Coerced" confessions are obviously related to

18. Unless it is to be based on wholly illusory benefits, a functioning system of plea bargaining must provide defendants with an incentive to plead guilty. Therefore, defendants who insist on trial must suffer in some way if they are convicted. It is ordinarily assumed that this suffering will be in the form of harsher sentences, and in all probability this is often true.

It is not necessarily true, however. Defendants might bargain not to receive any ultimate benefit, but simply to reduce uncertainty. For example, suppose that defendants charged with a particular crime are offered a guaranteed five-year sentence on plea of guilty. If they insist on trial, assume that 80% of those convicted will receive three-year sentences, but that 20% will be sentenced to 13 years. The average sentence (five years) will be the same for the pleading and nonpleading groups. But defendants averse to risk might still prefer to plead guilty. And of course, the particular defendants who insisted on trial and received 13-year sentences would, indeed, have received harsher treatment because of their refusal to plead guilty, even though the groups as a whole are treated the same.

One study of plea bargaining in the District of Columbia concluded that no difference existed in the average sentences given to defendants charged with assault, larceny and burglary, whether they pleaded guilty or insisted on trial. A statistically significant difference did occur in sentences given to defendants charged with robbery. W. RHODES, *PLEA BARGAINING: WHO GAINS? WHO LOSES?* 39-60 (1978). It may be that defendants pleading guilty to the first three of these crimes do so because they wrongly believe they will get a sentence concession. But it is also possible that they are pleading guilty simply to reduce the uncertainty about their sentence.

19. *Adamson v. California*, 332 U.S. 46, 50-51 (1947); *Twining v. New Jersey*, 211 U.S. 78, 114 (1908). The Court effectively overruled these cases in *Malloy v. Hogan*, 378 U.S. 1, 3 (1964), holding that the privilege against self-incrimination is binding on the states through the due process clause.

20. *Brown v. Mississippi*, 297 U.S. 278 (1936) was the first. For good reviews of the co-

"compelled" self-incrimination.²¹ Some of the Court's guilty plea cases had analogized guilty pleas to the confessions subject to review under the fourteenth amendment.²² Moreover, the body of law on what became known as "involuntary" confessions was unusually rich.²³ Accordingly, the involuntary confession cases might be a productive source of doctrine.²⁴

3. Waiver and unconstitutional conditions

Finally, some of the guilty plea cases noted that a defendant who pleads guilty is more than simply a "witness against himself," for he gives up more than does a defendant who merely confesses.²⁵ One who pleads guilty gives up a bundle of rights related to the trial process—the right to a trial itself, the right to a trial by jury, the right to make an argument and to call witnesses in his defense, the right to put the state to its proof, and so on. This implies the relevance of cases dealing, in one way or another, with the waiver of constitutional rights. A good deal of law on this subject existed by 1969. Particularly important to the constitutionality of plea bargaining was a line of cases that had considered what kinds of pressures could permissibly be placed on people in an attempt to persuade them to waive constitutional rights, and what kind of burdens could permissibly be placed on people who refused to do so. By and large, the source of law in these cases was the due process clause, and the doctrine labeled the doctrine of "unconstitutional conditions"; occasionally, however, the Court would perform a similar analysis under the equal protection clause.²⁶ One case in particular seemed to cry out for

erced confession doctrine, see Kamisar, *What is an "Involuntary" Confession?*, 17 RUTGERS L. REV. 728 (1963); *Developments in the Law—Confessions*, 79 HARV. L. REV. 935, 961-83 (1964).

21. *Cf. Malloy*, 378 U.S. at 6-8, opining that the coerced confession cases had for all practical purposes adopted the fifth amendment "compulsion" test as the test for "coercion."

22. *Waley v. Johnston*, 316 U.S. 101, 104 (1942) (relying on *Chambers v. Florida*, 309 U.S. 227 (1940), a coerced confession case).

23. *See, e.g., Culombe v. Connecticut*, 367 U.S. 568, 568-635 (1961) (opinion of Frankfurter, J., joined only by Stewart, J., announcing judgment).

24. One might expect that the coerced confession cases would, like the compelled self-incrimination cases, have developed a second line of doctrine, detailing impermissible coercion in cases where defendants had been pressed to confess but remained silent. No such cases reached the Supreme Court. It is unclear whether this is because the police, once started, inevitably continued until they got their confession, or because such cases would be difficult to litigate. *See Foote, Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955).

25. *Boykin*, 395 U.S. at 243; *McCarthy*, 394 U.S. at 466.

26. For a review of the doctrine of unconstitutional conditions, see Note, *Another Look at Unconstitutional Conditions*, 117 U. PA. L. REV. 144 (1968). For a similar analysis under the equal protection clause, see *Shapiro v. Thompson*, 394 U.S. 618, 631-33, 638 n.21 (1969).

consideration. In *United States v. Jackson*,²⁷ the Court struck down the death penalty provisions of the Federal Kidnaping Act²⁸ because a defendant who insisted on trial by jury could be sentenced to death, while one who pleaded guilty or agreed to a bench trial could not.²⁹ In the Court's view, the vice of the statute was "not that it necessarily *coerce[d]* guilty pleas and jury waivers but simply that it needlessly *encourage[d]* them."³⁰ The practice of offering sentence concessions for pleas of guilty would seem to be subject to a similar analysis.

Thus, in 1970, four strands of doctrine were woven into the fabric of the law and were apparently relevant to plea bargaining. No strand was entirely without knots. In order to understand the relationship of these doctrines to each other and to plea bargaining, more detailed consideration of each doctrine is required.

B. The "Voluntary" Plea of Guilty

Pertinent to the question of plea bargaining are cases in which the Supreme Court has discussed the requirements for a valid plea of guilty.³¹ By 1969, the Court had decided ten such cases. Unfortunately, none of these cases focuses with any precision on the question of what standards must be met before a plea of guilty can be entered. Most of the cases involved collateral issues—whether the petitioner was entitled to a hearing on disputed factual allegations, what kind of record must be made when the plea is taken and so forth. On close examination, the cases do show the existence of some commonly held, unstated assumptions about the requisites for a valid plea of guilty. Unfortunately, those assumptions are difficult to discern with precision.

The Court first discussed guilty pleas in 1927, in *Kercheval v. United States*.³² The question directly presented in *Kercheval* was whether a

27. 390 U.S. 570 (1968).

28. 18 U.S.C. § 1201(a) (1964), amended by 18 U.S.C. § 1201(a) (1978).

29. *United States v. Jackson*, 390 U.S. at 572.

30. *Id.* at 583 (emphasis in original).

31. One might hope for guidance from cases discussing pleas of *nolo contendere*, but one would not find it. In *Sullivan v. United States*, 348 U.S. 170 (1954), the petitioner claimed *inter alia* that his plea was invalid because he had been misled by a promise of probation. *Id.* at 174. However, the district court found as a fact that no such promise had been made, and the Supreme Court agreed that Sullivan and his lawyer "were not and could not have been misled." *Id.* at 175. The other cases deal entirely with collateral questions. See *Lott v. United States*, 367 U.S. 421 (1961) (time for taking appeal); *United States v. Norris*, 281 U.S. 619 (1930) (factual issues not open after plea); *Hudson v. United States*, 272 U.S. 451 (1926) (jail term may be imposed after plea).

32. 274 U.S. 220 (1927). The judgment was unanimous, but Justice Stone concurred only in the result.

plea of guilty, once withdrawn, could be used as evidence against the defendant at trial.³³ The Court held that it could not, because the withdrawn plea "could not be received as evidence without putting . . . [the defendant] in a dilemma utterly inconsistent with . . . awarding him a trial."³⁴ On its way to this conclusion, the Court made a few remarks about pleas of guilty and the circumstances in which they should be accepted:

A plea of guilty differs in purpose and effect from a mere admission or extra-judicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence. Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences. When one so pleads he may be held bound. But, on timely application, the court will vacate a plea of guilty shown to have been unfairly obtained or given through ignorance, fear or inadvertence. Such an application does not involve any question of guilt or innocence. The court in exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial if for any reason the granting of the privilege seems fair and just.³⁵

Kercheval is at best inconclusive on the requisites for a valid plea. To begin with, the language just quoted is clearly dicta. Given the Court's explanation of its result, the question when a defendant should be "award[ed] a trial" was not pertinent. Whether the Court believed itself to be merely describing judicial behavior—"courts are careful"—or prescribing it was not clear. Even if the Court was gently prescribing behavior, it was not clear whether common law or the Constitution was the source of the prescription. It *is* clear that the Court believed pleas should be made "voluntarily after proper advice and with full understanding of the consequences."³⁶ But the import of these terms was never explained. Since "voluntariness" had long been the standard by which confessions of guilt were judged,³⁷ the Court might have been drawing an analogy between guilty pleas and extrajudicial confessions,

33. *Id.* at 221-23.

34. *Id.* at 224.

35. *Id.* at 223-24 (citations omitted). The Court referred to several state court cases and to *United States v. Bayaud*, 23 F. 721 (C.C.S.D.N.Y. 1883), where a circuit court refused to vacate a plea which the U.S. Attorney swore had not been induced by him in any way.

36. *Kercheval*, 274 U.S. at 223.

37. See *infra* notes 109-68 and accompanying text.

and suggesting that circumstances which would invalidate a confession would also invalidate a plea of guilty. If so, however, its failure even to mention *Bram v. United States*,³⁸ the then leading case on confessions is puzzling.

The Court returned to pleas of guilty in three cases in the early 1940's. In *Walker v. Johnston*,³⁹ a federal prisoner sought habeas corpus alleging that he had pleaded guilty only after he had asked to see a lawyer and was told that he could not, and after he was warned that he would get "twice as great" a sentence if he refused to plead guilty.⁴⁰ There seems to have been little dispute that his allegations, if true, entitled him to relief.⁴¹ The primary issue in the case was whether the district court could deny a hearing on the basis of affidavits denying Walker's version of the facts.⁴² The Supreme Court held that it could not: "If he did not voluntarily waive his right to counsel, or if he was deceived or coerced by the prosecutor into entering a guilty plea, he was deprived of a constitutional right."⁴³ In *Smith v. O'Grady*,⁴⁴ the Court made it clear that *Walker* applied to prisoners in state as well as federal custody.⁴⁵ Finally, in *Waley v. Johnston*,⁴⁶ the Court reversed per curiam the denial of a hearing on allegations that a guilty plea had been induced by the FBI's threat to manufacture false evidence that would get Waley

38. *Bram v. United States*, 168 U.S. 532 (1897).

39. 312 U.S. 275 (1941) (unanimous decision).

40. *Id.* at 281.

41. The government did argue that Walker's waiver of counsel need not be intentional, but could be "implied as a matter of law" when justified "by reasons of extrinsic policy." *Id.* at 277-78.

42. *Id.* at 283.

43. *Id.* at 286 (footnotes omitted) (emphasis added). For the first proposition, the Court cited *Johnson v. Zerbst*, 304 U.S. 458 (1938), which held that a criminal defendant must be aware that he has a right to counsel before he can waive that right. For the second proposition, the Court relied on *Mooney v. Holohan*, 294 U.S. 103 (1935), which involved the prosecution's knowing use of perjury to obtain a conviction.

44. 312 U.S. 329 (1941) (unanimous decision).

45. Smith alleged that he had been arrested and, two days later, told he was charged with simple burglary. *Id.* at 332. Then, he said, an agreement was made on the phone between him and someone identified as the prosecutor that if he pleaded guilty he would get no more than three years. *Id.* He thereafter asked for a copy of the charge and was denied it; he pleaded guilty and was immediately sentenced to 20 years. *Id.* He protested, asked to withdraw the plea and asked for a lawyer. *Id.* All of the requests were refused. *Id.* Only in the penitentiary did he find that he had pleaded not to simple but to aggravated burglary (burglary with explosives). *Id.* Not surprisingly, the Court held that the allegations, if proved, made out a denial of due process. *Id.* at 334. It cited *Walker, Johnson*, and *Chambers v. Florida*, 309 U.S. 227 (1940) (coerced confession case). *Id.* at 334 n.5.

46. 316 U.S. 101 (1942) (per curiam). The Solicitor General had confessed error under *Walker*. *Id.* at 104.

hanged on other charges.⁴⁷ “[A] conviction on a plea of guilty coerced by a federal law enforcement officer is no more consistent with due process than a conviction supported by a coerced confession.”⁴⁸

This early Trilogy of guilty plea cases has a number of interesting features. None of these cases relies on or mentions *Kercheval*. In the 1940's, at least, the Court had either forgotten the *Kercheval* dicta or did not read it as stating a constitutional standard.⁴⁹ On the other hand, all of the cases are quite positive that such a standard exists. The question is hardly discussed. In *Walker*, the Court said that a constitutional violation would be made out if a defendant were “deceived or coerced by the prosecutor” into entering his guilty plea.⁵⁰ The Court's sole authority for this proposition was a case holding that knowing use of perjured testimony by the prosecution rendered a conviction invalid under the due process clause, thereby suggesting that the vice of a “coerced” plea is that it is likely to be inaccurate.⁵¹ A year later, in *Waley*, the Court continued to speak of “coerced” pleas, but this time directly analogized such pleas to compelled self-incrimination under the fifth amendment⁵² and coerced confessions under the due process clause⁵³—with no explicit discussion of what coercion was. Never was there any suggestion of a separate standard for guilty pleas. But in each of the cases the Court's central focus had not been on whether the allegations, if true, rendered the plea invalid, but on whether the lower courts had properly found the facts against petitioners without an evidentiary hearing.⁵⁴ Thus it is plausible to conclude that slight changes of citation on the coercion point were inadvertent. Making what it believed to be an obvious and uncon-

47. *Waley*, a hardy sort, also alleged that the FBI had threatened to beat him up and throw him out the window, but that “didn't bother” me. 316 U.S. at 103. He, unlike all the others, was represented by counsel when he entered his plea.

48. *Id.* at 104 (citing *Chambers v. Florida*, 309 U.S. 227 (1940); *Bram v. United States*, 168 U.S. 532, 543 (1897)).

49. Of the Justices who decided *Kercheval*, only Justice McReynolds and Justice Stone (who had not joined the *Kercheval* opinion) remained in 1941.

50. See *supra* text accompanying note 43.

51. *Mooney*, 294 U.S. 103. The Court there stated:

[Due process] cannot be deemed to be satisfied by a mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured.

Id. at 112.

52. *Waley*, 316 U.S. at 104 (citing *Bram v. United States*, 168 U.S. 532 (1897)).

53. *Id.* (citing *Chambers v. Florida*, 309 U.S. 227 (1940)). *Chambers* had played a bit part in *Smith v. O'Grady*, 312 U.S. 329, 334 (1941).

54. None of the lower courts appears to have questioned that the allegations, if true, would render the pleas vulnerable.

tested point, the Court merely looked for a convenient case to use as authority.

For the next twenty years, the Court had little to do with guilty pleas.⁵⁵ Then in 1962 came *Machibroda v. United States*.⁵⁶ Machibroda pleaded guilty to two charges of robbery and was sentenced to forty years in jail.⁵⁷ He challenged the pleas, arguing that they were not voluntary because they had been induced by promises made by the Assistant United States Attorney in charge of the prosecution that Machibroda would get no more than twenty years if he pleaded guilty.⁵⁸ Machibroda said that the Assistant U.S. Attorney warned him not to tell his own lawyer about the conversations,⁵⁹ and said that if he "insisted in making a scene," certain unsettled matters concerning two other robberies would be added to the petitioner's difficulties."⁶⁰ The lower courts denied relief on the ground that the assistant's affidavit denying the charges, and the surrounding circumstances, showed that the charges were untrue.⁶¹ The Supreme Court held that Machibroda was entitled to a hearing on his claims. The Court reasoned:

There can be no doubt that, if the allegations contained in the petitioner's motion and affidavit are true, he is entitled to have his sentence vacated. A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void. A conviction based upon such a plea is open to collateral attack. "A plea of guilty differs in purpose and effect from a mere admission or an extra-judicial confession; it is itself a con-

55. There were very few cases, all revolving around the right to counsel. In *Von Moltke v. Gillies*, 332 U.S. 708 (1948), a plurality of four Justices would have held an uncounseled plea invalid in the absence of a sufficient waiver of counsel. Justices Frankfurter and Jackson, whose votes were necessary for disposition, thought that *Von Moltke* was entitled to relief only if she had in fact received legal advice (conceded to be erroneous) from an FBI agent. *Id.* at 727-31.

Canizio v. New York, 327 U.S. 82 (1946), involved the sole claim that a plea was invalid because it was entered in the absence of counsel. The Court held that on the facts of the particular case, where counsel had been appointed prior to sentencing, had actively represented *Canizio*, and could have moved but didn't move to vacate the plea, *Canizio* was not deprived of his right to counsel. *Id.* at 87.

Finally, in *Pennsylvania ex rel. Herman v. Claudy*, 350 U.S. 116 (1956), the Court upheld an attack on guilty pleas to 30 separate charges by an uncounseled defendant to whom the charges had never been explained. *Id.* at 121-22. An alternative ground was that the pleas may have been the product of a prior coerced confession. *Id.* at 117.

56. 368 U.S. 487 (1962).

57. *Id.* at 488.

58. *Id.* at 489.

59. *Id.*

60. *Id.* at 490.

61. *Id.* at 488-90.

viction. . . . Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences."⁶²

This looks like strong language. Giving the words their natural meaning, taking into account the factual background against which they were written, they cut a broad swath. The case is not even a close one—"[t]here can be no doubt" that the allegations make out a claim.⁶³ Since the only threat in the record is the threat to bring additional charges, it follows that a plea "induced" by such a threat is "void." Similarly, since the only promises alleged are promises that the maximum sentence would be no more than twenty years, a plea "induced" by such a promise must be equally "void."⁶⁴ Thus, the *Kercheval* standard, dormant for thirty-five years, blossomed in a successful collateral attack on a conviction, suggesting it is not merely a statement of usual practice or even a rule of federal procedure, but a requirement of constitutional magnitude.⁶⁵

Yet *Machibroda* retains the puzzling vagueness characteristic of the guilty plea cases. Once again, all parties seem to have accepted without question that the allegations, if true, made out a claim for relief.⁶⁶ The only real dispute was over the procedures to be followed in determining

62. *Id.* at 493 (citations omitted) (quoting *Kercheval v. United States*, 274 U.S. 220, 223 (1927)) (ellipses in *Kercheval* quotation added). The omitted citations, which appear immediately following the sentence about collateral attack, are to *Walker v. Johnston*, 312 U.S. 275 (1941); *Waley v. Johnston*, 316 U.S. 101 (1942); *Shelton v. United States*, 356 U.S. 26 (1958) and, in a footnote, to a passel of lower court cases. *Shelton*, the only Supreme Court case among these not already discussed, accepted the Solicitor General's concession that a specific plea was involuntary for a variety of factors, including the petitioner's illness at the time the plea was entered. *Id.* at 26.

63. *Machibroda*, 368 U.S. at 493.

64. The district court seems to have taken this view of the law. In a passage quoted with apparent approval by the Supreme Court, it stated its view that "the 'charges of an agreement between a former Assistant United States Attorney and the defendant are serious,'" and said that it would hold a hearing if there were any doubt about their falsity. *Id.* at 493-94 (quoting *United States v. Machibroda*, 184 F. Supp. 881, 883 (N.D. Ohio 1959), *affirmed*, 280 F.2d 379 (1960), *vacated*, 368 U.S. 487 (1962)). *But see infra* note 70.

65. *Machibroda* sought relief under 28 U.S.C. § 2255, a collateral attack procedure substantially equivalent to habeas corpus for prisoners in federal custody. *Id.* at 488. Relief under section 2255 is generally only available for claims of constitutional error. *See Sunal v. Large*, 332 U.S. 174 (1949). In *Machibroda* and a companion case, *Hill v. United States*, 368 U.S. 424 (1962), the Court held that failure to follow the formal requirements of then Federal Rule of Criminal Procedure 32(a) and to ask the defendant if he has anything to say before sentence is imposed is not cognizable under section 2255. *Hill*, 368 U.S. at 428. *Hill* was recently reaffirmed in *United States v. Timmreck*, 441 U.S. 780, 783 (1979).

66. *Machibroda*, 368 U.S. at 493.

whether the allegations were true.⁶⁷ Thus, the Court's attention was never closely directed to the issues that concern us here. Machibroda was represented by counsel during the discussions and when he entered his plea. If his allegations were true, however, the prosecutor not only negotiated with him in the absence of counsel but expressly told him not to mention those discussions to his lawyer.⁶⁸ The prosecutor's statements were either deliberate lies or disastrously inaccurate predictions, presented as certainties. In either event Machibroda was wrongly advised by a government attorney.⁶⁹ Thus the case did not present the question of promises made and kept.⁷⁰ The Supreme Court's statement that the "threats" in the case would vitiate the plea is only an alternative ground. And the function of the *Kercheval* statement in the opinion is not clear. It may be only a decorative flourish. Even if the reference was intended to present a substantive standard for the acceptance of guilty pleas, the key word, "voluntarily," is undefined. If *Kercheval* did create a standard, it could be one of the rare cases in which nonconstitutional grounds formed a basis for collateral attack on a federal conviction.⁷¹

Two remaining cases are rich in suggestion, but not in specificity. In *United States v. Jackson*,⁷² the Court held a sentencing scheme that al-

67. The district court felt the allegations stated a claim. The government did not contest the point in the Supreme Court. Brief for the United States, at 37-44, *Machibroda v. United States*, 368 U.S. 487 (1962). Justices Clark, Frankfurter and Harlan, the sole dissenters, argued only that the allegations were clearly false. See *Machibroda*, 368 U.S. at 496-501 (Clark, J., dissenting).

68. Cf. *Massiah v. United States*, 377 U.S. 201 (1964) (prohibiting on right-to-counsel grounds the use against a defendant of incriminating statements elicited from him after he had been indicted and in the absence of his lawyer).

69. *Machibroda*, 368 U.S. at 489-90.

70. Cf. *Von Moltke*, 332 U.S. at 729 (Frankfurter, J., separate opinion) (guilty plea would be invalid if it were based on bad legal advice from a government agent in the absence of counsel for the defendant).

Noting that the "charges of an agreement" between the prosecutor and Machibroda "are serious," the district court suggested that it would have granted relief if they were true. See *Machibroda*, 368 U.S. at 493-94. This language, however, might in context have meant not that all agreements were improper, but only that this particular, unkept one was. The district judge who heard the section 2255 motion was the one who had taken the plea and imposed the sentence. He would likely have remembered if he had agreed to a 20-year sentence. If he had not, the prosecutor's supposed statements would have been false, and the judge would have known this when he was discussing Machibroda's claim.

71. For the general rule denying collateral relief for error neither constitutional nor jurisdictional, see *Sunal v. Large*, 332 U.S. 174 (1947); for the meaning of "jurisdictional" in this context, see *Bowen v. Johnston*, 306 U.S. 19 (1939). For the sole exception explicitly upheld by the Supreme Court, see *Davis v. United States*, 417 U.S. 333 (1974) (statutory claim). See generally *Developments in the Law—Federal Habeas Corpus*, *supra* note 12, at 1066-72. The Court regularly states that relief is available "only if [the] custody is in violation of the Federal Constitution." See, e.g., *Mabry v. Johnson*, 467 U.S. 504 (1984).

72. 390 U.S. 570 (1968).

lowed the death penalty to be imposed on defendants who were convicted by a jury, but not on defendants convicted at bench trials or on guilty pleas to be unconstitutional.⁷³ The scheme was impermissible because it “needlessly encourage[d]” guilty pleas and jury waivers.⁷⁴ In *United States v. Jackson*, the United States argued that the scheme was permissible because trial judges would, in any event, reject coerced pleas of guilty.⁷⁵ The Court found this argument insufficient even if it were true. The Court stated:

A procedure need not be inherently coercive in order that it be held to impose an impermissible burden Thus [our conclusion that the scheme is unconstitutional] . . . hardly implies that every defendant who enters a guilty plea to a charge under the Act does so involuntarily. . . .

. . . .
. . . So, too, in *Griffin v. California*, the Court held that comment on a defendant’s failure to testify imposes an impermissible penalty on the exercise of the right to remain silent at trial. Yet it obviously does not follow that every defendant who ever testified at a pre-*Griffin* trial in [states following the California rule] . . . is entitled to automatic release upon the theory that his testimony must be regarded as compelled.⁷⁶

The importance of this passage is the light that it sheds on the Court’s notion of what an “involuntary” guilty plea was in 1968. Unfortunately, much of the light is at wavelengths beyond human perception. The Court clearly rejected an argument *sub hoc ergo propter hoc*—some guilty pleas under the Act were voluntary even though they were entered at a time when the unconstitutional penalty scheme was in effect. The illustrative example suggests that this is so because, in the Court’s view, some defendants who pleaded guilty did so for reasons entirely unrelated to the existence of the penalty scheme. Certainly, some defendants who testified in California before *Griffin* did so because they wanted to get their testimony to the jury, and not merely to avoid adverse comment by the prosecutor if they did not. However, the Court’s quoted statement did not answer the question whether a guilty plea is involuntary if it is

73. The sentencing scheme did not compel the death penalty for defendants convicted by jury trial. *Id.* at 570-71.

74. *Id.* at 583 (emphasis omitted). *United States v. Jackson* is also important in determining the propriety of the threats used to persuade a defendant to plead guilty. That aspect of the case is discussed at *infra* notes 192-216 and accompanying text.

75. *United States v. Jackson*, 390 U.S. at 583.

76. *Id.* at 583 & n.25 (citing *Griffin v. California*, 380 U.S. 609 (1965)) (citations and footnote omitted).

entered in order to avoid a possible death penalty. It would still be consistent with the quoted language to argue that such a motive for entering a plea is simply irrelevant to "voluntariness."⁷⁷ *United States v. Jackson*, therefore, cannot be used to distinguish between these two polar alternatives.

Equally suggestive, but in the end equally inconclusive, is *McCarthy v. United States*.⁷⁸ In *McCarthy*, the Court held that Rule 11 of the Federal Rules of Criminal Procedure required the judge accepting a guilty plea to question the defendant personally in order to determine whether the plea was "truly voluntary."⁷⁹ The defendant's underlying claim in *McCarthy* was that his guilty plea was based on his mistaken belief that inadvertent tax errors were criminal under the statute he was charged with violating.⁸⁰ Characterizing the guilty plea as a waiver of other rights, the Court stated that "[f]or this waiver to be valid under the Due Process Clause, it must be 'an intentional relinquishment or abandonment of a known right or privilege.'⁸¹ Consequently, if a defendant's guilty plea is not *equally* voluntary and knowing, it has been obtained in violation of due process and is therefore void."⁸² The Court returned to the waiver concept and expressly stated that standards developed for other waiver situations were identical with, and not merely similar to, those for guilty pleas. The Court's language also indicates that, by 1969, it was reading *Machibroda* as a constitutional decision. But in light of the claim actually presented, the relevance of all this language is a little puzzling. *McCarthy* did not claim that he misunderstood any *constitutional* rights that he had waived. His actual claim was dealt with in the sentence following the one quoted above. "Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understand-

77. The tenor of the *Jackson* remarks suggests that the author of the opinion, at least, then felt a plea of guilty entered solely to avoid the possibility of a death penalty would be "involuntary." But the language, advertently or not, is consistent with other possibilities.

78. 394 U.S. 459 (1969). Justice Black, dubiously, concurred only in the result. *Id.* at 477 (Black, J., concurring).

79. *Id.* at 472, 477. The Rule has since been substantially amended, and in its present form requires the court to inquire whether a guilty plea is the result of negotiations. FED. R. CRIM. P. 11(d). If it is, the judge must give the defendant additional information and, in some cases, allow him to plead anew if the judge does not accept the agreement. FED. R. CRIM. P. 11(e).

80. *McCarthy*, 394 U.S. at 460-62. *McCarthy*'s real unhappiness seems to have been that he expected but did not get probation. *Id.* at 462.

81. At this point, the Court cited *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

82. *McCarthy*, 394 U.S. at 466 (citing e.g., *Machibroda v. United States*, 368 U.S. 487, 493 (1962); *Von Moltke v. Gillies*, 332 U.S. 708 (1948); *Waley v. Johnston*, 316 U.S. 101 (1942) (citation omitted) (emphasis added)).

ing of the law in relation to the facts.”⁸³

The guilty plea cases thus circle like planets around a dim and fuzzy sun. The central concept of “voluntariness” is critically important, but its precise contours are hard to discern. Certainly, a pleading defendant must have some knowledge of the applicable law. A plea of guilty is not voluntary if the defendant is mistaken in believing that even if his version of the facts were accepted, he would be guilty of the crime charged.⁸⁴ Equally certainly, some kinds of improper behavior by the prosecutor will vitiate a plea. The prosecutor cannot lie, or threaten to manufacture false evidence, or make an unfulfilled promise of benefit.⁸⁵ The cases do imply that *some* other “threats or promises,” perhaps *any* “threats or promises,” will likewise vitiate a plea.⁸⁶ But against this ambiguous implication is the fact that in several cases which actually involved bargained pleas, the Court knew of the bargain and said little or nothing to indicate its disapproval.⁸⁷ The point was not raised in those cases, and perhaps the opinions simply reflect a practice not to deal with questions not presented by the parties.

It is fair to conclude that the Court had not thought very much about the particular problems of bargained guilty pleas. The cases, how-

83. *Id.* (emphasis added).

The Court decided two other guilty plea cases that term, neither of which adds anything of substance to the standards for voluntariness. *Halliday v. United States*, 394 U.S. 831 (1969), simply held (without oral argument) that *McCarthy* was not to be retroactively applied. The opinion noted that *McCarthy* involved a prophylactic rule and that previously entered involuntary pleas could still be collaterally attacked. Finally, in *Boykin v. Alabama*, 395 U.S. 238 (1969), the Court in effect applied the prophylactic rule of *McCarthy* to the states through the due process clause. *Boykin* was something of a horror case, where a black defendant, who had pleaded guilty to five counts of armed robbery, received from an Alabama jury a sentence of death on each count, even though apparently none of the victims had been harmed. *Id.* at 239-40. The petition for certiorari presented only the question whether the death penalty in such circumstances was cruel and unusual punishment, and the case was badly argued by well-meaning but ill-prepared counsel. In the course of a rambling opinion, the Court analogized pleas of guilty to confessions, and stated that “the same standard must be applied in determining whether a plea of guilty is voluntarily made.” *Id.* at 242. Then the Court reiterated the notion of guilty pleas as a waiver of other constitutional rights, several of which it listed. *Id.* at 243. *Boykin* could be important, but the egregious nature of its facts and the irrelevance of the grounds of decision to anything briefed or argued make it impossible for me to give weight to the details of the opinion.

84. *McCarthy*, 394 U.S. at 466, 469.

85. *Machibroda*, 368 U.S. at 493 (unfulfilled promises, at the least); *Waley*, 316 U.S. 101 (false evidence); *Smith v. O’Grady*, 312 U.S. 329 (1941) (lies).

86. See *supra* notes 55-71 and accompanying text.

87. In *McCarthy*, the defendant pleaded guilty to one count of an indictment and the other two counts were dismissed. 394 U.S. at 460-61. In *Canizio*, the defendant pleaded guilty to one charge “on condition” that he not be prosecuted on two others. 327 U.S. at 85. The plea in *Von Moltke* also appears to have been the result of a bargain. 332 U.S. at 709-10.

ever, are clear and consistent on one point—doctrine developed in three analogous areas are relevant to the constitutionality of pleas of guilty. Time and again, the Court analogized “involuntary” guilty pleas to “compelled” self-incrimination,⁸⁸ to “coerced” confessions⁸⁹ and to the “involuntary” waiver of constitutional rights in general.⁹⁰ By 1970, as will appear below, these three doctrines had substantially cohered. Before that time, however, they developed independently. I will therefore consider them separately.

C. “Compelled” Self-Incrimination

The fifth amendment provides that no person “shall be compelled in any criminal case to be a witness against himself”⁹¹ The Supreme Court’s analogy between pleas of guilty and self-incriminatory statements suggests that standards for guilty pleas could be formed by considering cases in which the Court had determined that particular statements were or were not “compelled” within the meaning of the fifth amendment.⁹² However, surprisingly few such cases exist.⁹³ The Court has, of course,

88. See, e.g., *Boykin*, 395 U.S. at 242; *United States v. Jackson*, 390 U.S. at 583; *Waley*, 316 U.S. at 104; cf. *Kercheval*, 274 U.S. at 223.

89. See, e.g., *Pennsylvania ex rel. Herman*, 350 U.S. at 118; *Waley*, 316 U.S. at 104; *O’Grady*, 312 U.S. at 334.

90. *Boykin*, 395 U.S. at 243; *McCarthy*, 394 U.S. at 466; *O’Grady*, 312 U.S. at 334; cf. *Waley*, 316 U.S. at 104.

91. U.S. CONST. amend. V.

92. A second line of self-incrimination cases exists. This second line involves circumstances in which pressure has been applied to persuade an individual to talk but no statements have been forthcoming, and the person pressured seeks judicial review of the legality of the pressure. These cases are discussed under the doctrine of “unconstitutional conditions” *infra* notes 169-216 and accompanying text.

93. At one time, the Court’s self-incrimination decisions routinely noted that the privilege was waived if it was not specifically claimed. *Smith v. United States*, 337 U.S. 137, 150 (1949) (finding no waiver); *United States v. Sullivan*, 274 U.S. 259, 263-64 (1927) (finding waiver); *Raffel v. United States*, 271 U.S. 494, 496-97 (1926) (same); *but see Adams v. Maryland*, 347 U.S. 179, 181 (1954) (dictum, arguably ambiguous).

Notwithstanding *Bram v. United States*, 168 U.S. 532 (1897), holding that a confession violated the privilege against self-incrimination despite the fact that no claim of privilege was raised at the time of the questioning, the *Smith* line of cases may have discouraged counsel from basing their arguments on the fifth amendment. Typical suspects questioned by federal police agents presumably did not make explicit reference to their privilege against self-incrimination.

Beginning in 1938, the Court, for a considerable period of time, committed itself to the proposition that waiver of a constitutional right must be “an intentional relinquishment or abandonment of a known right or privilege.” *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). This rule was specifically applied to the privilege against self-incrimination without discussion or even mention of the *Smith* line of cases. *Grosso v. United States*, 390 U.S. 62, 70-71 (1969) (Harlan, J.); *Miranda v. Arizona*, 384 U.S. 436, 475 (1966). There is a continuing tension between the requirements of *Smith* and the waiver doctrine of *Johnson v. Zerbst*, 304 U.S. 458.

frequently dealt with extrajudicial confessions of guilt. But the Court disposed of most confession cases coming from the federal courts on grounds independent of the privilege against self-incrimination.⁹⁴ As late as 1951 the Court expressed doubt whether, in federal cases, the fifth amendment was even a relevant source of law governing the admissibility of confessions obtained from an accused in police custody.⁹⁵ Additionally, the use of such confessions given to state officers was not generally governed by the fifth amendment until 1964.⁹⁶ Even after that date, state confession cases appear governed far more by due process than by fifth amendment standards, and will be considered under that rubric.⁹⁷

1. Confessions to the police

There are very few fifth amendment cases which deal with confessions to the police. In *Bram v. United States*,⁹⁸ the Court expressly stated that the relevant source of law regulating confessions taken from those in police custody was the fifth amendment's privilege against self-incrimination.⁹⁹ The rule, "expressed in the text-books,"¹⁰⁰ was that "a confession . . . must be free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by *any* direct or implied promises, however slight, nor by the exertion of any improper influence."¹⁰¹

That rule was applied in *Bram* to exclude a confession from a sus-

94. *E.g.*, *McNabb v. United States*, 318 U.S. 332 (1943) (violation of Federal Rules of Criminal Procedure); *Massiah v. United States*, 377 U.S. 201 (1964) (denial of sixth amendment right to counsel).

95. *United States v. Carignan*, 342 U.S. 36, 41 (1951). Mr. Justice Stewart expressed similar doubts as late as 1968. *Grosso*, 390 U.S. at 76-77 (Stewart, J., concurring). *See generally Developments in the Law, Confessions*, *supra* note 20, at 960-61.

Some of the Court's federal confession cases exhibit a studied ambiguity towards the relevance of the privilege against self-incrimination. *E.g.*, *Upshaw v. United States*, 335 U.S. 410, 414 n.2 (1948) (Court not deciding "any" fifth amendment claims, due process or self-incrimination); *Ziang Sung Wan v. United States*, 266 U.S. 1 (1924) (reversing conviction and citing *Bram*, the then leading case on confessions and self-incrimination, but never mentioning the Constitution or using the phrase "self-incrimination").

96. *See supra* note 19. If federal officers assisted and the confession was to be used in federal court, then federal standards would apply. *Anderson v. United States*, 318 U.S. 350 (1943).

97. *See infra* notes 109-68 and accompanying text.

98. 168 U.S. 532.

99. *Id.* at 542.

100. *Id.*

101. *Id.* at 542-43 (quoting 3 W. RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS 478 (6th English ed. 1896)). Russell, an English writer, was not purporting to state the law of the fifth amendment, but only a common-law rule of evidence. Since the Court in *Bram* felt that the constitutional provision was merely a crystallization of common-law rules, such citation was entirely apposite. *See Bram*, 168 U.S. at 543. As a matter of history the *Bram* Court was probably wrong. L. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST

pect who had been or who was in the process of being stripped naked. Other facts persuaded the Court that the authorities were holding out to the suspect "a suggestion of some benefit as to the crime and its punishment" if he talked.¹⁰² After *Bram*, the Court more or less finessed the privilege against self-incrimination in extrajudicial confession cases. No other cases prior to 1964 squarely held a confession was inadmissible because it was compelled self-incrimination. However, some suggestive language does exist. Cases occasionally noted that a particular confession was not in fact the result of any threats or promises.¹⁰³ Other cases stated in dicta that a confession would be inadmissible if it were the result of a threat or promise.¹⁰⁴ Taken together, however, this line of cases gives little more than a hint of a standard. *Bram* stated clearly that even a suggestion of lenience would void a confession on self-incrimination grounds, but one case in seventy years does not establish a strong tradition.¹⁰⁵

2. Other circumstances

Occasionally, the Court has been faced with defendants' statements that were given to government agents who were not police investigators and that were later attacked as "compelled" under the fifth amendment. Where testimony is given under a threat of imprisonment or prosecution if the witness is silent, the Court has routinely concluded that the testimony is "compelled" and thus inadmissible against the witness in a criminal prosecution.¹⁰⁶ Similarly, a statement is "compelled" if it is "made

SELF-INCRIMINATION 405-32 (1968); McCormick, *The Scope of Privilege in the Law of Evidence*, 16 TEX. L. REV. 447, 453 (1938).

102. *Bram*, 168 U.S. at 564-65. The Court also suggested that the confession was inadmissible because it must have been the product of either hope or fear—hope that by talking he could explain otherwise damaging evidence, and fear that by remaining silent he might be taken as admitting guilt. *Id.* at 564. The first of these suggestions is puzzling. The accumulation of evidence tending to show guilt unless satisfactorily explained has not otherwise been thought a circumstance that would render attempts at explanation "compelled." Indeed, one is tempted to speculate that this is precisely the explanation for most of the testimony given in court by defendants in criminal cases.

103. *Carignan*, 342 U.S. at 40-41 (defendant expressly told that no promises could be made to him, although "his Maker might think more of him if he told the truth about the crime"); *United States v. Mitchell*, 322 U.S. 65, 69-70 (1944) (spontaneous statements).

104. "In the federal courts, the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat." *Ziang Sung Wan*, 266 U.S. at 14 (emphasis added).

105. Arguably *Bram* holds only that a false promise of lenience will void a confession, since *Bram* himself was convicted of murder and sentenced to death—hardly a "lenient" result. *Bram*, 168 U.S. at 533.

106. See *Adams*, 347 U.S. at 181. Compelled statements may be used against the declarant in a prosecution for perjury in making the statements. *United States v. Knox*, 396 U.S. 77, 80-

under a governmental threat of discharge from employment if no statement is forthcoming.¹⁰⁷ However, the cases do not go beyond this point. In particular, they are silent about the circumstances—if any—in which offers of *benefit* will render an incriminating statement “compelled” under the fifth amendment. Perhaps this is not surprising, since society is not in the habit of offering rewards for self-incriminating testimony.¹⁰⁸

The Supreme Court’s cases considering whether particular statements were “compelled” for purposes of the privilege against self-incrimination, then, are of little more value than the guilty plea cases on the critical questions surrounding plea bargaining. As with the guilty plea cases, there is language suggesting that “any threat or promise” will render a statement “compelled.” But no clear holdings appear on this point, and the general disapproval of “promises” may stand for nothing more than a disapproval of false or unfulfilled promises. The search for doctrine applicable to bargained pleas of guilty must continue elsewhere.

D. “Involuntary” Confessions

From at least the eighteenth century, the common law of evidence developed a body of doctrine limiting the circumstances under which a confession could be taken if it were later to be introduced into evidence against its maker.¹⁰⁹ Although any precise statement of the common-law rules would have to take account of date and jurisdiction, the cases as a whole display several common themes. A major concern is to ensure that unreliable confessions are excluded, although this was never the rules’ sole purpose.¹¹⁰ The language of the cases coheres around the common requirement that a confession must be “voluntary” to be admissible.¹¹¹ The language and holdings of the cases indicate that a confes-

83 (1969). See also *Mackey v. United States*, 401 U.S. 667, 702-13 (1971) (Brennan, J., concurring) (exceptions to the general statement).

107. *Garrity v. New Jersey*, 385 U.S. 493 (1967).

108. In addition, some may find it analytically difficult to find a statement “compelled” if it has been induced by a promise to do something nice rather than a threat to do something unpleasant.

109. Wigmore, who believed that confessions were evidence “of the highest value” and generally opposed limitations on their admissibility if it was satisfactorily proved that they were made, dates the doctrine to the late seventeenth century. 3 J. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* §§ 818-820, 820b at 304 (J. Chadbourn rev. ed. 1970). McCormick, less hostile to the rules than Wigmore, follows his chronology. C. MCCORMICK, *MCCORMICK ON EVIDENCE* § 147(a) (E. Cleary rev. 2d ed. 1972). Leonard Levy dates the rules from the seventeenth century or earlier. L. LEVY, *supra* note 101, at 326-29.

110. *Regina v. Baldry*, 169 Eng. Rep. 568 (Ct. Crim. App. 1852); McCormick, *supra* note 101, at 451-57.

111. E.g., *Regina v. Garner*, 169 Eng. Rep. 267 (Ct. Crim. App. 1848). A large collection of cases is in 3 J. WIGMORE, *supra* note 109, § 826.

sion is not voluntary if it is induced by physical violence or threats of violence,¹¹² by promises that no prosecution will be brought if the suspect confesses¹¹³ or by promises of lenient treatment if prosecution is brought.¹¹⁴

As a matter of constitutional law, the Supreme Court first subjected confessions by suspects in state custody to scrutiny under the United States Constitution in 1936. In *Brown v. Mississippi*,¹¹⁵ the Court held that the defendants had been denied due process of law when they were convicted on the basis of confessions beaten out of them with a metal-studded belt. The Court analogized these convictions to convictions obtained by the knowing use of perjured testimony.¹¹⁶ The facts of the cases and the choice of analogy both suggested (although the Court never said so) that a major concern of the rule announced was the prevention of convictions based on unreliable evidence. Although this theme occasionally reappeared in later cases, most notably in *Stein v. New York*,¹¹⁷ it was decisively repudiated in the early 1960's when the Court squarely stated that "the reliability of a confession has nothing to do with its voluntariness."¹¹⁸

Early Supreme Court cases quickly took up the common-law language of "voluntariness," although the facts of the cases—and the variety of common-law doctrines—leave unclear just how much of the substance of those doctrines was incorporated within this newly constitutionalized term.¹¹⁹ The Court was quick to say, quite explicitly, that it was concerned only with "voluntariness" with respect to the state of the confess-

112. *E.g.*, *Bonner v. State*, 55 Ala. 242, 246 (1876); *Regina v. Moore*, 169 Eng. Rep. 608 (Ct. Crim. App. 1852). The current edition of Wigmore calls this the "clearest" case for exclusion. 3 J. WIGMORE, *supra* note 109, § 833, at 457.

113. *State v. Williamson*, 339 Mo. 1038, 99 S.W.2d 76 (1936); *Beggarly v. State*, 67 Tenn. 520, 522 (1875); *Regina v. Gillis*, 11 Cox Crim. Cas. 69, 71 (Crim. App. 1866). It is not clear whether the objection is to the fact of any promise, or to the falsity of the promise actually made—when it is fulfilled, no prosecution occurs.

114. *E.g.*, *People v. Johnson*, 41 Cal. 452 (1871) (lighter punishment); *Smith v. State*, 125 Ga. 252, 54 S.E. 190 (1906) (same); *Commonwealth v. Curtis*, 97 Mass. 574 (1867) (hope of lighter sentence). It may be that part of the objection is to the raising of false hopes.

115. 297 U.S. 278 (1936).

116. *Id.* at 286 (citing *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)).

117. 346 U.S. 156 (1953), *overruled by* *Jackson v. Denno*, 378 U.S. 368, 391 (1964). Justice Frankfurter, dissenting, expressed the hope that *Stein* was a "temporary, perhaps an *ad hoc*, deviation from a long course of decisions," *id.* at 201 (Frankfurter, J., dissenting), and so it proved.

118. *Jackson v. Denno*, 378 U.S. 368, 384-85 (1964); *accord*, *Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961). *Jackson v. Denno* expressly overruled *Stein*. 378 U.S. at 391.

119. *E.g.*, *Ward v. Texas*, 316 U.S. 547, 555 (1942). In addition, many of the early cases were unexplicated *per curiam* decisions, *e.g.*, *Lomax v. Texas*, 313 U.S. 544 (1941); *White v. Texas*, 309 U.S. 631 (1940).

ing suspect's mind, not with the legality or desirability of the police practices that produced the confession.¹²⁰ By 1960, however, a few cases began to sound a contrary theme,¹²¹ which, by the close of that decade, became the primary theme of involuntary confession law. A confession was involuntary if it was induced by unconstitutional or otherwise impermissible police conduct.¹²²

1. The concept of voluntariness

There is an ambiguity underlying the "amphibian" concept of voluntariness.¹²³ Tying the law to voluntariness assumes a free will, and then asks whether that will has been fettered. But fettered by what? Speech is not a reflex; it is a willed act. One need not be a determinist to know that all confessions, except those uttered randomly, are the result of *some* kind of internal or external pressure.

The question must be why a confession produced by physical torture (or the threat of physical torture) is "involuntary," but a confession produced by a sense of guilt is not. One might say that confessions produced by torture, unlike confessions produced by guilt, are likely to be untrue. But the decisive rejection of a reliability rationale for excluding involuntary confessions closes off this approach. One might also say that the effects of torture will drive even an ordinary individual beyond the bounds of rationality, will deprive him of the most elementary power of self-control. Certainly, cases do suggest that confessions taken from anyone in such an aberrant state are involuntary.¹²⁴ But the concept of involuntariness is broader than this. By the late 1940's, the Court excluded confessions based on evidence that in no way suggested that the accused was in a state of mind approaching temporary insanity.¹²⁵ Ultimately, one is driven to conclude that a confession is "involuntary" if it is the result of forbidden pressure.¹²⁶ Two questions must therefore be an-

120. *Lisenba v. California*, 314 U.S. 219, 234-35 (1941).

121. *Blackburn v. Alabama*, 361 U.S. 199, 206-07 (1960); *Spano v. New York*, 360 U.S. 315, 320-21 (1959).

122. *Brooks v. Florida*, 389 U.S. 413, 414-15 (1967); *Sims v. Georgia*, 389 U.S. 404, 407 (1967); *Beecher v. Alabama*, 389 U.S. 35, 38 (1967); *Jackson v. Denno*, 378 U.S. at 386-88. Cf. *Wong Sun v. United States*, 371 U.S. 471 (1963) (effect of unconstitutional search and seizure).

123. The metaphor is Justice Frankfurter's. *Culombe v. Connecticut*, 367 U.S. 568, 605 (1961).

124. *Townsend v. Sain*, 372 U.S. 293 (1963) (confession given while under influence of "truth serum" inadmissible); *Blackburn v. Alabama*, 361 U.S. 199 (1960) (confession of institutionalized mental patient inadmissible); *Fikes v. Alabama*, 352 U.S. 191 (1957) (confession of schizophrenic inadmissible).

125. E.g., *Turner v. Pennsylvania*, 338 U.S. 62 (1949).

126. It appears that philosophers writing about the voluntariness of bargained pleas have,

swered to determine the voluntariness of a confession: What caused the confession? Was that cause a forbidden one?

2. Causality

In life as well as law, the concept of causality appears as a smooth plastic surface surrounding a closely intertwined and perhaps tangled skein of wire. It may be impossible, even in theory, to unpack and follow those strands.¹²⁷ It is certainly hard. Ordinarily, answers to causal questions will generally depend on the purpose for which the question is asked.¹²⁸ In matters of criminal responsibility, causation is quite clearly more than simply a matter of fact; courts will find causation quickly when the actor hoped to produce the result he did, and find it more hesitantly when the actor did not.¹²⁹

Except perhaps at the bedrock "but-for" level of causation, the notion of cause is not solely a factual question. It requires a judgment of value. One might, therefore, expect that causation in confession cases would be similarly tangled, but that the Court would be quicker to find causation the more reprehensible they viewed the provoking practice. Certainly the cases are consistent with this notion.¹³⁰ But the Court's factual analysis of causation is typically so compressed that no certain judgments can be made.¹³¹

from their own perspective, generally reached this same conclusion. See Philips, *supra* note 5 at 209, 222-23; Wertheimer, *Freedom, Morality, Plea Bargaining, and the Supreme Court*, 8 PHIL. & PUB. AFF. 203, 234 (1979). *Contra*, Kipnis, *Criminal Justice and the Negotiated Plea*, 86 ETHICS 93 (1976), replied to, Wertheimer, *The Prosecutor and the Gunman*, 89 ETHICS 269 (1979).

127. Whether causality exists in the universe is one of the questions that have divided physicists of the calibre of Einstein (yes) and Bohr (no) for more than half a century. Most physicists today are in Bohr's camp. For a good popular account, see J. GRIBBIN, *IN SEARCH OF SCHRÖDINGER'S CAT* 155-76 (1984). For a more technical discussion see, e.g., M. JAMMER, *THE PHILOSOPHY OF QUANTUM MECHANICS: THE INTERPRETATIONS OF QUANTUM MECHANICS IN HISTORICAL PERSPECTIVE* (1974).

128. Suppose a house burns down because a short circuit, a defective fusebox, the house's wooden structure and the absence of the fire department all coincided. An insurance company may say the loss was "caused" by the wooden structure, particularly if the owner was paying rates for concrete. The fire inspectors may focus on the defective fusebox. A legislative investigating committee might ask where the fire department was.

129. For discussion and a collection of cases, see W. LAFAVE & A. SCOTT, *CRIMINAL LAW* 252-66 (1972).

130. For example, the Supreme Court has never questioned causality when the confession followed immediately upon police violence.

131. E.g., *Frazier v. Cupp*, 394 U.S. 731, 739 (1969) (stating facts and conclusion of voluntariness, nothing more); *Turner v. Pennsylvania*, 338 U.S. 62, 65 (1949) (plurality opinion) ("no other possible conclusion" than involuntariness, but no explanation).

3. Forbidden and permitted pressures

Internal pressures such as shame and guilt have never been held to vitiate a confession.¹³² So long as hopes, fears and other psychological factors were not played upon or exploited by the police, these factors have had no place in the congeries of factors relevant to voluntariness.¹³³ Some kind of external pressure has always been indispensable to a finding that the "suction process" has unlawfully produced a confession.¹³⁴

Not every external pressure will vitiate a confession, even if it is the sole cause of the speech.¹³⁵ Implicit in virtually every case of police interrogation is the threat that failure to answer will lead at least to further questioning, or at least to further attempts to persuade the suspect to agree to more questioning. Although unduly harsh or long interrogation or the threatened use of it may invalidate a confession, the mere possibility of additional questioning or asking the suspect to talk will not.¹³⁶ Also implicit in virtually every case of police interrogation is the promise that if the suspect can provide a sufficiently convincing explanation of innocence, he will be freed and presumably, the police will concentrate their attention elsewhere. However, this implicit promise is also insufficient to invalidate a confession.¹³⁷

132. Some opinions do suggest that a different result might be reached in truly pathological cases. *See* cases cited *supra* note 124.

133. Finding that a confession was "spontaneous" has always terminated the inquiry into voluntariness. *E.g.*, *United States v. Mitchell*, 322 U.S. 65, 69-70 (1944); *cf. Miranda*, 384 U.S. at 478 (dictum) (spontaneity ends voluntariness inquiry).

134. "A statement to be voluntary of course need not be volunteered. But . . . [w]hen a suspect speaks because he is overborne . . . yielding to questioning . . . is plainly the product of the suction process of interrogation and therefore the reverse of voluntary." *Watts v. Indiana*, 338 U.S. 49, 53 (1949) (plurality opinion) (Frankfurter, J.).

135. Given the underlying uncertainty about concepts of causation, *see supra* note 127, it may be difficult to speak of any event as the "sole cause" of another one. *See supra* note 128. I use the term here because it is common in everyday speech, and contains none of the cumbersome and sometimes contradictory baggage attached to all of the technical adjectives—"proximate," "legal," and so forth—attached to "cause" in legal writing.

136. *Michigan v. Mosley*, 423 U.S. 96 (1975). In extreme cases, this will not always be true. *Ziang Sung Wan*, 266 U.S. at 8-14 (doctor testified suspect was in pain and would have signed "anything" to get questioning to stop). *Cf. Miranda*, 384 U.S. at 473-74 & 474 n.25.

137. There is still no clear answer to the question when an individual may be detained against his will for investigation or questioning, how long he may be detained, or under what circumstances. *See United States v. Hensley*, 469 U.S. 221, 228-29 (1985) ("difficult to define" limitations when past criminal activity is being investigated, reserving question whether probable cause is required if crime is not a felony); *United States v. Sharpe*, 470 U.S. 675, 685 (1985) ("no rigid time limitation" on investigative stops). *Cf. J. CHOPER, Y. KAMISAR & L. TRIBE, THE SUPREME COURT: TRENDS AND DEVELOPMENTS 1979-1980: AN EDITED TRANSCRIPT OF THE SECOND ANNUAL SUPREME COURT REVIEW AND CONSTITUTIONAL LAW SYMPOSIUM 140-41* (D. Opperman ed. 1981).

4. Lies and trickery

Social consensus regarding whether (or when) lies and trickery may be an appropriate means of obtaining a confession is unlikely.¹³⁸ The Court's cases reflect society's ambivalence. In *Spano v. New York*,¹³⁹ Spano confessed only after a close friend, under police instructions, falsely told Spano that the friend and his family would be in serious trouble if Spano did not admit guilt. The Court held the confession involuntary, and *Spano* has been interpreted as forbidding the use of confessions obtained by false statements. But the Court's opinion mentioned Spano's inexperience, and also the fact that the confession was obtained after indictment and after Spano had requested and had been refused an opportunity to speak to his lawyer.¹⁴⁰ Four concurring Justices would have based the decision squarely upon this latter ground.¹⁴¹

On the other hand, in *Frazier v. Cupp*,¹⁴² the Court upheld as voluntary a confession which had promptly followed a false police statement that a companion had confessed and a sympathetic statement that the victim had probably started the fight.¹⁴³ The Court merely noted that the false statements were "relevant," but were "insufficient in our view to make this otherwise voluntary confession inadmissible."¹⁴⁴ The only explanation why the false statements were insufficient was that cases involving voluntariness must be decided "by viewing the 'totality of the circumstances.'"¹⁴⁵ The facts of *Frazier* make it easy to suspect that the confession might have been the product not of the lies, but of the sympathetic attitude of the police, or perhaps of other factors. If so, finding the confession voluntary does not imply that police lies can ever permissibly

138. An extensive body of law, on the other hand, exists expressing hostility to those who lie to the government. It is a crime to lie to a federal official concerning a matter properly under investigation, even if the statements are not under oath. 18 U.S.C. § 1001 (1982) (providing for up to five years in jail as punishment); see Note, *Obscene Harpies and Foul Buzzards? The FBI's Use of Section 1001 in Criminal Investigations*, 78 YALE L.J. 156 (1968). The Supreme Court has held that unconstitutional compulsion to speak is no defense to a prosecution for perjury. *United States v. Knox*, 396 U.S. 77 (1969). It has expressed disapproval of lying under oath in the strongest terms. *E.g.*, *Harris v. New York*, 401 U.S. 222, 224-25 (1971). For an excellent discussion of society's ambivalence about lying, see S. BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* (1978).

139. 360 U.S. 315.

140. *Id.* at 317-19, 321-23.

141. *Id.* at 324-27 (Douglas, J., Black, J., Brennan, J., and Stewart, J., concurring). All of the concurring Justices joined the opinion of the Court.

142. 394 U.S. 731.

143. *Id.* at 737-39.

144. *Id.* at 739. The Court here was speaking explicitly about the false police statement that the companion had confessed, and not about the policeman's later sympathetic comments.

145. *Id.* (quoting *Clewis v. Texas*, 386 U.S. 707, 708 (1967)).

produce a voluntary confession.¹⁴⁶ Moreover, a lie may not be believed, and perhaps the Court's unwillingness ever to state outright that lies will invalidate a confession goes only to the question of cause. When lies are shown by the record, the Court has noted or emphasized their presence.¹⁴⁷ In light of the strong disapproval of lies in other contexts, it seems fair to read the cases as holding that the government may not lie to induce a confession, and that if it does and the lie, believed, causes a confession, that confession is involuntary.¹⁴⁸

5. Bargains

Involuntary confession cases occasionally state that a confession is involuntary if it is induced by promises of benefit.¹⁴⁹ But the cases are

146. *Frazier* cited *Clewis v. Texas*, which was relevant to *Frazier* only in that the *Clewis* opinion, too, had mentioned that the determination of voluntariness must be made considering all relevant circumstances. 386 U.S. 707, 708-10 (1967). There were no lies in that case. This, if anything, strengthens the proposition that the confession in *Frazier* was upheld because the Court did not believe the lies "caused" the confession, not because a confession produced by lies is voluntary.

147. In *Watts v. Indiana*, the Court held involuntary a confession given by a suspect arrested on a Wednesday and held incommunicado for almost a week in a cell with no place to sit or sleep except the floor. 338 U.S. 49 (1949). When not in the cell, he was constantly questioned. However, nothing indicated that Watts was lied to. The same day in *Turner v. Pennsylvania*, the Court held involuntary a confession taken from a suspect held in custody for five days, apparently under tolerable conditions, who was never questioned more than six hours in any day. 338 U.S. 62 (1949). He was, however, falsely told that other suspects had implicated him. *Id.* at 63-64. A plurality of the Court found *Watts* and *Turner* indistinguishable, a difficult conclusion unless the lies in *Turner* weighed heavily in the scales. *Id.* at 65.

In *Rogers v. Richmond*, the Court held a state conviction invalid because the state courts had applied the wrong standard of voluntariness. 365 U.S. 534 (1961). Since the Court was formally reviewing only the standard applied and not the ultimate question of voluntariness, no specific discussion of the latter point exists. But the Court's discussion of the facts emphasized that Rogers confessed only after the police chief feigned a telephone call directing the police to be ready to bring in Rogers' sick wife for questioning, and later emphasized that she was about to be arrested. *Id.* at 535-38, 541-43; see also *Lynumn v. Illinois*, 372 U.S. 528 (1963) (prohibiting either lies or bargains, and perhaps both). For a discussion of *Lynumn*, see *infra* notes 156-65 and accompanying text.

148. In *Moran v. Burbine*, a divided Court held that a suspect's confession taken after the police had falsely assured his attorney that he would not be questioned was not involuntary. 475 U.S. 412 (1986). The Court emphasized that the misstatement had not been made—or otherwise communicated—to the defendant, but only to his attorney.

149. *E.g.*, *Haynes v. Washington*, 373 U.S. 503, 513, 517 (1963). "Threats" and "promises" are sometimes hard to separate. Is a suspect "threatened" with further violence or "promised" peaceful treatment if he is being beaten and the police tell him they will quit if he confesses? It may not be important to distinguish between these two concepts. To the extent that it is, this Article will use "threat" to mean the threat of *more harm than the law permits*, and "promise" to mean the promise of *less harm than the law allows*. The beaten suspect is being threatened. If he were told that his confession would get him less than the maximum possible sentence, he would be getting a promise.

far more equivocal than that language. Threats of additional questioning, or promises of release if a statement proves the suspect's innocence, have not ordinarily invalidated a confession.¹⁵⁰ In one case, the Supreme Court explicitly upheld a confession that was the result of a bargain. In *Stein v. New York*,¹⁵¹ the suspect, Cooper, confessed to the police only after he was able to obtain their promise to release his jailed father and not to charge his brother with parole violation if Cooper confessed.¹⁵² The Court not only approved the lower courts' finding that the confession was voluntary,¹⁵³ but also emphasized that Cooper's desire to sell his statements was a factor supporting voluntariness.¹⁵⁴ However, *Stein* was premised on a reliability-based theory of voluntariness which the Court has since abandoned.¹⁵⁵

On the other hand, in *Lynumn v. Illinois*,¹⁵⁶ the Court held a confession induced by threats that the suspect's children would be taken away if she didn't cooperate, combined with promises of lenient treatment if she confessed to be involuntary. In *Lynumn*, the Chicago police arrested one Zeno for possession of narcotics, and then promised to go easy on him if he would "set somebody up."¹⁵⁷ He purported to purchase marijuana from Lynumn in circumstances suggesting that she might have been framed.¹⁵⁸ The police immediately arrested Lynumn and interrogated her in her apartment.¹⁵⁹ Discovering that she had children, one officer told her that the children might be taken from her if she were arrested and charged, and that her welfare payments would be cut off.¹⁶⁰ However, they said, "if she wished to cooperate, we would be willing to recommend to the State leniency in her case."¹⁶¹ The officers said this "more than once."¹⁶² After initially denying any sale, she finally claimed

150. See *supra* notes 132-34 and accompanying text.

151. 346 U.S. 156.

152. *Id.* at 167.

153. In compliance with the oddities of New York procedure, the jury simultaneously determined voluntariness of the confession and guilt of the accused, but rendered only a general verdict of guilt or innocence. Thus, there was no clear finding at trial that the confession was voluntary. The jury could have found the suspect's confession involuntary and disregarded it. See *Jackson v. Denno*, 378 U.S. 368 (1964) (holding the procedure unconstitutional).

154. *Stein*, 346 U.S. at 186.

155. *Jackson v. Denno*, 378 U.S. at 383-85 ("underpinning of *Stein* . . . unequivocally put to rest"); *Rogers v. Richmond*, 365 U.S. 534 (1961). *Stein* itself was overruled on another point in *Jackson v. Denno*, 378 U.S. at 391.

156. 372 U.S. 528 (1963).

157. *Id.* at 529.

158. *Id.*

159. *Id.* at 529-30.

160. *Id.* at 531-34.

161. *Id.* at 532.

162. *Id.* at 533.

there had been one—in her words, because of “the hope of saving myself from going to jail and being taken away from the children.”¹⁶³ She was convicted of the sale and sentenced to not less than ten (nor more than eleven) years in the penitentiary.¹⁶⁴

The Court thought it “clear” that the confession was involuntary, but never explained why; counsel for Illinois conceded the involuntariness of the confession.¹⁶⁵ The Court may have felt that the promises of leniency were false (she got ten “lenient” years); or that the statements about the children were bad law; or that promises of leniency, generally, would vitiate a confession; or simply that even if everything told her was true, Lynumn was simply not capable at the time of dealing with the truth.

Thus the import of *Stein* and *Lynumn* is not entirely clear. One commentator has suggested that they can be reconciled by concluding that a defendant may bargain away his statements if he is sufficiently in control of himself to negotiate well, but not otherwise.¹⁶⁶ This resolution, however, is insufficient. *Stein* was decided on the since-rejected theory that a confession not produced by violence or the threat of physical violence is involuntary only if it is likely to be untrue.¹⁶⁷ With this notion of voluntariness rejected, the holding stands in limbo, unsupported by a rationale but not clearly wrong until measured against the proper concept of voluntariness and found wanting. That concept is that a confession is involuntary if it is the product of illegal pressures.¹⁶⁸ The question therefore becomes whether the pressures involved in the bargaining process are themselves illegal. *Stein* has been repudiated, and *Lynumn* is too ambiguous to provide an answer. However, one body of law deals directly with questions of this kind—the doctrine of unconstitutional conditions.

E. Unconstitutional Conditions

The vast bulk of governmental action in the United States is free

163. *Id.* at 531-32.

164. *Id.* at 529.

165. *Id.* at 534-35.

166. *Developments in the Law—Confessions*, *supra* note 20, at 978-79.

167. *See Stein*, 346 U.S. at 182-87. For rejection of the *Stein* theory, see *supra* text accompanying note 117.

168. The *Stein* opinion did not wholly reject this notion. Explaining why physical violence or threats of violence would inevitably void a confession, the Court mentioned that such violence “serves no lawful purpose.” *Stein*, 346 U.S. at 182. Psychological pressures, on the other hand, often served entirely proper purposes. *Id.* at 184-86. Furthermore, illegal detention at the time was solely a matter of state law. *Id.* at 186-88.

from substantial constitutional scrutiny.¹⁶⁹ Burdens and benefits, taxes and welfare, licenses and jobs are apportioned, granted and withheld throughout the country on a daily basis. Governments frequently want to condition the grant of benefits, or the abatement of burdens, on an agreement to waive, or not to exercise, at least for the time being, some constitutional right. At one extreme this is indispensable to the operation of government. We may have a constitutional right to loaf,¹⁷⁰ but the government can insist we give it up in order to obtain a government job. At the other extreme, however, allowing the government to condition receipt of any governmental benefit on the waiver of *every* constitutional right would effectively destroy all such rights.¹⁷¹ The doctrine mediating between these competing considerations is known as the doctrine of unconstitutional conditions.¹⁷²

While uncertainly applied at the outset,¹⁷³ by the late 1960's the doctrine was well developed. If benefits were to be conditioned upon the waiver of constitutional rights, the state was required to show a purpose for the waiver that was more than a simple desire to prevent the exercise of those rights.¹⁷⁴ Since the right being waived was of constitutional magnitude, the relationship between the benefit granted and the waiver demanded had to be far closer than the "rational relationship" traditionally demanded by due process and equal protection analysis.¹⁷⁵ Coerced

169. This does not mean that no constitutional constraints apply, but merely that, after those constraints have been applied, there remains an immense freedom of choice—whether to license optometrists at all, for instance, and if so, under what standards.

170. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972).

171. If one expands the notion of "benefit" to mean anything the government is not forbidden from doing to an individual, the point is obvious. It would be impossible to survive for long with no rights but those guaranteed by the Constitution.

172. The doctrine in its heyday generated a vast amount of literature. Among the best discussions are Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); Note, *Another Look at Unconstitutional Conditions*, 117 U. PA. L. REV. 144 (1968); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960).

173. *Compare Security Mut. Life Ins. Co. v. Prewitt*, 202 U.S. 246 (1906) (right of foreign corporation to conduct business conditioned on waiver of right to remove lawsuits to federal courts) and *Davis v. Massachusetts*, 167 U.S. 43 (1897), *overruled by Terral v. Burke Constr. Co.*, 257 U.S. 529 (1922) (access to public property conditioned on waiver of public speaking) and *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 29 N.E. 517, 517 (1892) (policeman fired for "talk[ing] politics") with *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583 (1926) (invalidating waiver of right against uncompensated takings as condition of access to public property) and *Terral v. Burke Constr. Co.*, 257 U.S. 529 (1922) (partially overruling *Prewitt*) and *Western Union Tel. Co. v. Kansas*, 216 U.S. 1 (1910) (invalidating franchise tax on corporation's entire stock).

174. *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969); *United States v. Jackson*, 390 U.S. 570, 581 (1968) ("patently" unconstitutional if no such showing).

175. For due process purposes, a relationship was "rational" if it was not, demonstrably, more likely untrue than true. *E.g.*, *Williamson v. Lee Optical Co.*, 348 U.S. 483, 485-88

waivers had to be necessary¹⁷⁶ to promote a state interest of substantial importance.¹⁷⁷

The cases arose in different contexts and occasionally generated different syntax in the opinions. An individual might be required to execute a formal waiver of rights as a condition for the receipt of benefits, and subsequently litigate the validity of the waiver. In *Garrity v. New Jersey*,¹⁷⁸ police officers were questioned during an investigation into ticket-fixing. They were told they had a right to remain silent; that if they spoke, their statements might be used against them in a criminal prosecution; and that if they did remain silent, they could be fired for their silence. The officers spoke and were later convicted of crimes on the basis of their answers.¹⁷⁹ Using the language of "coercion," the Supreme Court held the statements to be involuntary and reversed the convictions.¹⁸⁰

In other cases, an individual asked to waive his rights might refuse, and thereafter be denied a benefit for his refusal. Subsequent litigation would concern the propriety of denying the benefit. In *Gardner v. Broderick*,¹⁸¹ a policeman was summoned before a grand jury investigating police corruption. Asked to sign a waiver of his privilege against self-incrimination, he was told that he would be fired if he refused to sign. He refused and he was fired. He brought suit seeking reinstatement and back pay.¹⁸² The Supreme Court held unconstitutional the New York City Charter provision which commanded the firing of any city employee who refused to waive the privilege against self-incrimination in any investigation concerning city affairs. "[T]he great privilege against self-incrimination does not tolerate the attempt, regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers on penalty of

(1958); *Tot v. United States*, 319 U.S. 463 (1943). For equal protection purposes, the issue was similar but not always identical. *E.g. Williamson*, 348 U.S. at 486-87. *See generally* Tussman & TenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

176. *See generally* *United States v. Jackson*, 390 U.S. 570, 582-83 (1968); *Shelton v. Tucker*, 364 U.S. 479, 488-89 (1960). "Necessary" in this context as in others is a term of art. It did not mean "absolutely necessary"; the state need not expend all its resources before it conditions a benefit on a waiver. Generally, however, if an equally costly but less burdensome alternative was available, the state's choice was not "necessary"; nor was it "necessary" if a more costly but less burdensome alternative was available, unless the additional cost was wholly disproportionate to the gain in constitutionally protected liberties. *See generally* Wormuth & Mirkin, *The Doctrine of the Reasonable Alternative*, 9 UTAH L. REV. 254 (1964).

177. *See generally* *Shapiro*, 394 U.S. at 634; *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

178. 385 U.S. 493 (1967).

179. *Id.* at 494-95.

180. *Id.* at 496-500.

181. 392 U.S. 273 (1968).

182. *Id.* at 274-75.

the loss of employment."¹⁸³

Finally, as was most often the case, an individual might simply exercise a constitutional right, and thereafter be denied a benefit. A convicted criminal defendant might exercise his right to challenge an unconstitutional conviction.¹⁸⁴ After his successful challenge, retrial and reconviction, the state may respond with a less lenient or more harsh sentence because he had successfully made the challenge. A family might exercise its right to migrate and settle in a new state that denies welfare benefits to newcomers. In *North Carolina v. Pearce*¹⁸⁵ and *Shapiro v. Thompson*,¹⁸⁶ the Court held these practices unconstitutional. In this latter class of cases, the Court frequently used the language "penalty" or "burden." In doing so, the Court would ask whether the practice would impermissibly "penalize" or "burden" the exercise of a particular constitutional right.¹⁸⁷ However, frequent cross-citation among cases in the several classes reveals that the Court was using a single analytic form, even though the expression varied.¹⁸⁸ Although many of the early cases involved rights protected under the first amendment, later cases explicitly and implicitly stated that the doctrines developed there were applicable to constitutional rights whatever their source.¹⁸⁹

One case particularly pertinent to plea bargaining is *United States v. Jackson*.¹⁹⁰ The Federal Kidnaping Act provided that a person convicted of kidnaping could be executed if the victim had not been released

183. *Id.* at 279. Other examples of waiver of constitutional rights include *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation*, 392 U.S. 280 (1968) and *Spevack v. Klein*, 385 U.S. 511 (1967).

184. Although the Court has frequently stated that no absolute constitutional right to appeal a criminal conviction exists, e.g., *Rinaldi v. Yeager*, 384 U.S. 305, 310-11 (1966), it is clear that once a state makes available a mode of appeal, it cannot exclude federal constitutional questions from that appeal. *Testa v. Katt*, 330 U.S. 386 (1947).

185. 395 U.S. 711 (1969).

186. 394 U.S. 618.

187. E.g., *Pearce*, 395 U.S. at 723-25; *Shapiro*, 394 U.S. at 634; *Griffin v. California*, 380 U.S. 609 (1965).

188. *Garrity*, a coerced waiver case, said it was controlled by the same principle as *Spevack*, a case involving refusal to waive. 385 U.S. at 497. *Gardner*, also a case involving refusal to waive, relied heavily on *Garrity*. 392 U.S. at 277.

Of course, where the question was the validity of an executed waiver, there was always the additional inquiry whether the impermissible pressure produced the waiver, or whether some other factor did; and the Court consistently retained this distinction. *United States v. Jackson*, 390 U.S. at 583; *Gardner*, 392 U.S. at 278-79; *Garrity*, 385 U.S. at 498-500.

189. The point is explicit in *United States v. Jackson*, 390 U.S. at 582, and implicit in *Shapiro*, 394 U.S. at 634 (citing, inter alia, first amendment and equal protection cases without noting a distinction).

190. 390 U.S. 570 (1968).

unharmful. The penalty was not mandatory, however, and it could be imposed only if the defendant had a jury trial. Defendants convicted after a bench trial or on plea of guilty could receive nothing more than life imprisonment.¹⁹¹

The Supreme Court held this sentencing scheme unconstitutional.¹⁹² Speaking for six members of the Court,¹⁹³ Mr. Justice Stewart noted that under the statute as construed, a defendant who waived his right to jury trial, either by opting for a bench trial or by pleading guilty, was "assured" that he would not be sentenced to death if convicted; but a defendant who "seek[s] a jury acquittal stands forewarned" that he may be sentenced to death if found guilty.¹⁹⁴ Justice Stewart framed the issue by stating that:

Our problem is to decide whether the Constitution permits the establishment of such a death penalty, applicable only to those defendants who assert the right to contest their guilt before a jury. The inevitable effect . . . is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial. If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional.¹⁹⁵

However, the Court agreed with the government's argument that this was not the sole purpose of the death penalty provisions of the statute. The provisions were designed to insure that defendants would be sentenced to death only if a jury thought they should be.¹⁹⁶ In the government's view, this beneficent purpose made it irrelevant that the provision might "have the incidental effect of inducing defendants not to" fight their cases as hard as they could—by demanding a jury trial.¹⁹⁷ The Court did not agree. "Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights. The question is not whether the chilling effect

191. 18 U.S.C. § 1201(a) (1964) (amended 1972). The Court rejected a proposed construction of the statute that would have avoided the constitutional question, or presented it in a different light. *United States v. Jackson*, 390 U.S. at 572-81.

192. *United States v. Jackson*, 390 U.S. at 572.

193. Justices Black and White dissented. Justice Marshall did not participate. *Id.* at 591 (Black, J., and White, J., dissenting).

194. *Id.* at 581.

195. *Id.* (footnote omitted).

196. *Id.*

197. *Id.* at 581-82 (citations omitted).

is 'incidental' rather than intentional; the question is whether that effect is unnecessary and therefore excessive."¹⁹⁸ In this particular case, it was "clear" to the Court that the provision was unnecessary in order to serve the concededly laudable purpose of restricting life-or-death decisions to juries.¹⁹⁹ The statute could easily provide that a jury would be empaneled to determine the penalty in every case of conviction, whether after jury trial, bench trial or plea of guilty.²⁰⁰

Finally, the Court stated:

It is no answer to urge . . . that federal trial judges may be relied upon to reject coerced pleas of guilty and involuntary waivers of jury trial. For the evil . . . is not that [the statute] necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them. A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right. Thus [this case] . . . hardly implies that every defendant who enters a guilty plea to a charge under the Act does so involuntarily.²⁰¹ The power to reject coerced guilty pleas and involuntary jury waivers might alleviate, but it cannot totally eliminate, the constitutional infirmity in the capital punishment provision of the Federal Kidnaping Act.²⁰²

The general question of plea bargaining was mooted in the *United States v. Jackson* briefs. The Court was aware of the problem, and studiously avoided going beyond the case actually presented for decision.²⁰³ But a case cannot be removed from the stream of law in which it floats. After *United States v. Jackson*, the questions seemed clear even if the answers remained to be formulated. Plea bargaining involves a system of inducements for defendants who plead guilty, matched by burdens on

198. *Id.* at 582 (citations omitted).

199. *Id.*

200. *Id.* (citations omitted).

201. At this point, the *United States v. Jackson* Court observed in a footnote:

"See *Laboy v. New Jersey*. So, too, in *Griffin v. California*, the Court held that comment on a defendant's failure to testify imposes an impermissible penalty on the exercise of the right to remain silent at trial. Yet it obviously does not follow that every defendant who ever testified at a pre-*Griffin* trial [in states following the California rule] . . . is entitled to automatic release upon the theory that his testimony must be regarded as compelled."

Id. at 583 n.25 (citations omitted).

202. *Id.* at 583. The Court also rejected an argument that it should save the penalty provisions by simply instructing trial judges to reject all pleas of guilty and jury waivers. "Quite apart from the cruel impact of such a [rule]," the power to accept guilty pleas was "necessary for the . . . practical . . . administration of the criminal law." *Id.* at 584-85.

203. See *infra* notes 209-11 and accompanying text.

defendants who do not.²⁰⁴ *United States v. Jackson* raised two questions about this system. First, did a particular system of bargained pleas have any "other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them"?²⁰⁵ If not, the system would be "patently unconstitutional."²⁰⁶ If it did, the second question would be whether the actual system was "necessary" to implement whatever other purposes it served. If, as in *United States v. Jackson*, those purposes could be served without "chilling," "burdening," or "encouraging the waiver of" the constitutional right to plead not guilty, the system as a whole would be unconstitutional.²⁰⁷

Of course, a plea bargaining case might arise, unlike *United States v. Jackson*, after, instead of before, the plea had been entered. If so, *United States v. Jackson* did not directly affect the ultimate test for the validity of a guilty plea—a plea was still, as before, invalid if it was "involuntary." But that question, as it appeared from prior cases, was the same as the question whether the plea was the product of any unconstitutional pressure.²⁰⁸ If the particular plea bargaining system in effect when the plea was entered was *not* in itself unconstitutional, then pleas produced by the pressures of the system would, as a general matter, be voluntary and thus valid.²⁰⁹ But if the system in effect when the plea was entered *was* unconstitutional, then the only remaining question would be whether the particular plea was in fact the *product* of the unconstitutional system, or whether it had been entered for other reasons—for example, the lawful, internal pressure of guilt.²¹⁰

The Court carefully avoided answering those questions beyond the needs of *United States v. Jackson* itself. It made no effort to survey the "purpose or effect" of any plea bargaining system in general. It mentioned its belief that the power to *accept* guilty pleas was "necessary" for the administration of criminal law, but said nothing about the power to

204. Of course the benefits (and thus the burdens as well) may in fact be illusory. See W. RHODES, *supra* note 18, concluding that most defendants in the District of Columbia received the same sentence whether they pleaded guilty or insisted on trial.

205. *United States v. Jackson*, 390 U.S. at 581.

206. *Id.*

207. Similarly, even if some pressures were necessary to serve permissible purposes, not all pressures would be necessary. *United States v. Jackson* therefore suggested that even if plea bargaining could not be eliminated, the Constitution provided a basis for cabinining the prosecutor's power.

208. See *supra* notes 31-168 and accompanying text.

209. Of course, a weak-minded defendant in a particular case could still be driven beyond rationality by the problem facing him and thus be incapable of entering a voluntary plea.

210. Similarly, if the system were unconstitutional, defendants who had refused to plead guilty and received harsher sentences as a result could attack the additional portion of their sentence as a penalty on their decision to demand trial.

"coerce" or "encourage" guilty pleas.²¹¹ On the question of voluntariness, the Court contented itself with the obvious point that not all pre-*United States v. Jackson* pleas of guilty to kidnaping were necessarily coerced. Just as California defendants might have decided to testify in their own defense for reasons independent of the possibility that the prosecutor might comment on their silence, some pre-*United States v. Jackson* defendants might have decided to plead guilty for reasons independent of their chances of being sentenced to death.²¹²

Examination of the purpose, effect and necessity of plea bargaining systems thus appeared almost unavoidable in determining their constitutionality. The constitutionality of any particular system of plea bargaining could be raised in several ways. First, it could be raised by a defendant in Jackson's position, who had not yet pleaded and sought to challenge the legality of the pressure placed on him to plead guilty. Since such a defendant would be in a position identical to Jackson's, the question would be whether the pressure was "unnecessary [to serve legitimate purposes independent of a desire to encourage guilty pleas] and therefore excessive."²¹³ Second, it could be raised by a defendant who had refused or been unable to plead guilty, and was penalized for his insistence on trial.²¹⁴ The question, again, would be whether the penalty was necessary to further a state interest of substantial importance.²¹⁵ Finally, the question could be raised by a defendant who *had* pleaded guilty under the pressures of a plea bargaining system and later sought to challenge his plea as "involuntary" because of those pressures. The particular plea might not in fact be the "product" of such a system, and thus would not raise the question of constitutionality since, if the plea bargaining system did not produce the plea, the issue of voluntariness would be irrelevant. However, if the plea was produced by the plea bargaining system, then its voluntariness, under the previously developed standards,²¹⁶ would depend on the legality of the pressures that produced it—raising the same questions of necessity discussed above.

Only one possibility remained that would avoid examination of these questions of the necessity of plea bargaining. The guilty plea cases

211. *United States v. Jackson*, 390 U.S. at 583.

212. *Id.* at 583 & n.25. The analogy is the *Jackson* Court's. *Id.*

213. *Id.* at 582-83; see also *supra* notes 193-204 and accompanying text.

214. For example, in *Pettyjohn v. United States*, 419 F.2d 651 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1058 (1970), a defendant accepted a plea bargain, but his plea was refused by the district court as "involuntary" and, when he was ultimately convicted, he received a sentence greater than he could have gotten had the bargain gone through.

215. See *supra* text accompanying notes 175-77.

216. See *supra* notes 31-168 and accompanying text.

analogized the "voluntariness" of guilty pleas to the "voluntariness" of confessions. Perhaps the analogy, never closely thought through, would not hold when closely examined. If "voluntariness" meant a different thing in the guilty plea context than it did in the context of a confession, there might be a failure of symmetry. A particular plea could be valid even if produced by an unconstitutional system. This, however, would only mean that the constitutionality of the system would not be presented by a case questioning the voluntariness of a plea already entered. The constitutionality of the system would still be presented by cases like *United States v. Jackson*, attacking the system prior to entry of a guilty plea, or by cases brought by defendants who refused or were unable to plead guilty and were thereby disadvantaged.

It was against this legal background that the Supreme Court decided the *Brady* Trilogy.

III. THE *BRADY* TRILOGY

The Court at last spoke squarely to the practice of plea bargaining in three cases handed down the same spring day in 1970.²¹⁷ The Court concluded that plea bargaining in general was without constitutional flaw. What is remarkable about these opinions is not the result they reached; rather, it is the essential lawlessness²¹⁸ of the opinions themselves.

In upholding the legitimacy of plea bargaining, the Court did not rely on any prior cases, interpreted or reinterpreted, to support the conclusion it set forth. Precedent was referred to only to demonstrate its irrelevance to the problem at hand. In the Court's view, it was called upon to make law in a vacuum. With the air thus cleared for decision, the Court announced its conclusions. It did not in any significant sense attempt to explain or justify those conclusions, except perhaps by inferences that might be drawn from the phrasing and examples which the opinions contain. At critical points throughout the opinions, the Court simply puts the question presented, announces its answer, and explains that answer by nothing more than a statement that it is not persuaded that a different answer would be correct. On occasion, even this explanation is omitted.

217. *Brady v. United States*, 397 U.S. 742 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); *Parker v. North Carolina*, 397 U.S. 790 (1970). *Brady* and *McMann* are the major opinions; *Parker* contains no independent discussion of principles.

218. I use the term "lawlessness" advisedly.

A. *The Voluntariness Standard: Brady v. United States*

The Trilogy's lead opinion is attached to *Brady v. United States*.²¹⁹ Brady had been charged in 1959 with capital federal kidnaping under the sentencing scheme held unconstitutional in *United States v. Jackson*.²²⁰ After a codefendant pleaded guilty and became available to testify against him, Brady also pleaded guilty and was sentenced to fifty years in jail.²²¹ In 1967, Brady challenged his plea as involuntary on a variety of grounds, including the ground that it had been entered in order to avoid the possibility of the death penalty.²²² The lower courts found the plea voluntary and the Supreme Court affirmed.²²³ Expressing some doubt that the plea was actually entered as a consequence of the unconstitutional sentencing scheme, the Court treated the case as if it had been.²²⁴

219. 397 U.S. 742 (1970).

220. *Id.* at 743.

221. *Id.* at 743-44.

222. *Id.* at 744.

223. *Id.* at 745.

224. It is not at all clear just what case, in the ordinary sense, the Court thought was before it for decision. Ordinarily, a judgment on voluntariness requires two factual determinations and the application of a legal standard to them. *Culombe v. Connecticut*, 367 U.S. 568, 603 (1961). One must find the external circumstances, the pressures operating on the defendant when he made the choice under review—was he beaten, was he lied to, was he drugged and so forth. *Id.* Second, one must determine the *effect* of those pressures on the individual's decision. Although there may be direct testimony from the defendant on that question, unless his version is accepted this judgment must be made as a matter of inference from the circumstances determined to exist. *Id.* Finally, of course, the standard of voluntariness must be applied to the inferences drawn from the facts found. *Id.*

Typically, the Supreme Court has treated the question of external circumstances as one of fact, reviewable like any other question of fact determined by the lower courts. It would take the facts as found so long as the determination was not clearly erroneous on the record. On the inferences to be drawn from those facts, however, it did not feel itself so bound. Although it would give some deference to the findings below, it would, where necessary, make its own independent determination of how the pressures (found by the lower courts) had actually operated on the individual before it. *Id.* at 603-06.

What makes for confusion in *Brady* is that the district court had found that Brady's plea was *not* the result of the unconstitutional sentencing scheme, and the Supreme Court's opinion never clearly said whether the Court accepted or rejected that finding—an inference, if you like. *Brady*, 397 U.S. at 745. The parties agreed on the external circumstances. Brady knew that his co-defendant was willing to testify against him, and he knew that if he insisted on a jury trial he could be sentenced to death. In stating the facts, and reiterating them at the outset of its opinion, the Supreme Court seemed to accept the inferences drawn by the district judge. *See id.* at 745, 747. But the critical language is ambiguous. The lower courts found the plea "voluntarily made," and "[w]e see no reason on this record to disturb the judgment of those courts." *Id.* at 749. This could mean either that the Court accepted the critical inference or that it found the inference wrong but the plea nevertheless voluntary under the proper legal standard. Immediately thereafter the Court said "[i]t may be" that Brady pleaded because of the unconstitutional sentencing scheme, and noted in a footnote that the district court "seems" to have rejected that possibility. *Id.* at 749 & n.7. At the end of the opinion, the

The consequent opinion has three parts. In the first, the Court concludes that *United States v. Jackson* is wholly irrelevant to the case before it—*United States v. Jackson* neither changed the existing standard for accepting guilty pleas nor required a new application of the old standard.²²⁵ The standard is simply whether the plea was voluntary and intelligent.²²⁶ The second part discusses the question of voluntariness.²²⁷ Prior cases concerning voluntariness in the context of confessions are irrelevant, and the Court “cannot hold” that plea bargaining is unconstitutional.²²⁸ Finally, the Court concludes that a plea of guilty is not unintelligently entered when it is based on bad legal advice so long as the bad advice came from a “competent” lawyer representing the defendant.²²⁹ Each part of the opinion requires discussion in greater detail.

1. The irrelevance of *United States v. Jackson*

Brady’s argument, in substance, was that his guilty plea was the product of the threat of death which was held unconstitutional in *United States v. Jackson*, and that it was therefore involuntarily entered. Mr. Justice White, writing for the Court in *Brady*, thought this read “far too much into the *Jackson* opinion.”²³⁰ The Court in *United States v. Jackson* had specifically stated that its conclusion “hardly implies that every defendant who enters a guilty plea to a charge under the Act does so involuntarily.”²³¹ In support of this statement the Court cited *Laboy v. New Jersey*,²³² a district court case holding a plea voluntary under the Act although it was entered in part to avoid the possibility of a death sentence. Moreover, the *United States v. Jackson* Court had rejected a suggestion that the Act could be saved by forbidding all guilty pleas and jury waivers in possibly capital cases, because “such a rule ‘would rob the

Court stated that “Brady’s plea of guilty may well have been motivated” to avoid a possible death sentence. *Id.* at 758.

The point of all this is that it is simply impossible to tell whether the Court accepted the inference but decided nevertheless to give its opinion on the facts of a case not before it, or whether the Court rejected the inference and substituted its own (never articulated) inference, in which case the Court’s somewhat ambiguous conclusions might be clarified by reference to the factual situation it believed was actually presented. This is a point of some importance in trying to understand the holding of *Brady*. See *infra* notes 275-77 and accompanying text.

225. *Brady*, 397 U.S. at 745-47.

226. *Id.*

227. *Id.* at 749-55.

228. *Id.*

229. *Id.* at 756-58.

230. *Id.* at 746.

231. *Id.* at 746-47 (quoting *United States v. Jackson*, 390 U.S. 570, 583 (1968)).

232. 266 F. Supp. 581 (D.N.J. 1967).

criminal process of much of its flexibility.' ”²³³

The Court concluded:

Plainly, it seems to us, *Jackson* ruled neither that all pleas of guilty encouraged by the fear of a possible death sentence are involuntary pleas nor that such encouraged pleas are invalid whether involuntary or not. *Jackson* prohibits the imposition of the death penalty under § 1201(a), but that decision neither fashioned a new standard for judging the validity of guilty pleas nor mandated a new application of the test theretofore fashioned by courts and since reiterated that guilty pleas are valid if both “voluntary” and “intelligent.”²³⁴

The best that can be said for the *Brady* Court’s discussion of *United States v. Jackson* is that it may announce a correct result. However, it nowhere explains it. The Court, of course, is correct in saying that *United States v. Jackson* did not announce, or purport to announce, a “new standard for judging the validity of guilty pleas.”²³⁵ It is likewise correct in saying that *United States v. Jackson* did not purport to rule that pleas encouraged by the unconstitutional sentencing scheme “are invalid whether voluntary or not.”²³⁶ But neither of those two statements disposes of the issue at hand. That issue is whether pleas of guilty which were entered to avoid the threat of death found unconstitutional in *United States v. Jackson* were involuntary pleas—or, in the Court’s words, whether *United States v. Jackson* “mandated a new application of the test theretofore fashioned by courts . . . that guilty pleas are” invalid if involuntary.²³⁷ That question simply cannot be answered without reference to the standard of involuntariness. If a plea is involuntary because it is the product of an unconstitutional threat, then *United States v. Jackson*, which holds unconstitutional the threat made by the sentencing provisions of the Kidnaping Act, has much to say about application of the old standard. If the standard of voluntariness is something else, then *United States v. Jackson* may or may not “mandate” a “new application,” depending on just what that something else is. Without reference to the standard, however, the question cannot be decided.

To be sure, in *United States v. Jackson* the Court stated that the conclusion was not logically compelled that “every” defendant who had

233. *Brady*, 397 U.S. at 747 (citing *United States v. Jackson*, 390 U.S. 570, 584 (1968)).

234. *Id.* at 747 (citing *Boykin v. Alabama*, 395 U.S. 238, 242 (1969)).

235. *Id.*

236. *Id.*

237. *Id.*

pleaded guilty under the Act had done so involuntarily.²³⁸ But this statement may have meant nothing more than that some defendants may have wanted to plead guilty for reasons entirely unrelated to the possible penalty. Certainly this is the image suggested by the *United States v. Jackson* Court's analogy to a defendant testifying under a rule that allows the prosecution to comment if he does not take the stand.²³⁹ Admittedly, the *United States v. Jackson* Court cited *Laboy v. New Jersey*²⁴⁰ as another illustration of the possibility that a voluntary guilty plea that could be entered under the Act. However, that citation is a slender reed upon which to rest since the Court decided *Laboy* under the explicit assumption that the sentencing scheme in the Kidnapping Act was constitutional.²⁴¹ Furthermore, elsewhere in the *United States v. Jackson* opinion the Court had been exquisitely careful to avoid the question of plea bargaining in general.²⁴² Most important, the Court's citation of *Laboy* only supports the proposition that a guilty plea is voluntary—even if it is *produced* by an unconstitutional threat—if either (1) the existing standard of volutariness would not bar such a plea; or (2) *United States v. Jackson* changed the existing standard of voluntariness by its unexplicated, illustrative citation of *Laboy* in a footnote.²⁴³ The second alternative, of course, is contrary to the *Brady* Court's conclusion that *United States v. Jackson* had not "fashioned a new standard" for the validity of guilty pleas.²⁴⁴ The first alternative merely advances the question: "What is the standard of voluntariness?" Only after deciding that question can one properly consider *United States v. Jackson*'s impact, if any, on that standard.

2. The question of voluntariness

The Court's discussion of voluntariness is the core of the *Brady* opinion. After ambiguously reiterating the facts of Brady's case, the Court moved on to its analysis. According to the Court, "[t]he voluntariness of Brady's plea can be determined only by considering all of the

238. *United States v. Jackson*, 390 U.S. 570, 583 (1968) (emphasis added).

239. The analogy was drawn by the Court in *United States v. Jackson* in a footnote explicating its statement in text. *Id.* at 583 n.25.

240. *Id.* at 583 n.7 (citing *Laboy v. New Jersey*, 266 F. Supp. 581 (D.N.J. 1967)).

241. *Laboy v. New Jersey*, of course, was decided before the Supreme Court decided *United States v. Jackson*, but after the district court's decision in that case. The *Laboy* court recognized the existence of *United States v. Jackson* but disagreed with it. *Laboy*, 266 F. Supp. at 585.

242. See *supra* note 211 and accompanying text.

243. See *supra* note 224.

244. *Brady*, 397 U.S. at 747.

relevant circumstances surrounding it."²⁴⁵ The Court was at this point willing to assume that Brady would not have pleaded guilty except for the unconstitutional sentencing scheme; but "this assumption merely identifies" that scheme "as a 'but for' cause" of the plea."²⁴⁶ It "does not necessarily prove" the plea was involuntary.²⁴⁷ Many pleas are not involuntary although they are encouraged by the state, as when the accumulation of evidence persuades a defendant to forego the "agony and expense" of a trial.²⁴⁸ Such a plea is "no more improperly compelled" than a decision to testify made by a defendant who believes that the evidence is such that he will certainly be convicted if he does not.²⁴⁹ "Of course . . . the State may not produce a plea by actual or threatened physical harm or by mental coercion overbearing the will of the defendant."²⁵⁰ "But nothing of the sort is claimed" here,²⁵¹ and the record does not support any claim that Brady's state of mind was so abnormal that "he did not or could not, with the help of counsel, rationally weigh" the factors involved in his decision to plead.²⁵² Brady's claim was of "a different sort," namely,

that it violates the Fifth Amendment to influence or encourage a guilty plea by opportunity or promise of leniency and that a guilty plea is coerced and invalid if influenced by the fear of a possibly higher penalty for the crime charged if a conviction is obtained after the State is put to its proof.²⁵³

Having so stated the question, the Court answered it. Little distinguishes Brady's situation from four other situations (not before the Court) where defendants pleaded guilty on the expectation that they will be more severely punished if they insist on trial by jury.²⁵⁴ The Court

245. *Id.* at 749 (citing *Haynes v. Washington*, 373 U.S. 503, 513 (1963) and *Leyra v. Denno*, 347 U.S. 556, 558 (1954), two coerced confession cases). With one trivial exception discussed below, see *infra* note 269, these are the *only* prior Supreme Court cases cited in *Brady* relevant to the question of voluntariness. The very few additional citations are all made for the purpose of showing the irrelevance of the cited cases to the question presented.

246. *Brady*, 397 U.S. at 750.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.* Since death is certainly physical harm, it is not clear just what the Court meant here. Either the Court meant to distinguish conditional from unconditional threats in general; or, more likely, by physical harm it meant something like physical harm not authorized by law as punishment for conviction.

252. *Brady*, 397 U.S. at 750.

253. *Id.* at 750-51.

254. The four situations are:

(1) the defendant, in a jurisdiction where the judge and jury have the same range of

stated:

We decline to hold, however, that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged.²⁵⁵

The opinion then moves to a general discussion—"the issue . . . is inherent in the criminal law . . . because guilty pleas are not constitutionally forbidden" and because given the characteristic range of the available sentences, the state and the defendant (particularly the defendant who sees little chance for acquittal) often find it mutually advantageous to trade shorter sentences for guilty pleas.²⁵⁶ This "perhaps" explains the prevalence of guilty pleas in the United States today.

Of course, that the prevalence of guilty pleas is explainable does not necessarily validate those pleas or the system which produces them. But we cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.²⁵⁷

The Court then turned to the coerced confession cases, explaining why they did not stand as a bar to its conclusions on plea bargaining.²⁵⁸ One case stands for all. The Court chose *Bram v. United States*²⁵⁹ which

sentencing power, who pleads guilty because his lawyer advises him that the judge will very probably be more lenient than the jury; (2) the defendant, in a jurisdiction where the judge alone has sentencing power, who is advised by counsel that the judge is normally more lenient with defendants who plead guilty than with those who go to trial; (3) the defendant who is permitted by prosecutor and judge to plead guilty to a lesser offense included in the offense charged; and (4) the defendant who pleads guilty to certain counts with the understanding that other charges will be dropped.

Id. at 751. The *Brady* Court carefully noted that it was making "no reference" to several *other* situations which were also not before it. *Id.* at 751 n.8.

255. *Id.* at 751.

256. *Id.* at 751-52.

257. *Id.* at 752-53. In the next paragraph, the opinion states that a contrary rule would "require" governments to forbid guilty pleas entirely, or at least to forbid allowing guilty pleas to lesser included offenses, reduced charges, or selected counts of an indictment. *Id.* Having stated this, it repeats: "The Fifth Amendment does not reach so far." *Id.* at 753.

258. *Id.*

259. 168 U.S. 532 (1897). See *supra* notes 99-106 and accompanying text for further discussion of *Bram*.

stated the strictest of all the standards. Under *Bram*, a confession must not be "obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence."²⁶⁰ But *Bram* is "not inconsistent" with the holding here, because *Bram* was "in custody, alone and unrepresented by counsel."²⁶¹ *Bram* did not hold that the "promise was an illegal act as such;" rather, defendants in such circumstances are "too sensitive to inducement."²⁶² The "possibly coercive impact" of promises of lenience, however, can be "dissipated by the presence and advice of counsel."²⁶³ Here, however, there were "no threats or promises [made] in face-to-face encounters with the authorities."²⁶⁴ Brady had a lawyer and time to weigh his decision. "[T]here was no hazard of an impulsive and improvident response to a seeming but unreal advantage."²⁶⁵ In short, the presence of counsel and time to reflect before entering a guilty plea make the coerced confession cases irrelevant.²⁶⁶

Finally, the Court squarely faced the question what is the test of voluntariness for pleas of guilty. It did not discuss the question. It did not analyze it. It merely stated that the standard "must be essentially that defined by" the Fifth Circuit thirteen years before.²⁶⁷

"[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes)."²⁶⁸

260. *Bram*, 168 U.S. at 542-43 (quoting 3 W. RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS 478 (6th English ed. 1896) (this quotation was also cited by *United States v. Brady*, 397 U.S. 742, 753 (1970))).

261. *Brady*, 397 U.S. at 754.

262. *Id.*

263. *Id.* Supporting this proposition, the Court in a footnote quotes *Miranda v. Arizona*. *Id.* at 754 n.12. The passage quoted states that "[i]n all the cases before us today" the presence of counsel would have been adequate to protect the privilege against self-incrimination. *Id.* Immediately preceding the quoted passage, the *Miranda* Court identified the vice in the interrogation process as the uncounseled defendant's belief that he was not entitled to remain silent. Therefore, it is sensible to assume that the *Miranda* Court was speaking only to this question. *Id.* at 754. How the presence of counsel can remedy any harm coming from, for instance, a threat of death or 30 years in jail is, at least, a different question.

264. *Id.* at 754.

265. *Id.*

266. *Id.* at 753-55.

267. *Id.* at 755.

268. *Id.* (quoting *Shelton v. United States*, 242 F.2d 101, 115 (Tuttle, J., dissenting), *judg-*

It is difficult to know what to say about this remarkable performance. The discussion of voluntariness in *Brady* is a discussion without law. The Court began by citing two coerced confession cases,²⁶⁹ thereby suggesting the relevance of at least those two cases and perhaps the entire line. But when the Court returned to its discussion of coerced confession cases, it distinguished the entire line as irrelevant because they involved unrepresented defendants and threats presented in "face-to-face" encounters rather than by operation of statute.

Indeed, the proposition for which the two coerced confession cases were cited is that voluntariness must be determined in light of all the relevant circumstances of the case. Yet the *Brady* Court flatly rejected this approach. The Court decided not only *Brady*'s case and similar ones, but explicitly purported to rule on four *classes* of cases which in no way were presented by the record before it.²⁷⁰ The Court relied on *Miranda v. Arizona*²⁷¹ for the proposition that the appointment of counsel can dissipate the coercive impact of some threats.²⁷² In context the reliance is overdrawn;²⁷³ but even accepting that the citation can bear all the weight placed on it by the Court, it served only to distinguish the coerced confession cases, and not to provide affirmative support for *Brady*. Beyond this, no support exists.²⁷⁴

ment set aside, 246 F.2d 571 (5th Cir. 1957) (en banc), *rev'd on other grounds*, 356 U.S. 26 (1958)). The dissent's view was adopted by a majority of the Fifth Circuit when *Shelton* was reheard en banc. 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc). When *Shelton* petitioned for certiorari, the Solicitor General confessed that his plea might have been improperly entered (listing a variety of reasons) and the Supreme Court reversed on that confession of error. *Shelton*, 356 U.S. 26 (1958).

269. See *supra* note 245. Immediately before turning directly to the question of voluntariness, the Court did observe that guilty pleas must be voluntarily entered, citing in a footnote four guilty-plea cases and one coerced confession case. *Brady*, 397 U.S. at 748 n.5 (citing *Machibroda v. United States*, 368 U.S. 487, 493 (1962); *Waley v. Johnston*, 316 U.S. 101, 104 (1942); *Walker v. Johnston*, 312 U.S. 275, 286 (1941); *Chambers v. Florida*, 309 U.S. 227 (1940); *Kercheval v. United States*, 274 U.S. 220, 223 (1927)). None of these cases is used in any way in discussing what "voluntariness" means, and none is even adverted to during the Court's discussion of the question.

270. See *supra* note 254.

271. 384 U.S. at 466.

272. See *supra* note 263 and accompanying text.

273. See *supra* note 263; Alschuler, *The Supreme Court, the Defense Attorney, and the Guilty Plea*, 47 U. COLO. L. REV. 1, 51-58 (1979).

274. At the conclusion of its discussion, the Court does cite the Fifth Circuit's decision in *Shelton v. United States*, as stating the proper standard. But coming at the end of discussion, the *Shelton* statement appears more as a felicitous coincidence than as doctrinal support. Unreviewed lower court dictum in a concededly erroneous case is not much to rest decision on. In any event given the Court's holding in *United States v. Jackson*, it is not clear that the *Shelton* standard supports the Court's conclusions. See *infra* note 281.

Finally, at the end of its opinion the Court notes that most lower federal courts have

This legal vacuum is matched by a factual one. At the outset of its discussion, the Court assumed that Brady would not have pleaded guilty but for the unconstitutional sentencing scheme. But that the "statute caused the plea in this sense does not necessarily prove that the plea was coerced"²⁷⁵ This suggests that something *more* than but-for causation from an unconstitutional threat is required to invalidate a plea. If so, it is important to know what (if anything) more than this but-for causation is present in Brady's case. But the Court never precisely identified the assumptions it was making in the case before it.²⁷⁶ In any event, on the basis of the Court's ultimate resolution of the issue, the whole exercise is misdirected. The Court ultimately concluded that the *kind* of threat involved in *Brady* is constitutionally insufficient to invalidate a guilty plea unless it drives the defendant insane.²⁷⁷ Otherwise, even the closest imaginable causal connection—for example, where the threat is the *only* reason the defendant decided to plead guilty—is insufficient.

The opinion looks in two directly opposite directions. *United States v. Jackson*, which deals with the legality (indeed, the constitutionality) of the sentencing scheme which produced Brady's plea, was discarded in the first part of the Court's opinion as irrelevant to the question of voluntariness.²⁷⁸ *Bram*, which deals directly with the question of voluntariness, was distinguished partly on the ground that it did not hold that "the promise [given in *Bram*] was an illegal act as such"²⁷⁹ If this distinction is pertinent, it means that the legality *vel non* of the threat or promise is critical to the determination of voluntariness.²⁸⁰ If so, *United States v. Jackson*, which squarely held the practice involved in *Brady* unconstitutional, is directly on point. Yet the Court had already rejected

reached the same conclusion. *Brady*, 397 U.S. at 755 n.14. Even the Court does not press this point very strongly (their "conclusion . . . seems to coincide"); and when, in one of the companion cases, the opposite was true, the Court merely noted the fact without comment and proceeded with its analysis. *McMann v. Richardson*, 397 U.S. 759, 765 n.10 (1970). The Court, in other words, appears to have regarded the matter as a happy coincidence and not the exhibition of a body of law supporting the conclusion it reached.

275. *Brady*, 397 U.S. at 750.

276. See *supra* note 224.

277. *Brady*, 397 U.S. at 750 ("could not . . . rationally" decide about a plea). The Court also reserves judgment on cases where the prosecutor or judge have possibly illicit motives. *Id.* at 751 n.8.

278. *Id.* at 747-48.

279. *Id.* at 754.

280. The dissenters, attempting to determine the Court's standard of voluntariness, were understandably puzzled by this. *Parker v. North Carolina*, 397 U.S. 790, 800 n.2 (1970) (Brennan, J., dissenting).

United States v. Jackson as irrelevant.²⁸¹

The whole line of confession cases, whether under the fifth amendment or the fourteenth, is distinguished from the plea-bargaining situation in which the defendant is represented by counsel and has time for consideration and reflection before he is called upon to enter his plea. The *Brady* Court never explored the relevance of this distinction. It did however, suggest two possibilities: first, that the effect of even mild promises or threats on the uncounseled defendant in custody is "too great to ignore and too difficult to assess"; and second, that for the counseled defendant pleading guilty, "no hazard of an impulsive and improvident response to a seeming but unreal advantage" exists.²⁸² Neither statement, however, is of much use in the context of voluntariness. It is hard to see how the appointment of counsel makes the effect of a threat or promise any *less* "difficult to assess," and in any event the Court in *Brady* eschewed particularized assessment. The psychological support a lawyer might provide could defuse the impact of some or many threats, but it could hardly render *all* threats (such as the threat of death, here involved) so trivial that they could be ignored.²⁸³ Following this distinction would require analysis of the degree of the particular threat and perhaps evaluation of counsel's role in emphasizing or belittling it. However, by treating *Brady* as raising the question of plea bargaining *in general*, divorced from the particular threat or inducement offered, the Court rejected those possibilities.²⁸⁴

It is certainly true that competent counsel and time for reflection should reduce or eliminate the hazard of "impulsive and improvident" responses to "a seeming but unreal advantage." But that consideration goes to the question of the defendant's knowledge of the available alternatives, a question that the Court in *Brady* separated from the question

281. The *Brady* Court's citation of *Shelton* and its standard further suggests the relevance of the legality of the underlying threat. The *Shelton* standard would invalidate pleas that were the product of "'threats (or promises to discontinue improper harassment)'" or "'promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g., bribes).'" *Brady*, 397 U.S. at 755 (quoting *Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), *rev'd on other grounds*, 356 U.S. 26 (1958)). The common element here seems to be illegality: "proper" harassment may continue, but "improper" harassment may not. "Improper" promises are also not permitted to induce pleas of guilty (at least, "perhaps"). If *United States v. Jackson* correctly decided that the threat was unconstitutional, it hardly can be said that such threats have a "proper" relationship to the prosecutor's business, or that continuing such a threat is not "improper harassment."

282. *Brady*, 397 U.S. at 754.

283. *Cf. North Carolina v. Alford*, 400 U.S. 25 (1970). *Alford* upheld on the basis of *Brady* a guilty plea entered by defendant who simultaneously protested his innocence and said, "they said if I didn't they would gas me for it, and that is all." *Id.* at 28 n.2.

284. See *supra* notes 245-53 and accompanying text.

of voluntariness and treated as an independent issue.²⁸⁵ As will appear later, it may be that the underlying premise of the Trilogy is that a truthful confession of guilt is the universal solvent which dissolves constitutional objections to the plea bargaining process.²⁸⁶ Yet the coerced confession cases "unequivocally" rejected the notion that the truth of a confession diminished constitutional objection to the process by which it was obtained, and thus to its voluntariness.²⁸⁷ Why the presence of counsel should lessen (or eliminate) the constitutional concern for values other than truth in the process of determining guilt is not adequately explained and is not discussed—indeed, it is not even considered.

All of these criticisms could be said to be peripheral to the main point in *Brady*. Taken at their very strongest, they say no more than that *Brady* was wrong in its vision of plea bargaining as an issue *sui generis* for which prior law provides no helpful principles for decision. Perhaps these criticisms are wrong, or perhaps, although prior law is relevant, plea bargaining when clearly faced shows that prior law was based on wrong principles. What, then, can be said of the Court's opinion in *Brady*, taking the case as the Court saw it, as presenting for decision the propriety of plea bargaining in most or all of its contexts?

The opinion is still inadequate. Conceding that plea bargaining is an issue *sui generis* is only to pose, not to answer, the question of constitutionality. The *Brady* Court answers the question, but never explains or justifies its answer. Such implications as can be drawn from the opinion are, unfortunately, incoherent. After posing the question as the validity in general of pleas imposed by the bargaining process, the Court first notes that the issue presented is "inherent" in the administration of criminal law.²⁸⁸ This suggests an argument of necessity.²⁸⁹ But although the Court notes that guilty pleas are common, and speculates that they frequently serve the interests of both defendants and prosecutors, it explic-

285. *Brady*, 397 U.S. at 748, 756-58. See *infra* notes 307-54 and accompanying text.

286. See *infra* notes 420-49 and accompanying text.

287. *Jackson v. Denno*, 378 U.S. 368, 384 (1964). See *supra* notes 118-19 and accompanying text.

288. *Brady*, 397 U.S. at 751-53.

289. If the *United States v. Jackson* analysis were pertinent, one might think to ask, necessity for *what*? Of course, the Court in *United States v. Jackson* found the sentencing scheme unnecessary for the only constitutionally permissible purposes it could see in the statute. *United States v. Jackson*, 390 U.S. at 591. In *Brady*, the Court's refusal to focus on the pressures producing Brady's plea, and its insistence on treating the question as one of plea bargaining in general—a subject explicitly avoided in *United States v. Jackson*—may reflect the Court's underlying feeling that necessity was indeed the key issue. By focusing on plea bargaining in general it was thus able to avoid explicit conflict with *United States v. Jackson's* conclusion that the particular scheme before the Court was unnecessary for any constitutionally legitimate purpose.

itly disavows reliance on this part of the opinion as answering the question of constitutionality.²⁹⁰ "Of course, that the prevalence of guilty pleas is explainable does not necessarily validate those pleas or the system which produces them."²⁹¹ Constitutionality, then, is still an open question. It is closed by the next sentence, but the explanation remains obscure. The Court "cannot" hold it impermissible for the state to advance a benefit to one who

extends a substantial benefit to the State *and* who demonstrates by his plea that he is ready and willing to admit his crime *and* to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.²⁹²

One is compelled to ask why not. The first of the factors—benefit for benefit—only states the issue; it does not explain its resolution.²⁹³ The second factor—benefit for admission of guilt—only particularizes the issue of "benefit for benefit."²⁹⁴ The third factor—benefit (shorter sentences) for defendants who can be quickly rehabilitated—is relevant and at least superficially appealing. But the easy phrase packs together a congeries of assumptions about facts and values that cry out for explanation and it has implications nowhere developed in *Brady* or in the cases following it.²⁹⁵

The notion seems to be that in a penal system directed towards rehabilitation, offenders who can be quickly rehabilitated should serve shorter sentences. If so, then at best, this explanation speaks *only* to the constitutionality of plea bargaining in penal systems in which rehabilitation is *an* element, and perhaps only in systems in which rehabilitation is a *significant* element. Assuming that all American sentencing schemes contain

290. *Brady*, 397 U.S. at 752. If the Court had thought of this portion of the opinion as supporting constitutionality, it would, one expects, have engaged in more serious consideration. The only support other than speculation for the Court's statements is an "estimate" of the frequency of guilty pleas in 1966. *Id.* at 752 n.10. The estimate does not purport to deal with the reason those pleas were entered. *Id.* The Court's own speculation is vague and tentative: mutual advantage "perhaps" explains the frequency of guilty pleas; "a great many" are motivated "at least in part" by hope for lenience. *Id.* at 752.

291. *Id.* at 752-53.

292. *Id.* at 753 (emphasis added).

293. Could the state offer cash for guilty pleas? One suspects that the *Brady* Court would hold not. See *Brady*, 397 U.S. at 755 (quoting *Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), *rev'd on other grounds*, 356 U.S. 26 (1958) (*Shelton* standard)).

294. The Court subsequently found admission of guilt unnecessary to validate a guilty plea. *Alford*, 400 U.S. 25.

295. An excellent discussion of plea bargaining considered as a sentencing device is contained in Alschuler, *The Changing Plea Bargaining Debate*, *supra* note 5, at 652-83, 718-23.

sufficient elements of rehabilitation to call this rationale into play,²⁹⁶ the explanation justifies plea bargaining *only* to the extent that defendants who have pleaded guilty are more easily rehabilitated than those who insist on trial.²⁹⁷ However, there is good reason to believe that most defendants who plead guilty promptly deny their guilt thereafter, which diminishes if not eliminates the argument that those defendants are more easily rehabilitated.²⁹⁸ The fundamental objection to this rationale is that it is hardly consistent with the operation of many American sentencing schemes with respect to major crimes, particularly in 1970 when *Brady* was decided. For a defendant sentenced to "flat time,"²⁹⁹ the rationale might hold—more easily rehabilitable defendants would be sentenced to shorter terms.³⁰⁰ But the majority of American criminal sentences, where the crime is a felony and probation is denied, are for some indeterminate period of imprisonment between the stated minimum and maximum terms.³⁰¹ In this area of indeterminacy, the decision to release the prisoner is in the hands of a parole board, directed to determine release on grounds that amount to a decision whether the prisoner has been "rehabilitated."

Justifying plea bargaining based on the judgment that defendants willing to plead guilty are more quickly rehabilitable is at least dubious in such cases. It means that the admittedly difficult decision on rehabilitation must be made in advance, by the prosecutor, instead of after observation by the parole board.³⁰² Of course, it is possible that in such

296. This assumption, doubtful in 1970 when *Brady* was decided, is even more questionable today. A growing body of literature has called for the end of indeterminate sentencing schemes and denied that rehabilitation is, or should be, a significant goal of penal systems. See, e.g., N. MORRIS, *THE FUTURE OF IMPRISONMENT* (1974); E. VAN DEN HAAG, *PUNISHING CRIMINALS* (1975); A. VON HIRSCH, *DOING JUSTICE* (1976).

297. Cf. Alschuler, *The Changing Plea Bargaining Debate*, *supra* note 5, at 661-69. The Court's rationale also suggests that individuals admitting guilt and eager for rehabilitation might have a *right* to a bargained plea if they desire it.

298. The New York State Study Commission appointed in the wake of the Attica prison riots concluded that: "Even though an inmate may receive the benefit of a shorter sentence, the plea bargaining system is characterized by deception and hypocrisy which divorce the inmate from the reality of his crime," hardly a condition likely to lead to quicker rehabilitation. NEW YORK STATE SPECIAL COMMISSION ON ATTICA, ATTICA 30-31 (1972).

299. Flat time is a determined period of months or years, fixed at the outset and thereafter modifiable (if at all) only by mechanical computation for want of offensive behavior in prison.

300. The same applies, of course, when the sentence is to probation (no jail time) instead of imprisonment.

301. In some jurisdictions, *all* felony sentences are indeterminate. E.g., WASH. REV. CODE ANN. § 9A.20.020 (West Supp. 1987).

302. This is not to say that either the prosecutor or the parole board makes the decision well (or badly, for that matter). It is only to say that, especially when long terms of years are concerned, it is difficult to imagine the decision being made more reliably at the outset than

schemes, plea bargaining defendants will receive no real benefit—that is, the actual sentence that they serve will be the same as it would have been if they had insisted on trial. But if this is so, then the rehabilitative rationale disappears and plea bargaining is based on persuading defendants to sell their chance of acquittal for an illusory pot of gold. Thus, if something about a defendant's willingness to plead guilty is relevant to any permissible purpose of a criminal sentencing scheme, the matter requires more discussion than the single brief portion of a sentence devoted to the matter in *Brady*.

The *Brady* opinion contains one final paragraph that might be thought of as elucidating the result:

A contrary holding would require the States and Federal Government to forbid guilty pleas altogether, to provide a single invariable penalty for each crime defined by the statutes, or to place the sentencing function in a separate authority having no knowledge of the manner in which the conviction in each case was obtained. In any event, it would be necessary to forbid prosecutors and judges to accept guilty pleas to selected counts, to lesser included offenses, or to reduced charges. The Fifth Amendment does not reach so far.³⁰³

This final castle is also made of sand. Once more, the *Brady* Court merely poses the question and answers it—any explanation must be inferred by the reader. The statements in the first sentence are dubious. They rely on unexamined, unexplicated assumptions that sentencers would not follow a rule forbidding plea bargaining unless their discretion were removed or the information on which they would have to rely were denied them.³⁰⁴ The Court itself does not seem to rely heavily on this. The main point is in the second sentence, where it asserts that to forbid plea bargaining one would have to forbid guilty pleas to selected counts or lesser included offenses.

after the passage of 10, 20 or 30 years. Cf. Dershowitz, *Background Paper* in TWENTIETH CENTURY FUND: TASK FORCE ON CRIMINAL SENTENCING 128 (1976) (effects of early or late determination of sentence). Nevertheless, for an instructive study suggesting that some such decisions may be made equally well at the outset, see A. VON HIRSCH & K. HANRAHAN, *THE QUESTION OF PAROLE* (1979).

303. *Brady*, 397 U.S. at 753.

304. Such assumptions are not common in the law. Although some kinds of evidence, such as confessions are thought sufficiently prejudicial that *juries* may not be presented with a possibly inadmissible confession and told to disregard it if involuntary, judges are trusted in this regard, and indeed in many others. *Jackson v. Denno*, 378 U.S. 368 (1964). The Court has never held as a general matter that forbidding racial discrimination requires that decisions be made by people unaware of the applicant's race; and it has never even hinted that if this *were* so it would support rejecting the rule forbidding racial discrimination.

This last argument is simply nonsense. All that would be *required* would be to forbid prosecutors to dismiss selected counts or greater levels of offenses *on the condition that the defendant plead guilty*.³⁰⁵ Thus, this last point is nothing but a bare tautology—to forbid plea bargaining would require us to forbid bargained pleas. True enough, but hardly an explanation.

3. Summary

Although the Court in *Brady* purports to uphold plea bargaining in terms of a pre-existing standard of voluntariness, the Court's opinion actually cuts that standard loose from its moorings in prior case law. The Court finds the prior cases irrelevant in the context of plea bargaining. In place of the rejected standard of voluntariness, the Court presents no analytical foundation for measuring the voluntariness of bargained pleas.³⁰⁶ It does little better in considering the knowledge that an individual defendant must have before he can intelligently enter a guilty plea. That question is discussed immediately below.

B. *The Question of Intelligence*

In the terms chosen by the Court in the Trilogy, a guilty plea may constitutionally provide the basis for criminal punishment only if it is both "voluntarily" and "intelligently" made.³⁰⁷ "Voluntariness" in these terms deals with forbidden and permitted pressures to plead guilty, and with their effect on the defendant's will. "Intelligence" deals with the defendant's knowledge of the law and facts bearing on the decision to

305. This rule could easily be policed by giving the defendant the opportunity to withdraw his plea *after* the prosecutor had irrevocably consented to dismiss the remaining counts or more serious charges.

306. The Court does set forth the form of words setting a standard for voluntariness in *Shelton*, 246 F.2d at 572 n.2. But the key terms are undefined and no attempt is made to explain why the particular standard should have been adopted. See *supra* note 268 and accompanying text. Not surprisingly, the Court has made little use of the *Shelton* standard since *Brady*.

307. On other occasions the Court has included both of these factors within the term "voluntarily." *E.g.*, *McCarthy v. United States*, 394 U.S. 459, 466 (1969) (plea not "truly voluntary" unless made with an "understanding of the law in relation to the facts"). It has sometimes phrased the requirement that a plea be "voluntary and knowing," *id.*, or "voluntarily and understandingly" made. *Boykin v. Alabama*, 395 U.S. 238, 244 (1969) (quoting *Boykin v. State*, 281 Ala. 659, 207 So. 2d 412 (1968)). At least one case discusses voluntariness as if the concept related *only* to the defendant's knowledge of the law and facts. *Henderson v. Morgan*, 426 U.S. 637, 645 n.13 (1976). And cases involving voluntariness outside the guilty plea context often merge "intelligence" with the concept of voluntariness. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (knowledge of right to refuse to be searched); *Lynumn v. Illinois*, 372 U.S. 528 (1963) (knowledge of law and of probable sentence; confession case).

plead guilty. In one sense, intelligence only requires knowing the answers to two simple questions: What will happen to me if I plead guilty? What will happen to me if I do not? But each of the answers is a prediction. Unless the case is a very simple one, the answers can not be known but only estimated by answering a host of often excruciatingly difficult questions: What will a court find to be the elements of the charged offenses? What evidence does the prosecution have? What evidence will be admitted? How will it strike the fact finder?—and so on. Obviously related to the constitutional requirement of the “assistance of counsel,” the rule that a plea must be “intelligently” entered seeks to assure that the defendant pleading guilty has at least some minimum understanding of the available alternatives.

The Court’s discussion of intelligence in the Trilogy, like its discussion of voluntariness, denies the relevance of prior doctrine and rests wholly upon its own intellectual foundation. The discussion is wrenched from the factual situations presented by the cases, and the problem is treated as an exercise in abstraction and generality. The discussion of intelligence is split between two opinions—*Brady v. United States*,³⁰⁸ in which the petitioner argued his plea was unintelligent because he hadn’t known that the Kidnaping Act’s death penalty provisions (which he pleaded guilty to avoid) were unconstitutional, and *McMann v. Richardson*,³⁰⁹ an opinion covering three cases in which prisoners sought to attack their pleas on the ground that the pleas were the result of unconstitutionally obtained confessions.³¹⁰ The opinions in both cases submerge issues that should have been considered as problems of collateral attack or retroactivity. Like its discussion of voluntariness, the Court’s discussion of intelligence offers little analysis. There are only conclusions.

1. *Brady*

The essence of Brady’s claim was that, as it turned out, he had traded his right to trial for a mess of pottage. He claimed that he had entered his guilty plea to avoid the risk of death attendant on a jury trial. Contrary to his belief, however, he could not have been executed in any event under the rule of *United States v. Jackson*. Therefore, according to

308. 397 U.S. 742 (1970).

309. 397 U.S. 759 (1970).

310. This statement slightly simplifies the actual allegations. See *infra* notes 322-28 and accompanying text. The third case, *Parker v. North Carolina*, 397 U.S. 790 (1970), involved both voluntariness and intelligence. However, *Parker* was merely resolved on the basis of *Brady* and *McMann*, and adds nothing significant to them.

his argument, his guilty plea was not a constitutionally intelligent act because he did not know that he was getting nothing for his bargain.

It is questionable whether Brady's claim should be considered to raise a question of an unintelligent guilty plea. Rather, it seems to present the question whether *United States v. Jackson* should be retroactively applied in the context of guilty pleas. *United States v. Jackson* was not decided until 1968; and although the doctrine of unconstitutional conditions has its roots in the nineteenth century, the *United States v. Jackson* Court primarily relied on cases not decided until the 1960's.³¹¹ Brady was charged, and he pleaded guilty in 1957. Had he been advised at that time that the Kidnaping Act's sentencing structure was unconstitutional, he might well have been executed before his claim was vindicated. Whether the argument in *United States v. Jackson* would have been accepted years earlier if Brady had been tried, convicted and sentenced to death (or whether he could have survived long enough to ultimately benefit from *United States v. Jackson*) is probably an unanswerable question.³¹² It is at least quite possible that Brady was, in fact, quite accurately informed what law would be applied to his case. If so, the question presented by *Brady* is not how to deal with a plea based on imperfect knowledge, but whether *United States v. Jackson* should be retroactively applied to invalidate guilty pleas entered to avoid a threat of death which was only later determined to be unconstitutional.

The *Brady* opinion feints in the direction of retroactivity, but ultimately seems to treat the problem as one of intelligence.³¹³ However, the Court's view of the facts is unclear³¹⁴ and this brief segment of the opinion contains nothing but conclusions. Therefore, it is hard to be sure exactly what the Court had in mind. After accurately stating that guilty pleas are often "heavily influenced by the defendant's appraisal of the

311. In *United States v. Jackson*, the Court relied primarily on *United States v. Robel*, 389 U.S. 258 (1967); *Griffin v. California*, 380 U.S. 609 (1965); and *Shelton v. Tucker*, 364 U.S. 479 (1960). See *United States v. Jackson*, 390 U.S. 570, 582-83 (1968).

312. The last federal execution in the United States was in 1963. See H. BEDAU, *THE DEATH PENALTY IN AMERICA* 56 (3d ed. 1982).

313. Introducing the discussion of this aspect of the case, the opinion stated: "The record before us also supports the conclusion that Brady's plea was intelligently made." *Brady*, 397 U.S. at 756. Moreover, in *McMann*, the Court appeared to deny the relevance of retroactivity doctrine to changes in the law affecting the decision to plead guilty. 397 U.S. at 773.

314. As noted above, see *supra* note 224, the district court in *Brady* had found that the possible death penalty played no part in Brady's decision to plead guilty, and it is impossible to say whether or not the Supreme Court accepted this view of the facts. On the one hand, the Court says that Brady pleaded "perhaps" to insure that he would get no more than "life imprisonment or a term of years." *Brady*, 397 U.S. at 756. On the other hand, it states that "Brady was aware of precisely what he was doing when he admitted that he had kidnaped the victim and had not released her unharmed." *Id.* (emphasis added).

prosecution's case," and that "such considerations frequently present imponderable questions for which there are no certain answers,"³¹⁵ the opinion merely repeats, six times in six consecutive sentences, its conclusion that Brady's plea was not invalid. The closest the opinion comes to an explanation appears in the third of these sentences. "More particularly, absent misrepresentation or other impermissible conduct by state agents, a voluntary plea of guilty intelligently made in light of the then applicable law does not become vulnerable because later decisions indicate that the plea rested on a faulty premise."³¹⁶

This is an inadequate explanation. The reference to "misrepresentation," in this context is at best, a red herring. If it *was* "misrepresentation" to say that Brady could have been executed if convicted after a jury trial, then certainly the "misrepresentation," which was contained in the statute, is attributable to the government. Nevertheless, Brady was *accurately* informed about the law as it then stood. The real question concerns the retroactivity of *United States v. Jackson*.³¹⁷ In other contexts,

315. *Id.*

316. *Id.* at 757 (citation omitted). The remaining sentences are:

[1] The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. [2] A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action. . . . [4] A plea of guilty triggered by the expectations of a competently counseled defendant that the State will have a strong case against him is not subject to later attack because the defendant's lawyer correctly advised him with respect to the then existing law as to possible penalties but later pronouncements of the courts, as in this case, hold that the maximum penalty for the crime in question was less than was reasonably assumed at the time the plea was entered.

[5] The fact that Brady did not anticipate *United States v. Jackson*, . . . does not impugn the truth or reliability of his plea. [6] We find no requirement in the Constitution that a defendant must be permitted to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops that the State would have had a weaker case than the defendant had thought or that the maximum penalty then assumed applicable has been held inapplicable in subsequent judicial decisions.

Id.

In this section of the opinion, as elsewhere, the Court found no prior law relevant to its decision. The only citations were to *United States v. Jackson*, 390 U.S. 570 (1968) (cited for information only), and *Von Moltke v. Gillies*, 332 U.S. 708 (1948) (cited in order to be distinguished).

317. Elsewhere, see the fourth sentence quoted in *supra* note 316, the Court suggests that the rule might be different for an uncounseled defendant. But it is hard to see why that should make a difference. If, as argued here, Brady in fact received good advice from his lawyer, his plea would hardly be less "intelligent" if he received equally good advice from a layman. And if he received bad advice, it is hard to see why the bad advice would make a plea "unintelligent" if received from a layman but "intelligent" if received from a lawyer. Of course, right-to-counsel principles could explain why a lawyer should be provided to criminal defendants

the Court has found the concept of retroactivity too complex to be dealt with in a single general statement—and rightly so.³¹⁸ Of course, holding *United States v. Jackson* to be retroactive in this context would open some bargained pleas under the Kidnaping Act to collateral attack.³¹⁹ However, this only restates part of the problem of retroactivity; it does not solve it. Although the government has an interest in keeping guilty kidnapers in jail, the prisoners have interests as well.³²⁰ Normal practice in retroactivity cases—what was lacking in *Brady*—is to provide some kind of reasoned explanation why the balance of interests with regard to the particular claim presented does or does not call for retroactive application.³²¹

2. *McMann*

Three cases, decided together under the name *McMann v. Richardson*,³²² involved prisoners who sought habeas corpus on the general ground that their bargained pleas were the results of unconstitutionally obtained confessions.³²³ Richardson alleged that he had been beaten into confessing, but had pleaded guilty after his lawyer told him that he

and why action taken without one could be invalid. But they do not explain the Court's suggestion that a difference in the intelligence of the two pleas would result.

318. *E.g.*, *Mackey v. United States*, 401 U.S. 667 (1971). For good discussions indicating the complexity of the issue, see Mishkin, *Forward: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56 (1965); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973).

319. Not all such bargained pleas would be subject to attack. Pleas entered (as Brady's may have been) for reasons independent of the death penalty provisions would not be rendered vulnerable by retroactive application of *United States v. Jackson*.

320. Among others, one interest is not having to give up the right to trial in order to obtain nothing more than the Constitution guarantees. It is worth noting that *Brady* does not appear to be a case where, conscious of uncertainty on the point, the parties struck a bargain in order to avoid the uncertainty. Apparently, both parties believed that the death penalty provisions were constitutional. In those circumstances, the doctrine of mutual mistake in civil contract cases would often allow rescission of the bargain.

321. Even if *Brady* were ultimately viewed as a case involving inaccurate advice on a debatable legal question rather than retroactivity, no explanation is given for the result in the opinion. The Court analogizes the case presented to ordinary judgments about the admissibility of evidence, the strength of the prosecution's case and so forth. *See supra* note 314. But the analogy is not self-evident. Constitutional and nonconstitutional error are treated differently in a variety of contexts, particularly collateral attack. *See supra* note 71. Even if the analogy holds, the opinion never explains why any, some, or all bad judgments about evidence, for example, should not invalidate a plea of guilty. If a defendant charged with treason knows the government can produce only a single witness against him and does not know that two witnesses are required for conviction of treason, has he "intelligently" pleaded guilty?

322. 397 U.S. 759.

323. Each of the three defendants pleaded guilty to less than he was originally charged with. Richardson, indicted for first-degree murder, pleaded guilty to second-degree murder. *Id.* at 762. Dash, indicted for first-degree robbery, pleaded guilty to second-degree robbery.

should plead and litigate his confession claim on habeas corpus.³²⁴ Another prisoner, Dash, claimed he had been beaten and refused counsel until he confessed, but was advised by counsel to plead guilty because he "didn't stand a chance" given the confession.³²⁵ The third prisoner, Williams, said his confession was obtained when he was handcuffed to a desk and threatened with a pistol.³²⁶ His lawyer advised a guilty plea, but Williams said nothing regarding any advice he may have received specifically about his confession.³²⁷ In each case, the district court denied relief without a hearing. The Second Circuit remanded for hearings, concluding inter alia that a guilty plea was constitutionally invalid if it was the "consequence" of an involuntary confession—at least if the plea was taken in New York at a time when the state procedure for challenging a confession at trial was constitutionally inadequate.³²⁸

The Supreme Court recited and then ignored the specific allegations of each prisoner in *McMann*. Instead, it identified the "core" of the Second Circuit's holdings as "the proposition that if in a collateral proceeding a guilty plea is shown to have been triggered by a coerced confession—if there would have been no plea had there been no confession—the plea is vulnerable at least in cases coming from New York where the guilty plea was taken prior to *Jackson v. Denno*"³²⁹

Id. at 761. Williams, indicted for five felonies, pleaded guilty to second-degree robbery. *Id.* at 763.

324. *Id.*

325. *Id.* at 762.

326. *Id.* at 764.

327. *Id.* Each of the respondents in *McMann* had claims other than those described here. For example, the heart of Williams' claim was that his lawyer categorically refused to investigate his alibi defense, and told him that he was pleading guilty not to a felony but to a misdemeanor. *Id.*

328. *United States ex rel. Ross v. McMann*, 409 F.2d 1016 (2d Cir. 1969) (*en banc*) (defendant Dash), *vacated*, *McMann v. Richardson*, 397 U.S. 759 (1970); *United States ex rel. Richardson v. McMann*, 408 F.2d 48 (2d Cir. 1969), *vacated*, *McMann v. Richardson*, 397 U.S. 759 (1970); *United States ex rel. Williams v. Follette*, 408 F.2d 658 (2d Cir. 1969), *rev'd*, *McMann v. Richardson*, 397 U.S. 759 (1970).

Before 1964, New York's procedure for challenging a confession as involuntary was to present the evidence on voluntariness, as well as the confession, to the trier of fact (judge or jury) during the trial. *Jackson v. Denno*, 378 U.S. 368, 374-75 (1964). The jury would be instructed to determine whether the confession was voluntary, and if it was not, to disregard it when considering the question of guilt. This procedure was upheld in *Stein v. New York*, 346 U.S. 156 (1953), but later condemned in *Jackson v. Denno*, which overruled *Stein*. The Court condemned the procedure primarily because it asked too much of the jury to disregard a confession it found involuntary, but true, in a close case, and required that trial judges make an independent determination of voluntariness before submitting the question to the jury. It appears that some New York trial judges were doing this even before *Jackson v. Denno*. Reply Brief for Petitioner at 10 & 10-11 n.*, *McMann v. Richardson*, 397 U.S. 759 (1970).

329. *McMann*, 397 U.S. at 766. This characterization substantially overstates the Second

Because the *McMann* opinion divorced the issues from the facts of any of the cases,³³⁰ and because it considered any prior doctrine, other than *Brady*, irrelevant to the conclusion it reached,³³¹ it is uncertain just how the Court viewed the question presented. However, citation of *Brady* and reference to competently counseled defendants suggests that the Court saw the question as involving the intelligence of a plea entered to avoid the probability of conviction at trial on the basis of an involuntary confession.³³² In essence, the opinion replays *Brady*: "the decision to plead guilty before the evidence is in frequently involves the making of

Circuit's holding in *Richardson's* case, and may be misleading as to the others. The *Richardson* opinion was written by Judge Moore, who dissented from the en banc decision involving the others. *United States ex rel. Richardson*, 408 F.2d 48. Judge Moore ordered a hearing on Richardson's allegation that his lawyer had told him that the proper way to raise his coerced confession claim was to plead guilty and litigate the matter on habeas corpus. *Id.* at 53. The court reasoned that if this were the advice Richardson was given, he could in no way be said to have knowingly bypassed the state procedures for raising his claim. *Id.*

In its en banc opinion involving Dash's case, the Second Circuit started from "the well-established doctrine that if the [guilty] plea is voluntary, it is an absolute waiver of all non-jurisdictional defects in any prior stage of the proceedings . . ." *United States ex rel. Ross*, 409 F.2d at 1019. A voluntary guilty plea is a waiver of such claims because by pleading guilty the defendant "has deliberately failed or refused to raise his claims by available state procedures . . ." *Id.* at 1022 (quoting *United States ex rel. Rogers v. Warden*, 381 F.2d 209, 213 (2d Cir. 1967)). However, waiver is inapplicable "when the state fail[s] to afford a constitutionally acceptable means of presenting [the] claim," as was the case in *New York state prior to Jackson v. Denno*. *Id.* at 1024. In these circumstances, a defendant "cannot be deemed to have entered a voluntary plea of guilty if the plea was substantially motivated by a coerced confession the validity of which he was unable, for all practical purposes, to contest." *Id.* This rule disposed of Dash's case, *id.* at 1024, and of *Williams* as well. *United States ex rel. Williams*, 408 F.2d at 660.

330. In discussing the question of intelligence, the Court never says that it should be answered by looking at the totality of the circumstances. *Cf. Brady*, 397 U.S. at 749 (voluntariness). However, in *Henderson v. Morgan*, 426 U.S. 637 (1976), the Court dealt with an inadequate-knowledge claim under the rubric of voluntariness and returned to the totality-of-the-circumstances language. *Id.* at 644.

331. The *McMann* Court cited *McCarthy v. United States* for the truism that a guilty plea normally involves an admission of the crime charged. *McMann*, 397 U.S. at 766 (citing *McCarthy v. United States*, 394 U.S. 459, 466 (1969)). The Court also cited *Jackson v. Denno*, *Pennsylvania ex rel. Herman v. Claudy*, and *Chambers v. Florida*, and claimed that they were irrelevant. *Id.* at 771, 774-75. *Stein v. New York* was cited to show that counsel would not have been incompetent prior to *Jackson v. Denno* for advising that the New York confession procedure was constitutionally valid. *Id.* at 774. Several cases were cited to show that felony defendants are entitled to effective counsel, and one lower court case is cited to note that its facts would present a different question. As affirmative support for the conclusion reached, the Court cited only *Brady*.

332. See *McMann*, 397 U.S. at 770. However, the Court's persistent, but understandable, emphasis on the fact that the pleas are being collaterally attacked some time after they were entered, e.g., *id.* at 771, 773, suggests that the question of "intelligence" might be viewed differently when a trial judge is making the initial decision whether to accept a plea. For reference to the "good sense and discretion of trial [judges]," see *id.* at 771.

difficult judgments. . . . Waiving trial entails the inherent risk that the good-faith evaluations of a reasonably competent attorney will turn out to be mistaken"³³³ *Jackson v. Denno* is irrelevant because a defendant who pleads guilty

is convicted on his counseled admission in open court that he committed the crime charged against him. The prior confession is not the basis for judgment Whether or not the advice the defendant received in the pre-*Jackson* era would have been different had *Jackson* then been the law has no bearing on the accuracy of the defendant's admission that he committed the crime.³³⁴

Failure to challenge the New York confession procedures cannot be below the required level of legal advice because such a claim had previously been rejected by the Supreme Court.³³⁵

Given *Brady*, the Court may have been correct in concluding that a coerced confession does not provide a basis for attacking a guilty plea, even if the confession was the basis for the entry of the plea. When the defendant is competently represented, this weakness in the prosecution's case should be one of the elements entering into the particular bargain struck between the prosecution and defendant. Trying later to undo the bargain, the *McMann* defendants were less appealing than *Brady*, who sought to undo his bargain because it was entered under a mutual mistake.³³⁶ And if, as *Brady* holds, the Constitution permits the prosecution to encourage defendants to bargain away arguable claims of innocence in order to obtain assured benefits in sentencing, it is difficult to see why arguable claims that a confession was coerced may not also be purchased by the prosecution in exchange for sentence discounts.³³⁷

Particularly troubling about the *McMann* opinion was the abstract treatment of the questions presented, and the opinion's heavy reliance on the unexamined, unexplicated standard set for the competence of counsel. To begin with, the opinion did not explore the problems presented by the particular allegations actually before the Court.³³⁸ The precise

333. *Id.* at 769-70.

334. *Id.* at 773.

335. *Id.* at 772-73.

336. See *supra* notes 308-11 and accompanying text.

337. For attempts to draw lines between those rights which are, and those rights which are not, waived by a plea of guilty, see Saltzburg, *Pleas of Guilty and the Loss Of Constitutional Rights: The Current Price of Pleading Guilty*, 76 MICH. L. REV. 1265 (1978); Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 MICH. L. REV. 1214 (1977).

338. One could say that the *McMann* Court was merely dealing with general standards, and

question presented was whether the three prisoners were entitled to relief if *everything* alleged in their petitions was true. Accepting their allegations, that their confessions—induced by beatings and threats of immediate death—were not even arguably voluntary, no minimally competent lawyer in the past quarter century could have advised that confessions so obtained could lawfully be introduced in evidence. On their facts, therefore, at least Dash's and Richardson's allegations present cases not discussed by the Court—cases of defendants, acting on *incompetent* advice from their attorneys, and pleading guilty because of a clearly unconstitutional confession.³³⁹

Reality, of course, is rarely simple. Coerced confession cases are not decided on the facts; they are decided on what the trial judge finds to be the facts, which may be a very different thing. Confessions are typically taken in private, with only the defendant and state employees (police, sometimes a prosecutor, and—at the end of the process—occasionally a stenographer) present. The state's witnesses often show uncanny ability to frame their testimony on suppression motions so that it barely fits within the most recent legal guidelines.³⁴⁰ Lawyers ordinarily and quite properly advise their clients what the lawyer believes *will* happen, not just what should happen. It is quite possible that Dash was accurately relating what had happened to him, while his lawyer was accurately predicting that the confession would be admitted if Dash went to trial.³⁴¹ In this light, Dash was well advised by his lawyer. But so viewed, a very real question arises whether such abuses are too frequent to be tolerably swept under the rug by a process which makes guilty pleas invulnera-

that the factual problems were left for exploration on remand. However, the courts below seem to have read the *McMann* opinion as conclusively resolving all claims arising from the confessions against the prisoners. See *United States ex rel. Williams v. Follette*, 453 F.2d 745, *on remand*, *United States ex rel. Richardson v. McMann*, 340 F. Supp. 136 (S.D.N.Y. 1971), *aff'd per curiam* 458 F.2d 1406 (2d Cir. 1972). This is particularly troubling in Richardson's case. See *supra* text accompanying note 324.

339. Dash pleaded guilty after his lawyer told him he " 'didn't . . . [have] a chance . . . [in view] of the . . . confession . . . ' " *McMann*, 397 U.S. at 762. Richardson's lawyer told him that the proper procedure to follow was to plead guilty and challenge the confession on habeas corpus. *Id.* at 763. Some discussion whether this was or was not inadequate advice entitling Richardson to plead anew was surely called for.

340. Occasionally judicial skepticism about such testimony breaks into reported opinions, as when District of Columbia police testified to a rash of "spontaneous apologies" by suspects to their supposed victims after the Court of Appeals held such testimony admissible. See *Veney v. United States*, 344 F.2d 542, 543 (D.C. Cir. 1965) (Wright, J., concurring) (collecting at least eight such apologies, all credited by the trial courts).

341. It is also possible, of course, that Dash's allegations were not true. The Court's opinion, however, never suggests this as a basis for dismissal. The problem of dishonest collateral attack deserves exploration, but not blanket rules dismissing true claims with bad ones.

ble.³⁴² At the least, one would hope for more than a rueful statement that fact-finding is a difficult process.

Second, reference to guilty pleas as a waiver of trial and the rights associated with trial³⁴³ suggests that the body of law regarding defendants who deliberately forego presentation of their claims to an available state forum is relevant.³⁴⁴ That problem is particularly poignant in Richardson's case, where his lawyer told him that plea and collateral attack was the proper way to raise his claim. If, as it appears, the Court did not regard this advice as falling below the standard demanded by counsel,³⁴⁵ the case raises complicated questions concerning when a defendant can be irrevocably bound by his lawyer's actions.³⁴⁶ Indeed, if a defendant *can* be bound by such a mistake on counsel's part, it is hard to understand the Court's quick dismissal of prior cases as irrelevant where defendants had not been represented by counsel.³⁴⁷ If two defendants receive identical bad advice and act on it, it is not obvious why subsequent claims should be barred if, and only if, the identical bad advice came from an attorney. There may be reasons, but the Court nowhere explains them.³⁴⁸

The last troubling aspect of the Court's treatment of the intelligence

342. In setting forth the prophylactic rules of *Miranda v. Arizona*, the Court emphasized the hazards of fact-finding in traditional interrogations where only the suspect and the police were present. 384 U.S. 436, 445-48, 466 (1966).

343. *McMann*, 397 U.S. at 768, 770.

344. Cf. *Fay v. Noia*, 372 U.S. 391 (1963) (failure to appeal state conviction does not necessarily bar assertion of claim on federal habeas corpus); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (waiver requires "intentional relinquishment or abandonment of a known right"). The point is not that such cases would compel a different result from the one reached in *McMann*; if plea bargaining is to be allowed, compromise of at least some claims seems proper. But so great a departure from prior law calls at least for a search for distinctions and intermediate grounds, not wholesale neglect of prior cases. And in fact, subsequent to *McMann*, the Court significantly weakened *Johnson* and *Fay*. See *Wainwright v. Sykes*, 433 U.S. 72 (1977); Tigar, *The Supreme Court, 1969 Term—Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1 (1970).

345. *McMann*, 397 U.S. at 774. The Court merely remanded for consideration of "other claims," language which the courts below read as excluding all aspects of the coerced confession claims. *Id.* at 774-75; *United States ex rel. Williams*, 453 F.2d 745.

346. Compare the Court's struggle with a similar issue in *Wainwright*. 433 U.S. 72 (7-2 decision with five different opinions filed).

347. In *Pennsylvania ex rel. Herman v. Claudy*, the Court reviewed an involuntary confession claim on habeas corpus brought by a state prisoner who had not challenged the confession, but had pleaded guilty. 350 U.S. 116 (1956). The *McMann* Court found *Herman* irrelevant because the defendant in *Herman* did not have a lawyer. *McMann*, 397 U.S. at 767 (citing *Pennsylvania ex rel. Herman v. Claudy*, 350 U.S. 116, 116 (1956)).

348. In *Brady*, the Court concluded that threats which would invalidate an uncounseled confession would not invalidate a counseled guilty plea because the presence of counsel prevented the "hazard of an impulsive and improvident response . . ." *Brady*, 397 U.S. at 754. Assuming this is true, it does not automatically carry over to the situation in *McMann*, where

requirement is the *deus ex machina* on which it relied to uphold guilty pleas entered on bad estimation of the facts or law applicable to the case: an attorney who gives advice "within the range of competence demanded of attorneys in criminal cases."³⁴⁹ This unilluminating language was snatched from the air; the Court was not relying on a standard that has been given content (or even given voice) by its application to facts in previous cases.³⁵⁰ It is not even clear whether the Court was setting the same or different standards for trials and guilty pleas.³⁵¹ Nor was the amorphous standard significantly fleshed out, as it might have been, by careful application to the facts of the cases. The advice given Richardson and Dash on their coerced confession cases is nowhere discussed; the only actual application of the standard is to the *Jackson v. Denno* point.³⁵² The Court quickly resolved this issue on the ground that reliance on an existing Supreme Court decision cannot be advice below the required standard.³⁵³ Since relatively few claims of inadequate advice

the defendants allegedly were receiving bad advice from their lawyers. *McMann*, 397 U.S. at 767.

349. *McMann*, 397 U.S. at 771. Elsewhere the Court uses different language, without any indication that a substantive difference is intended: "so incompetently advised" as to allow a new plea, *id.* at 769; "good-faith evaluations of a reasonably competent attorney," *id.* at 770; "incompetent or ineffective," *id.*; "reasonably competent advice," *id.*; "incompetent counsel," *id.* at 771; "gross error on the part of counsel," *id.* at 772; "serious derelictions on the part of counsel sufficient to show that his plea was not . . . a knowing and intelligent act," *id.* at 774. Some of the formulations, such as the first and last quoted here, are obviously circular.

350. In general, the Court prior to *McMann* had studiously avoided extensive consideration of the standards for effective assistance of counsel. *E.g.*, *Chambers v. Maroney*, 399 U.S. 42, 53-54 (1969) (refusing to make independent judgment on the issue); *cf. id.* at 55-60 (Harlan, J., dissenting).

351. *McMann*, 397 U.S. at 771 n.14. The cases cited in the *McMann* opinion's footnote suggest that the standard would be the same. However, the variety of novel phrases and the Court's insistence that trials are very different from guilty pleas, suggest a different standard. *Id.* at 773.

352. That is, the point that New York had no constitutionally acceptable procedure for challenging involuntary confessions when the pleas were entered. *Id.* at 771-72 (citing *Jackson v. Denno*, 378 U.S. at 377).

In *Parker v. North Carolina*, the Court also applied its standard to conclude that Parker had received advice "well within" the required range of competence. 397 U.S. at 797. The Court supplied no analysis or discussion; having recited the facts, the Court merely held that, "[b]ased on the facts of record relating to Parker's confession and guilty plea, which we have previously detailed, we think the advice he received was well within the range of competence required of attorneys representing defendants in criminal cases." *Id.* at 797-98.

353. I may overstate the clarity of the opinion on this point. The Court stated that Richardson, Dash and Williams would have to demonstrate "gross error on the part of counsel," to obtain relief. *Id.* at 772. "Such showing cannot be made," since a constitutional challenge to the New York procedure "was presented to the New York courts and to this Court in *Stein v. New York*, and in 1953 this Court found no constitutional infirmity . . . Counsel . . . cannot be faulted for not anticipating *Jackson v. Denno* or for considering the New York procedures to be as valid as the four dissenters in that case thought them to be." 397 U.S. at 772-73.

can be resolved by such a rule, this particular application of the standard offers little guidance. If the standard for counsel's assistance were a peripheral matter, of only critical importance in an occasional case, the Court's Delphic obscurity would be regrettable but not serious. But the assistance of counsel is the linchpin holding the whole opinion together.³⁵⁴

3. Summary

The Trilogy's discussion of guilty pleas is without anchor in precedent and without the rudder that careful analysis and explanation could provide. The Court's discussion of voluntariness denies the relevance of a very considerable body of prior law; as an *a priori* matter, it fails to justify the conclusions reached. The discussion of intelligence consists simply of assertions. The Court paints with a broad brush, submerging factual differences that would seem critical. The opinions, in short, are unjustified by the criteria of reason and explanation traditionally demanded of courts. What the opinions do is treat plea bargaining as a problem *sui generis* divorced from the fabric of American constitutional law.

Maybe it is. When a case, for the first time, churns up issues not previously perceived, it may be asking too much of the Court to provide a fully considered explanation for the result it reaches. It is surely better for the Court to give heed to the felt imperatives of the case at hand and decide it rightly rather than unthinkingly force the law into a Procrustean mold of irrelevant doctrine. If the Court finds the right result in the first case, explanation and doctrinal development can fairly wait for full development in later cases.

This has not, however, been the history of plea bargaining at the hands of the Supreme Court. The Court's initial cases on plea bargaining, whether or not they reach correct results on the facts before the Court, are lacking in the reasons we ordinarily think necessary to provide a foundation for the principled development of constitutional rules. Unfortunately, so are the Court's later cases. They look back to the Trilogy for support, but none is there. These later cases are chronicled in the next section.

354. It was the presence of counsel that allowed the Court, in both *McMann* and *Brady*, to distinguish as irrelevant prior cases that were otherwise analogous. Perhaps more important, considering the results of the cases, the advice of counsel is the only bulwark that protects a defendant against the unwitting loss of *all* of his legal and factual claims.

IV. DEVELOPMENTS SINCE THE TRILOGY

The Supreme Court has not added any analytical clarity to its treatment of plea bargaining since it decided the Trilogy in 1970. Indeed, the cases since then have been radically inconsistent. The Trilogy's suggestion that guilty pleas can be valid even though they would be invalid under traditional notions of "voluntariness" *because* they represent reliable admissions of guilt was jettisoned in less than seven months.³⁵⁵ But this suggestion continues to bob up in later opinions.³⁵⁶ One line of cases wholly eschews questions of "voluntariness" and "intelligence," relying instead on the Court's view of how a functioning system of plea bargaining should be structured—an approach reminiscent of the one taken in *United States v. Jackson*, but emphatically rejected in *Brady* as irrelevant to the question of bargained pleas.³⁵⁷ At the same time other cases have insisted on a pure voluntariness approach, and refused on occasion even to consider claims relating to the system as a whole.³⁵⁸ Cases in this second line sometimes affirm and sometimes deny the relevance of traditional notions of waiver to guilty pleas.³⁵⁹ When the Court was urged to consider the relationship of plea bargaining to capital sentencing schemes, the Court's prevailing opinion flatly denied the possibility of *any* effective regulation of the process.³⁶⁰

The result of this doctrinal free-for-all has been the withdrawal of the Constitution as a source of law governing most aspects of plea bargaining.³⁶¹ The only substantial constitutional rule seems to be that

355. *North Carolina v. Alford*, 400 U.S. 25 (1970).

356. *See, e.g., Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978); *Henderson v. Morgan*, 426 U.S. 637, 648 (1976) (White, J., concurring).

357. *See infra* notes 372-90 and accompanying text.

358. *See infra* notes 391-98 and accompanying text.

359. *Compare Haring v. Prosise*, 462 U.S. 306 (1983) (denying waiver basis for guilty plea cases); *and Tollett v. Henderson*, 411 U.S. 258, 266 (1973) (plea valid, though "undoubtedly" it would be invalid in traditional waiver terms) *with Henderson*, 426 U.S. at 645 n.13 (citing classical waiver cases to explain the standard for guilty pleas).

360. *Gregg v. Georgia*, 428 U.S. 153, 199 & n.50 (1976) (opinion of Stewart, Stevens & Powell, JJ.).

361. The Court once, however, suggested that guidance could be found in A. CORBIN, *CONTRACTS* § 578 (2d ed. 1960), *Blackledge v. Allison*, 431 U.S. 63, 75 n.6 (1977). It has since used contract law language in referring to the "executory" nature of plea agreements until the defendant has actually pleaded guilty or otherwise relied on the agreement to his detriment. *Mabry v. Johnson*, 467 U.S. 504 (1984).

More recently, the Court has suggested that in federal cases, Rule 11 of the Federal Rules of Criminal Procedure may contain considerable law governing the plea bargaining process. *See United States v. Benchimol*, 471 U.S. 453, 456 (1985) (Rule 11 may or may not "allow[] bargaining about [the] degree[] of enthusiasm" with which a prosecutor makes his recommendation for sentence, and "may well" allow agreement that the prosecutor state his reasons for the bargain on the record.).

prosecutors must either keep their promises or allow the defendant an opportunity to withdraw his plea.³⁶² To be sure, the defendant must ordinarily be represented by counsel, but the lawyer can certainly give bad advice and ignore substantial defenses without discussing the matter with the client.³⁶³ And the substance of the bargain, the size and nature of the club which the prosecution can wield, remains in a constitutional blind spot.

A. *The Plea as Admission of Guilt*

A plea of guilty, the Court said in the Trilogy, is a "solemn admission[]" in open court that . . . [the defendant] committed the act with which he is charged . . .";³⁶⁴ and similar language continued to appear in later opinions.³⁶⁵ I argue below that this admission of guilt, "[c]entral to the plea and the foundation for entering judgment against the defendant,"³⁶⁶ could provide a tenable basis for the development of a rational body of plea bargaining law.³⁶⁷ However, barely seven months after the Trilogy, the Court found admissions of guilt were in fact unnecessary to support guilty pleas.

In *North Carolina v. Alford*,³⁶⁸ Harry Alford, charged with the possibly capital offense of first-degree murder, pleaded guilty to second-degree murder. Alford stated: "I ain't shot no man, but I take the fault for the other man. . . . I just pleaded guilty because they said if I didn't they would gas me for it, and that is all."³⁶⁹ The Court found the plea valid, simply arguing (on the basis of cases holding that prison sentences may be imposed upon a plea of *nolo contendere*), that there was no constitutional bar to the imposition of a prison sentence on a "consenting" de-

362. In addition, the defendant must be told the elements of the offense to which he is pleading guilty, *Henderson*, 426 U.S. 637, and the possible sentence he can receive if he pleads guilty, *Blackledge*, 431 U.S. 63. The record of the plea-taking procedure must meet the standards set forth in *Boykin*, 395 U.S. 238. Federal defendants must meet the standards of Rule 11 of the Federal Rules of Criminal Procedure. Failure to follow Rule 11, however, is error that ordinarily can be raised only on direct appeal from the conviction. *Haring v. Prosser*, 462 U.S. 306 (1983).

363. See *Tollett v. Henderson*, 411 U.S. 258 (1973) (failure to investigate grand jury racial composition); *Alford*, 400 U.S. 25 (defendant told death sentence certain); *McMann v. Richardson*, 397 U.S. 759, 769-75 (1970); *Brady v. United States*, 397 U.S. 742, 756-58 (1970).

364. *Brady v. United States*, 397 U.S. 742, 757 (1970).

365. *Henderson v. Morgan*, 426 U.S. 637, 645 n.13 (1976); *Tollett v. Henderson*, 411 U.S. 258, 267 (1973).

366. *Brady*, 397 U.S. at 748; see also *McMann*, 397 U.S. at 773.

367. See *infra* notes 420-49 and accompanying text.

368. 400 U.S. 25 (1970).

369. *Id.* at 28 n.2. The statements were not made on collateral attack, but during the plea-taking proceedings.

fendant who nevertheless denies his guilt.³⁷⁰

The *Alford* Court's reasoning misses the point. *Brady* did not uphold the validity of bargained pleas of nolo contendere; it upheld the validity of bargained pleas of guilty, emphasizing several times that the plea's basis, a counseled *admission of guilt*, served to distinguish prior law that would have otherwise seemed relevant.³⁷¹ With that basis absent, one would expect either a discussion of what other reasons justify bargained pleas of this kind or at least an explanation why the prior law, no longer avoidable on the basis that the plea represented an admission of guilt, was avoidable on other grounds. But no such discussion was forthcoming.

B. Systemic Considerations: The Irrelevance of Voluntariness

Although the Trilogy had emphasized voluntariness and intelligence as the only questions relevant to bargained pleas, in the first major plea bargaining case decided after the Trilogy, the Court entirely avoided considering whether the plea at issue was voluntary. In *Santobello v. New York*,³⁷² the defendant, Rudolph Santobello was indicted on two felony gambling charges. He agreed to plead guilty to a misdemeanor charge on the condition that the greater charges be dismissed and that the prosecution make no recommendation as to sentence. At the sentencing hearing, however, a different prosecutor was present and recommended that Santobello receive the maximum sentence, which he did.³⁷³ Not surprisingly, the Court felt that something was wrong. What makes the opinion interesting is the difficulty the Court had in explaining just what.

The *Santobello* opinion never stated what constitutional provision was violated by Santobello's conviction and sentence.³⁷⁴ Although the opinion stated that guilty pleas "must . . . be voluntary and knowing,"³⁷⁵

370. *Id.* at 31, 33-38.

371. I do not suggest that bargained pleas of nolo contendere should not be permitted, particularly if bargained pleas of guilty are. If anything, the special nature of the nolo contendere plea—which at least in the federal system, cannot be subsequently used against the pleader to support, for example, civil damages or enhanced punishment would seem to strengthen the argument that bargained pleas are permissible. My point is merely that if they are proper, it is certainly not because they represent an admission of guilt. FED. R. CRIM. P. 11(e)(6).

372. 404 U.S. 257 (1971).

373. The Court concluded that the prosecution's breach of its agreement was "inadvertent." *Id.* at 262.

374. For an interesting discussion of this problem, see Westen & Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 CALIF. L. REV. 471 (1978), arguing that *Santobello* implicitly recognized a constitutional right that the government fulfill its contracts.

375. *Santobello*, 404 U.S. at 261.

the Court did not hold the plea involuntary or unknowing. Instead, the Court wrote a page and a half of explanation why it believed that plea bargaining was both "essential" and "highly desirable."³⁷⁶ Then, stating that plea bargaining "must be attended by safeguards to insure the defendant what is reasonably due in the circumstance[s],"³⁷⁷ the Court concluded "that the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty will be best served by remanding the case"³⁷⁸ to the New York court to determine whether, in the discretion of the state court, Santobello's plea should have been vacated (so that he would plead anew to the original charges) or whether he should have gotten "specific performance" of his original agreement.³⁷⁹

Santobello cannot be explained by assuming that the Court found the plea either involuntary or unintelligent. Such a finding is not obvious under the Trilogy.³⁸⁰ More important, if the plea was involuntary or unintelligent, it was invalid when entered and New York did not have, without the defendant's consent, the option of resentencing Santobello on the basis of the invalid plea. Therefore, *Santobello* necessarily held that the Constitution contains not only law regulating the voluntariness and

376. *Id.* at 260-61 (citing only *Brady v. United States*, 397 U.S. 742, 751-52 (1970)). Recent commentators agree that whether plea bargaining is "essential" or not is a question of some complexity. For a good recent review of the relevant literature, see Schulhofer, *supra* note 5.

377. *Santobello*, 404 U.S. at 262.

378. *Id.* at 262-63.

379. *Id.* at 262. "Specific performance" was understood by the Court to mean that Santobello would be resentenced by a different judge at a sentencing hearing where the prosecution would make no recommendation regarding sentence. One can only wonder whether this is really what Santobello bargained for. If trial judges read the United States Reports, or even gossip with their colleagues, the new sentencing judge might well know that the prosecution had previously recommended the maximum.

380. On one hand, *Brady* quoted the *Shelton* standard, which condemned pleas as involuntary if induced by "misrepresentation (including unfulfilled or unfulfillable promises)." *Brady v. United States*, 397 U.S. 742, 755 (1970) (citing *Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), *rev'd on other grounds*, 356 U.S. 26 (1958)). On the other hand, the Court in the Trilogy was insistent in analytically separating "involuntary" from "unintelligent" pleas of guilty, and Santobello's plea seems much more "unintelligent" than "involuntary." He could have argued that his plea was unintelligent because his lawyer presumably had failed to warn him that the prosecution might negligently not live up to its bargain. But under the Trilogy, the plea would be vulnerable to this attack only if the attorney's failure to give such a warning was below the "range of competence demanded of attorneys in criminal cases," *McMann v. Richardson*, 397 U.S. 759, 771 (1970). The Court's grudging application of this standard makes it unlikely that counsel could be faulted for failing to give such a warning. *McMann*, 397 U.S. at 773; *Tollett v. Henderson*, 411 U.S. 258, 268-69 (1973) ("slim" chance of making the required showing since Tennessee attorneys would never have thought to challenge the racial composition of the grand jury at the time the plea was made).

intelligence of guilty pleas, but also law regulating other aspects of the process, and that this law is relevant at least in determining the remedies available to one who has pleaded guilty and now regrets the fact. The source and nature of this law are both obscure. The Court noted that plea bargaining "must be attended by safeguards."³⁸¹ Whether this "must" be so because of considerations of efficiency (defendants otherwise would too often refuse to plead guilty), of fairness (defendants otherwise could be unfairly treated), or for other reasons, was never explained by the Court.³⁸² But at the bedrock level, *Santobello* held that *some* such considerations—considerations which I shall refer to as "systemic" considerations—can sometimes control the result.

Similarly, in *Lefkowitz v. Newsome*,³⁸³ the Court upheld federal habeas corpus relief to a defendant who had pleaded guilty with the assistance of counsel, without finding the plea either involuntary or unintelligent. The defendant, Newsome, had unsuccessfully sought to suppress in state court the evidence of heroin and narcotics paraphernalia found during a search of his person. When the New York court denied his motion, he pleaded guilty to a charge of attempted possession of dangerous drugs.³⁸⁴ New York law, at the time, allowed the appeal of unsuccessful suppression motions after conviction whether the conviction was on plea of guilty or at trial. When the New York courts rejected his claim, Newsome obtained federal habeas corpus. The Supreme Court affirmed his discharge, holding that such claims could be raised on federal habeas corpus, notwithstanding a voluntary and intelligent plea of guilty, where state law allowed the claim to be appealed after conviction on the plea.³⁸⁵

381. *Santobello*, 414 U.S. at 262.

382. Because the opinion in *Santobello* takes some pains to emphasize the importance of plea bargaining to the criminal process, one is tempted to speculate that the basis for the result is efficiency. *Id.* Given the opinion, however, this cannot be more than speculation.

383. 420 U.S. 283 (1975).

384. Newsome was originally charged with possession of the drugs; his plea, presumably the result of a bargain, was to a lesser offense included under the original charge. *Id.* at 284.

385. Newsome claimed that the search, justified as incident to his arrest, was unconstitutional because the statute under which he was arrested was itself unconstitutional. *Id.* at 284-86. The Supreme Court has since rejected claims of this kind. See *Michigan v. DeFillippo*, 443 U.S. 31 (1979). In addition, the Court since *Newsome* has held claims of unconstitutional search and seizure generally unavailable for state prisoners, so long as they had a full and fair opportunity to litigate their claims in the state courts. *Stone v. Powell*, 428 U.S. 465 (1976). Although *Stone* formally phrases its holding in terms of evidence introduced at trial, see 428 U.S. at 482, 494, its reasoning would apply to Newsome's situation as well, and the courts of appeals have so held. *Phillips v. Attorney General*, 594 F.2d 1299 (9th Cir. 1979); *Kahn v. Flood*, 550 F.2d 784 (2d Cir. 1977). However, on the general point that guilty pleas do not waive claims which local law permits to be retained, *Newsome* has not been questioned.

It is extremely difficult to fit *Newsome* into the mold of an unintelligent guilty plea. *Newsome*'s plea could be considered unintelligent because he entered into it expecting that federal collateral review would be available when it was not available. But this theory is directly contrary to the Court's conclusion in *Richardson* that a guilty plea was both voluntary and intelligent, the defendant relied on his attorney's advice that the way to challenge his confession was to plead guilty and raise the confession on collateral attack.³⁸⁶ To find that *Newsome*'s plea was "unintelligent" under the Trilogy required a finding that his attorney, who relied on the apparent promise of the New York statute, was giving advice "below the range of competence demanded of attorneys in criminal cases"; it would also mean that, in the future, states could not hold out the promise that defendants could plead guilty without thereby losing their right to federal collateral review.³⁸⁷ The Court was unwilling to do this since it would "frustrate the State's policy."³⁸⁸ "Many defendants" would insist on trial "solely to preserve the right to an ultimate federal forum," which would "eviscerate New York's commendable efforts" to cut down on trials "in a manner that does not diminish the opportunity for the assertion of rights guaranteed by the Constitution."³⁸⁹ Thus, *Newsome* was entitled to his release for reasons of policy relating solely to the practical operation of the system as a whole.³⁹⁰

C. Voluntariness Only: The Irrelevance of Other Considerations

On the other hand, in cases decided both before and after *Santobello* and *Newsome*, the Court has insisted on considering *only* voluntariness and intelligence, to the exclusion of the systemic considerations that were decisive in *Santobello* and *Newsome*. Thus, in *Tollett v. Henderson*,³⁹¹ the Court held that claims that an indictment had been returned by a racially discriminatory grand jury were lost by a counseled guilty plea. Notwithstanding *Santobello*, it made no difference that the injury, in such cases,

386. See *supra* notes 322-54 and accompanying text.

387. *Newsome*, 420 U.S. at 292. Moreover, holding such pleas unintelligent would have had the unwelcome consequence of invalidating all such pleas by New York defendants, whether or not their underlying search-and-seizure claims were invalid—unless the Court somehow could qualify its holding by concluding that if the underlying claims were invalid, the unconstitutionality of the guilty plea was harmless error.

388. *Newsome*, 420 U.S. at 292.

389. *Id.* at 293.

390. Three of the four dissenters, including Justice White, the author of the Court's opinions in the Trilogy, read *McMann* as having established the "substantive proposition" that a voluntary and intelligent guilty plea conclusively established "the defendant's guilt . . . and the State's consequent absolute right to incarcerate them" *Id.* at 296.

391. 411 U.S. 258 (1973).

"is not limited to the defendant—[that] there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal" ³⁹² After a counseled plea of guilty, the defendant "may *only* attack the voluntary and intelligent character of the guilty plea." ³⁹³

Similarly, in *Bordenkircher v. Hayes*, ³⁹⁴ the Court found no constitutional objection when the prosecutor, hoping to persuade a defendant to plead guilty to forgery of a check for \$88.30, threatened that if the defendant did not plead guilty, he would reindict the defendant as a third felony offender, subjecting him to mandatory life imprisonment upon conviction. ³⁹⁵ Central to the Court's reasoning was its conclusion that the case was "no different" from one in which the more serious indictment had been returned prior to commencement of the plea negotiations. ³⁹⁶ From the defendant's perspective, the point is at least arguably true. ³⁹⁷ However, this kind of charging behavior can have a corrosive effect on the charging and sentencing process, as the four *Bordenkircher* dissenters pointed out. ³⁹⁸ If systemic considerations were relevant to decision of the case, one would expect the Court to meet these arguments and reject them. It did not.

D. The Utility of Plea Bargaining

After *United States v. Jackson*, but before the Trilogy, the constitutionality *vel non* of plea bargaining apparently depended on the question whether bargained pleas were essential to the operation of the criminal

392. *Ballard v. United States*, 329 U.S. 187, 195 (1946); *see generally* *Rose v. Mitchell*, 443 U.S. 545 (1973).

393. *Tollett*, 411 U.S. at 267 (emphasis added). The Court did not mention *Santobello*.

394. 434 U.S. 357 (1978).

395. *Id.* at 358-59.

396. *Id.* at 360-61.

397. One can only speculate whether, as a general matter, defendants would be more likely to plead guilty if heavy charges were initially brought, and the prosecutor offered to reduce them, or if lighter charges were first brought, and the prosecutor threatened to increase them. Probably the differences, if any, would depend greatly on the psychological makeup of the individual defendant.

398. In some cases, at least, the prosecutor's threat to bring heavier charges is an empty one. The grand jury might consider the new indictment out of proportion to the offense, and refuse to indict. Moreover, if the prosecutor had to bring the charges *before* the negotiations, it would be a matter of public record that he was bringing heavy charges in those circumstances, and political pressures could be brought to bear against him by those citizens who thought he was being too harsh. Since plea negotiations are typically conducted in private and are unrecorded, the prosecutor will have much greater freedom, in practice, if he can threaten the defendant with additional charges once negotiations have begun. This need not, of course, command a different result in *Bordenkircher*. But if systemic considerations are relevant, the differences are great enough to warrant mention.

justice system.³⁹⁹ The issue of utility and necessity of bargained pleas has often been discussed in the literature.⁴⁰⁰ In the Trilogy, however, the Court refused to examine the question, dismissing it as irrelevant.⁴⁰¹ Since then the Court has never undertaken even a cursory investigation of that question, but, beginning with *Santobello v. New York*,⁴⁰² the Court's opinions are full of paeans of praise for the process. Plea bargaining "is not only an essential part of the process but a highly desirable part for many reasons."⁴⁰³ "Properly administered, [pleas] can benefit all concerned."⁴⁰⁴ This happy conclusion has been reached through a simple bootstrapping process.⁴⁰⁵ The Court has never considered the empirical data, as it did elsewhere when it decided factual questions of constitutional importance.⁴⁰⁶

E. Plea Bargaining as Sui Generis

In the Trilogy, the Court held, effectively, that the entry of a bargained plea was an event *sui generis*. Doctrines such as that of *United States v. Jackson*,⁴⁰⁷ developed in other contexts, were found irrelevant to determining the validity of a bargained plea. That conclusion was a sword with two edges—if legal doctrines developed outside the context of plea bargaining were completely irrelevant to such plea bargains, then legal doctrines developed in the context of plea bargaining were irrele-

399. See *supra* notes 7-216 and accompanying text.

400. There is enormous literature on the subject. Particularly interesting empirical studies include W. RHODES, *supra* note 18; Rubinstein & White, *Alaska's Ban on Plea Bargaining*, 13 LAW & SOC'Y REV. 367 (1979); Schulhofer, *supra* note 5. The American Bar Association has taken a position in support of the practice if it is regulated. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY 60-78 (Approved Draft, 1968). The National Advisory Commission on Criminal Justice Standards and Goals has opposed it. NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE, REPORT ON COURTS 42-49 (1973).

401. See *supra* notes 230-42 and accompanying text.

402. 404 U.S. 257 (1971).

403. *Id.* at 261.

404. *Blackledge v. Allison*, 431 U.S. 63, 71 (1977).

405. The Court in *Brady* noted that some plea bargains may benefit both the prosecution and the defendant. *Brady v. United States*, 397 U.S. 742, 752 (1970). In *Santobello*, *Brady* was cited for the proposition that plea bargaining is both "essential" and "highly desirable." *Santobello*, 404 U.S. at 261. Thereafter the courts' primary source for touting the benefits of plea bargaining has been *Brady* and *Santobello*.

406. Compare the extensive canvass of evidence on the deterrent effects of the death penalty in the several opinions in *Furman v. Georgia*, 408 U.S. 238 (1972).

The empirical data is not entirely pleasing. At least one estimate is that, in some federal courts, as many as one-third of the defendants pleading guilty would have been acquitted had they gone to trial. Finkelstein, *A Statistical Analysis of Guilty Plea Practices in Federal Courts*, 89 HARV. L. REV. 293, 309-10 (1975). For specific, anecdotal examples see Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 60-62 (1968).

407. 390 U.S. 570 (1968).

vant outside that context. The bargained plea became a black hole, disassociated with the remainder of the constitutional universe.

Since the Trilogy, this black hole has expanded. *United States v. Jackson* has never been overruled and indeed is occasionally cited with approval for the proposition that "if the only objective of a state practice is to discourage the assertion of constitutional rights it is 'patently unconstitutional.'" ⁴⁰⁸ Based on *United States v. Jackson*, it would appear that if a charge were brought against a defendant *solely* in order to "discourage" his assertion of a right to trial, imprisonment on that charge after he insisted on trial would be "patently unconstitutional."⁴⁰⁹ Not so. In *Bordenkircher v. Hayes*,⁴¹⁰ the Court stated that "in the 'give-and-take' of plea bargaining,"⁴¹¹ such doctrines have no relevance "so long as the accused is free to accept or reject the prosecution's offer."⁴¹² Since the accused in *Bordenkircher* had rejected the prosecution's offer and was sentenced to life imprisonment, the Court's dismissal of the *United States v. Jackson* line of cases as irrelevant expanded the *sui generis* character of plea bargaining to include bargains that were rejected as well as those accepted as long as the defendant can either accept or reject the offer. However, the *Bordenkircher* qualification barely outlived its creation. In *Corbitt v. New Jersey*,⁴¹³ the Court rejected the qualification and held that the *United States v. Jackson* doctrine did not apply even when the accused was *not* free to accept the prosecution's offer.⁴¹⁴

Although the Court has consistently decided plea bargaining cases as a law unto themselves,⁴¹⁵ it has never explained *why* these cases are different. The Court's lack of an explanation has created an unusual ten-

408. *Chaffin v. Stynchcombe*, 412 U.S. 17, 32-33 n.20 (1973) (citing *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969) (quoting *United States v. Jackson*, 390 U.S. 570, 581 (1968))). *United States v. Jackson*, however, may be in decline. It has not been cited for this point since *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), and in recent years has been used in opinions of the Court only for the proposition that unconstitutional statutes are sometimes severable. *E.g.*, *Regan v. Time, Inc.*, 468 U.S. 641 (1984).

409. *United States v. Jackson*, 390 U.S. at 581.

410. 434 U.S. 357 (1978).

411. *Id.* at 363.

412. *Id.* Astoundingly, the Court in *Bordenkircher* incorrectly paraphrased a passage from *Chaffin* and changed the word "discourage" to "penalize" and then distinguished such cases on the ground that there was no "penalty." *Id.* For the text of the passage from *Chaffin*, see *supra* text accompanying note 408.

413. 439 U.S. 212 (1978).

414. *Corbitt* involved a defendant who went to trial under a statutory scheme allowing lighter sentences for defendants who waived trial. The Court noted that, so far as the record disclosed, *Corbitt* might have attempted to plead guilty but had been refused the chance. *Id.* at 223.

415. Occasional small departures occur. See *supra* notes 355-56 and accompanying text.

sion in the law. This tension is highlighted when the *fact* of plea bargaining is argued to be relevant to other doctrines. For example, in *Gregg v. Georgia*,⁴¹⁶ the petitioners argued that Georgia's capital punishment statutes were unconstitutional under *Furman v. Georgia*⁴¹⁷ because the unregulated power of prosecutors to bargain pleas (among other factors) introduced too much unstructured discretion into the system to meet the fuzzy standards of *Furman*. The prevailing opinion did not try to meet this argument. It simply denied any possibility of control:

In order to repair the alleged defects pointed to by the petitioner, it would be necessary to require that prosecuting authorities charge a capital offense whenever arguably there had been a capital murder and that they refuse to plea bargain with the defendant. . . . Such a system, of course, would be totally alien to our notions of criminal justice.⁴¹⁸

The *Gregg* Court's response to the petitioner's relatively modest claim that the prosecution's decision whether or not to offer a bargained plea in capital cases should be subject to *some* standards bespeaks the confusion about why the law is as it is. Only two years later, the senior author of the quoted passage observed, for the Court, that "undoubtedly" the Constitution limits the prosecution's discretion whether or not to offer a bargained plea.⁴¹⁹ The Court has insisted that bargained pleas are an element foreign to the considerations that govern other aspects of constitutional law. But it has never explained why they are foreign. Without such an explanation, the Court is understandably at a loss to explain how plea bargaining can be integrated into a general body of constitutional doctrine.

416. 428 U.S. 153 (1976).

417. 408 U.S. 238 (1972).

418. *Gregg*, 428 U.S. at 199-200 n.50 (Stewart, J., announcing judgment). Justice White, joined by the Chief Justice Burger and Justice Rehnquist, disposed of the claim as unsupported by any facts . . . [to show] that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts. Unless prosecutors are incompetent in their judgments, the standards by which they decide whether to charge a capital felony will be the same as those by which the jury will decide the questions of guilt and sentence.

Id. at 225 (White, J., concurring). Although the passage refers only to the "charging" decision, it presumably applies to plea bargaining as well, since immediately before the quoted passage the opinion promises to deal with plea bargaining, and no other arguably relevant language appears. Within a year, these three Justices joined an opinion expressly rejecting any arguments that a prosecutor's decision whether and how to bargain pleas must be based on the strength of the prosecution's case. *Bordenkircher*, 434 U.S. at 364-65.

419. *Bordenkircher*, 434 U.S. at 365. The Court has never said what these limits are.

F. Summary

The Court's plea bargaining cases rest on a foundation of sand. The Trilogy, the foundation on which all subsequent cases attempt to rest, is incoherent in virtually everything except its result. Furthermore, later cases have not developed any coherent, consistent theme or theory that explains the rationale of plea bargaining, regulates its practice and integrates its doctrine into the general tapestry of constitutional law. Instead, the Court has responded on an ad hoc basis, repeatedly developing themes in one case only to see them ignored in the next. The following section suggests one possible direction for development.

V. THE ADMISSION OF GUILT

If the language of the Trilogy opinions is to be credited, the only question relevant to the validity of a bargained plea is what the Court views as the traditional inquiry into the defendant's state of mind at the time the plea was entered. Was the plea "voluntary"? Was it "intelligent"? At the same time, a second theme runs consistently through the cases. Pleas of guilty are "grave and solemn" acts that are valid because they represent "the defendant's admission in open court that he committed the acts charged"⁴²⁰ So long as this admission is sufficiently reliable,⁴²¹ the government may impose punishment on the basis of this admission and consider the matter finally resolved. The point is most fully developed in *Brady* where the Court stated:

This is not to say that guilty plea convictions hold no hazards for the innocent or that the methods of taking guilty pleas presently employed in this country are necessarily valid in all respects. . . . [W]e take great precautions against unsound results, and we should continue to do so, whether conviction is by plea or by trial. *We would have serious doubts about this case if the encouragement of guilty pleas by offers of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves.* But our view is to the contrary and is based on our expectations that courts will satisfy themselves that pleas of guilty are voluntary and intelligently made by competent defendants with adequate advice of counsel and that there is nothing to question the accu-

420. *Brady v. United States*, 397 U.S. 742, 748 (1970). Presumably the Court's failure to mention the state of mind with which the acts were committed—a critical factor in criminal liability and previously one crucial to the validity of a guilty plea is inadvertent. See *McCarthy v. United States*, 394 U.S. 459 (1969).

421. See *Brady*, 397 U.S. at 758; *McMann v. Richardson*, 397 U.S. 759, 773 (1970).

racy and reliability of the defendants' admissions that they committed the crimes with which they are charged.⁴²²

This theme, although abandoned by the Court within seven months,⁴²³ may represent the real basis of the Trilogy.⁴²⁴ When coupled with the Court's refusal to find any relevance in prior law developed in the context of prosecutions that went to trial, it presents a view of the guilty plea process as a procedure *sui generis*, founded upon and its differences justified by the defendant's admission that he is, in fact and in law, guilty of the crimes to which he is pleading. It is of course possible to quarrel with this view of the guilty plea process. But this vision is at least an arguable one.⁴²⁵ If consistently followed, this theme would provide a rationale of sufficient coherence to bring bargained pleas back into the constitutional universe.⁴²⁶

A. A View of the System

Perhaps the most important aspect of this vision of the guilty plea process is that it reintroduces consideration of the system of plea bargains as a functioning whole. This is not the same view that would have followed from application of cases such as *United States v. Jackson*; these cases require the Court to inquire whether the plea bargaining process

422. *Brady*, 397 U.S. at 757-58 (emphasis added).

423. It was, in my view, abandoned in *North Carolina v. Alford*, 400 U.S. 25 (1970), where the Court upheld a guilty plea entered by a defendant who, at the time he pleaded guilty, said he was innocent and was pleading guilty only to avoid execution. The Court did note the presence of a "strong factual basis" for the plea, but it surely must have realized that authorizing convictions on a "strong factual basis" will lead to conviction of far more innocent people than the ordinary, reasonable doubt standard will authorize. *Id.* at 38.

424. The Court emphasized this with unusual fervor. See, e.g., *Brady*, 397 U.S. at 757 ("solemn admissions in open court"); *id.* at 758 ("solemn admission of guilt"); *McMann*, 397 U.S. at 766 ("defendant's own admission in open court"); *id.* at 773 ("counseled admission in open court").

425. It is not one I prefer, since I share Professor Alschuler's opinion that plea bargaining is an "inherently unfair and irrational process." Alschuler, *The Changing Plea Bargaining Debate*, *supra* note 5, at 652. We do not generally say that almost anything goes as long as the defendant is guilty. But I believe that a system convicting primarily the guilty is, in any event, to be preferred over a system that convicts substantial numbers of innocent defendants as well as guilty ones.

426. I do not mean to imply that this vision of the plea bargaining process would adequately explain the results in cases the Court has so far decided. Those cases, I believe, are incoherent and cannot be made otherwise. Cf. Saltzburg, *supra* note 337, at 1307 ("[N]one of the Supreme Court's guilty-plea cases come to grip with the real problems of bargained-for justice.") I do believe, however, that it is consistent with some of them, and not contrary to the general thrust (though perhaps to some of the particular results) of the Trilogy. I also speculate that such a belief was important to the Court in the Trilogy, since I do not believe they would so cheerfully have placed a constitutional imprimatur on a system they believed would lead to wholesale conviction of the innocent.

"needlessly encourage[s]" guilty pleas.⁴²⁷ But the implication of the above-quoted passage from *Brady* is that *another* question, not directly related to the "voluntariness" or "intelligence" of the defendant's plea as those terms are defined in the Trilogy, should be asked. Does the system for producing guilty pleas create a substantial likelihood that innocent as well as guilty defendants will plead guilty?

This question provides a basis for the principled development of standards which delineate permissible, and impermissible, inducements for guilty pleas. More broadly, explicit adoption of such an approach allows consideration of problems beyond the scope of an inquiry into the pleading defendant's state of mind at the time the plea was entered. It provides a standard for measuring the prosecutor's presently uncontrolled decision of whether or not to offer concessions for a guilty plea. And it allows at least some consideration of the defendant who refuses a bargain, leading to the development of standards that would place *some* limits on the additional penalty imposed on a defendant for his insistence on going to trial.

B. Some Boundaries of Permissible Inducement

A defendant who is offered a discount on punishment in exchange for a plea of guilty is not faced with a choice between a certainly lesser sentence and a certainly greater one.⁴²⁸ The choice is actually between pleading guilty and getting the concession, and pleading not guilty and going to trial. Trial presents a range of possible outcomes from acquittal through conviction, and usually a range of possible sentences if the defendant is convicted. A premise of the system is that innocent defendants will be acquitted if they insist on trial.⁴²⁹ The initial focus therefore should be on such a defendant. What would induce a plea of guilty from a defendant who would, if tried, be acquitted?

The general answer is that an innocent defendant would plead guilty only if the prosecution offered some benefit more valuable than what the defendant can get by going to trial and obtaining an acquittal. The model proposed here leads to the conclusion that such inducements, which *would* substantially increase the likelihood that an innocent de-

427. See *supra* notes 169-216 and accompanying text.

428. To speak of a defendant being "offered" a plea bargain, as if the initial negotiating steps always came from the prosecution, oversimplifies reality; the initial move is frequently made by defense counsel. For present purposes, however, the simplification is adequate.

429. See *infra* text accompanying notes 443-44 for the implications of imperfection in this model.

fendant would plead guilty, should ordinarily be forbidden. How this would apply in practice requires further discussion.

1. Lenience for other defendants

On occasion the prosecution will offer to drop or reduce charges, or to provide other benefits, not to the pleading defendant but to a third party, such as the defendant's spouse. Lower courts have invariably upheld such bargains.⁴³⁰ Obviously these inducements will only be effective when the defendant has a close relationship with the third party. When the defendant has such a relationship, however, the effectiveness of the inducements will not be muted by the innocence of the pleading defendant. No matter how innocent the defendant, acquittal at the defendant's trial will not provide acquittal or any reduction in charges for third parties.

No doubt altruism has its limits, and inducements of this kind will not always persuade an innocent defendant to plead guilty. But they should never be allowed. However rational it may be in a rehabilitation-based penal system to give a discount to defendants willing to admit their guilt, no reason exists to reduce punishment for defendant *A* if defendant *B* is willing to forego trial.⁴³¹ Inducements of this kind present a very real possibility of inducing innocent people to plead guilty, and serve no other purpose than to persuade defendants to waive their constitutional right to trial. Such inducements should be outside the bounds of propriety.

2. Reduction or dismissal of other charges

More often, a bargain is struck whereby a defendant, charged with several offenses, agrees to plead guilty to one (or a few) counts in exchange for dismissal of other charges which may or may not be related. One could deal simplistically with this situation in one of two ways. The first alternative is to argue that concern should be with the defendant

430. *E.g.*, *United States v. Castello*, 724 F.2d 813, 814 (9th Cir.), *cert. denied*, 467 U.S. 1254 (1984) (threat to prosecute codefendant as "special dangerous offender," increasing liability sixfold); *Harman v. Mohn*, 683 F.2d 834 (4th Cir. 1982) (dismissal of charges against wife); *United States v. Tursi*, 576 F.2d 396 (1st Cir. 1978) (recommend probation for son); *Plunkett v. Commissioner of Internal Revenue*, 465 F.2d 299 (7th Cir. 1972) (dismissal of charges against wife); *Crow v. United States*, 397 F.2d 284 (10th Cir. 1968); *Cortez v. United States*, 337 F.2d 699 (9th Cir. 1964), *cert. denied*, 381 U.S. 953 (1965); *Kent v. United States*, 272 F.2d 795 (1st Cir. 1959). *But cf.* *United States v. Nuckols*, 606 F.2d 566 (5th Cir. 1979) (remanding for evidentiary hearing).

431. One is tempted to suspect that prosecutors are most willing to enter into this kind of agreement when, in fact, they have no desire to proceed against the third party anyway.

who is innocent of the actual charges to which he is pleading. In this situation, however, allowing dismissal of other charges would create a significant inducement for defendants to plead guilty to charges of which they were innocent. Therefore, this type of inducement should not be permitted.⁴³² Alternatively, one could argue that concern should be limited to defendants who are innocent of *all* charges. In this situation, defendants would still be expected to refuse the proffered bargain and go to trial. Therefore, inducements of this nature would be permissible.

But, the choices need not be limited to these two alternatives. In the ordinary case, the major problem with inducements of this kind is not how precisely the crime pleaded to corresponds with the crime actually committed⁴³³—assuming the defendant is guilty of *some* of the charges—but rather with the extent to which the availability of such inducements allows the prosecution to present the defendant with an offer too good for even an innocent defendant to refuse, by making the risks attendant on conviction intolerably high. I deal with the problem immediately below.

3. Limits to the inducement

Assuming that a defendant innocent of all the charges brought will in fact be acquitted if he insists on a trial, it is not necessary to consider at length the difference between the probable outcome upon conviction and the bargain actually offered. So long as complete acquittal is better than the prosecution's offer, *and so long as complete acquittal is a known certainty for the innocent defendant*, it does not matter how horrifying the consequences would be if the defendant were convicted after trial. Given these assumptions, the defendant need not fear the consequences of conviction.

At this point in the analysis, however, reality rears its complicated head. The trial process is not perfect. Particularly in the case of much street crime, where conviction or acquittal turns primarily on the jury's weighing of eyewitness identification from witnesses unfamiliar with the

432. In fact, defendants frequently seem to plead guilty to offenses that they did not commit. *See, e.g.*, D. NEWMAN, CONVICTION 100-01 (1966) (routine bargaining of nighttime burglary to lesser charge of daytime burglary). They occasionally plead guilty to nonexistent offenses. *E.g.*, *People v. Foster*, 19 N.Y.2d 150, 225 N.E.2d 200 (1967) (nonexistent offense of attempted second-degree manslaughter; plea upheld).

433. In exceptional cases, we may rightly be concerned with accuracy regarding the precise offense pleaded to. It would have been disturbing, to say the least, had James Earl Ray been offered a bargained plea to an unrelated crime in exchange for dismissal of the charges that he murdered Dr. Martin Luther King. Even in unexceptional cases, some would argue that the system is poisoned, in less dramatic ways, when it induces defendants to plead guilty to crimes they did not commit in exchange for dismissal of accusations of crimes they did commit.

defendant against alibi testimony from friends and relatives. Many innocent defendants will have a realistic fear of possible conviction. No doubt, there are limits on what can be done to alleviate the problem, and no doubt, the best solution would be to improve the accuracy of the trial process. However, a genuine concern for innocent defendants requires that there be at least *some* scrutiny of the degree of inducement offered for a guilty plea. Except for the fact that *Brady* explicitly rejected such a claim, one might hazard, as an initial matter, that questions of life or death should be removed from the plea bargaining process.⁴³⁴ If any realistic prospect of a death sentence upon conviction exists, even an innocent, life-loving defendant will be sorely tempted to plead guilty unless the case for acquittal—at least of the capital aspect of the charges—is open and shut.⁴³⁵ Similarly, when the choice is between an extremely light sentence—particularly one involving no additional imprisonment—and a substantial term of years, as may increasingly be the case under statutes that provide for mandatory minimum terms on conviction, one can realistically expect that a substantial number of even innocent defendants would prefer to plead guilty rather than face the possibility of conviction and the certainty of extended incarceration.⁴³⁶ Concern that innocent defendants not be frightened into pleading guilty does not, without more, dictate a particular result. It does, however, focus attention on the question that should be asked and explored, and provides a basis for at least some principled limitations on the inducements that the prosecution can legitimately offer.⁴³⁷

434. Compare the plea-taking procedure recorded in *United States v. Runge*, 427 F.2d 122 (10th Cir. 1970), where the trial judge exerted considerable effort to remove the fear of death from the defendant's decision. *Id.* at 123-24 n.4.

435. Not only is one's death uniquely difficult to contemplate with equanimity, it is uniquely final. The innocent defendant considering wrongful imprisonment can at least hope that sufficient evidence of his innocence will appear to justify a pardon, or provide a foundation for early parole. But posthumous vindication gives little satisfaction.

436. The same is true when the prosecution brings a multiplicity of charges and offers to drop most in exchange for a plea. One prosecutor of my acquaintance reported charging a defendant with 140 years of offenses in order to persuade her to plead guilty of a misdemeanor, for which he intended to recommend probation—which he thought was the just sentence for her complicity. Of course, it is important to consider not only the potential, but also the probable sentence after trial. Maximum consecutive terms are rare.

437. Obviously, any workable rules in this regard will to a great extent be rules of thumb, difficult to develop, and even more difficult to test. Some innocent defendants may resist virtually any pressure to plead guilty; others may plead guilty for pottage. But that a perfect answer is impossible does not mean that the question should not be asked, or that no answers can be ventured. I would, for instance, hope that the practice of offering incarcerated defendants immediate release if they plead guilty, and continued incarceration if they insist on trial, be forbidden. See *infra* text accompanying note 439.

4. Speed and cost

A guilty plea almost always can be entered more quickly, and more cheaply, than a defense can be presented at trial. An innocent defendant can thus save time and money by pleading guilty, and these inducements cannot be entirely eliminated without banning guilty pleas altogether.⁴³⁸ No doubt many mail-in pleas of guilty to parking offenses are entered by innocent defendants too busy to take the time for trial. For major offenses, this may be tolerable if it is unlikely that a defendant will accept a long sentence to save a relatively small amount of time at trial or that he will do so to save the substantial legal costs of defense. For very minor cases, such as parking offenses, this may be tolerable because we are simply not that offended by the possibility of wrongful convictions.

There remains, however, a large and troubling middle ground. Where lengthy pretrial delays are common, guilty pleas are often entered upon the promise that the plea will be accepted promptly, and (for defendants unable to make bail) the sentence will be for no more than the amount of time already served. If the defendant insists on trial, however, he will stay in jail for a considerable period before his case comes to trial. As one astonished defendant said: "You mean if I'm guilty I get out, but if I'm innocent I stay in jail?"⁴³⁹ In such circumstances the pressure even on innocent defendants to plead guilty may be overwhelming. At the same time, it is hard to see how the prosecution can obtain more than a purely statistical benefit from the conviction obtained in such a manner.⁴⁴⁰

The only problem with outlawing such clearly intolerable inducements is the problem of control. Forbidding time-served sentences would worsen the plight of defendants jailed pending trial, defendants who are already considerably worse off than their counterparts on the street.⁴⁴¹ Perhaps the only real solution is to require pretrial release (or trial) after significantly shorter periods than is presently the case, at least

438. So far as money is concerned, we could of course reimburse innocent defendants after their acquittal for the costs of the trial. This is proposed in Note, *Costs and the Plea Bargaining Process: Reducing the Price of Justice to the Nonindigent Defendant*, 89 YALE L.J. 333 (1979).

439. Mills, "I Have Nothing to do With Justice," *Life*, Mar. 12, 1971, at 57, 62. The defendant in question had been in jail 10 months pending trial; with time off for good behavior, a one-year sentence would result in his immediate release.

440. Conversations with prosecutors indicate that they are indeed concerned with this statistical benefit of cases terminated with conviction and what is recorded as a jail sentence. Occasionally, they are concerned with recording a felony conviction which will make the defendant liable to harsher sentences in the event of a subsequent conviction.

441. See, e.g., Rankin, *The Effects of Pre-Trial Detention*, 39 N.Y.U. L. REV. 641 (1964).

for offenses where time-served sentences are a realistic possibility.⁴⁴² The point is that genuine concern for innocent defendants should lead us to eliminate bludgeons that can compel them to plead guilty.

5. Other Considerations

For many defendants, the major value of a bargained plea may be the extent to which it reduces the uncertainty inherent in the trial and sentencing process, particularly in jurisdictions where without a bargain the allowable (and generally unreviewable) range of sentencing possibilities is extremely broad. Although some innocent defendants may plead guilty to lesser charges rather than risk conviction and a higher sentence, it is impossible to deal with this aspect of the problem short of modifying the sentencing scheme or requiring all defendants to go to trial.⁴⁴³ Uncertainty about the sentence that may be received, however, is somewhat more tractable. Basically, the problem is similar to the problem of unlimited inducements. Concern for preventing false guilty pleas does not dictate any particular result; it does, however, suggest that limits on sentencing discretion are appropriate, particularly for relatively trivial offenses.⁴⁴⁴

If one views the system of plea bargaining as a functioning whole, rather than as a collection of isolated acts by those involved in the process, two other considerations assume substantial importance. First is the problem of defendants who refuse bargains they are offered. Whatever additional sentence they receive is a direct consequence of their insisting on trial and is a penalty for demanding one of the most basic rights guaranteed by the Constitution. If plea bargaining is to exist at all, there must be some differential;⁴⁴⁵ but that there must be some differential is not to say that no limits should exist. Indeed *Brady*, which

442. If the prosecution is in fact willing to have the defendant released to the street immediately upon plea of guilty, it is difficult to understand what considerations would require the defendant to remain incarcerated pending trial.

443. One might think that the current trend toward fixed determinate sentences for particular crimes will help. I am less certain, however, since typically the *possible* sentence for most criminal activity is enormous, and the prosecutor's charging discretion virtually unchecked. For the argument that determinate sentencing schemes unwisely increase the prosecutor's power, see Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550 (1977).

444. For different reasons, the California Supreme Court held unconstitutional a sentence of one day to life for indecent exposure. *In re Lynch*, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972).

445. It may be that a system of plea bargaining can continue to function *without* actual penalties for going to trial, either because defendants are misinformed or because they are willing to plead guilty solely in exchange for an increase in certainty. See *supra* note 18.

distinguished as irrelevant but did not question *United States v. Jackson*, seems to say as much.⁴⁴⁶ An analysis similar to that in *United States v. Jackson* could provide a basis for limiting the penalties that can be imposed on defendants who refuse or are unable to accept a proffered bargain.⁴⁴⁷ Ultimately, this would effectively provide limits to the inducements that can be offered as part of bargained pleas even if pleas agreed to for greater inducements themselves remain valid. *United States v. Jackson* itself did as much for future defendants charged under the Federal Kidnaping Act. Indeed, defendants who refuse proffered plea bargains may often represent the most appealing case for lenient treatment, since the genuinely innocent defendant will often refuse any offer and insist on trial. The reality is that some of these defendants will be convicted. Yet in any rational sentencing scheme these are the defendants least deserving of harsh sentences.

Finally, to view the system as a functioning whole provides a basis for setting standards for the prosecutor's decision whether or not to bargain in the first place, and what kind of bargains to offer.⁴⁴⁸ Increasingly, a bargained guilty plea is the normal outcome of criminal cases, and trial followed by acquittal or conviction is the abnormal event. This places an awesome amount of power in the prosecutor because the prosecutor has unguided and unchecked discretion to make offers and to bargain over pleas.⁴⁴⁹ The problem is related to the problem of prosecutorial charging power in general. However, it is more serious because the prosecutor's discretion to charge is at least limited by the fact-finding process when cases go to trial, by the publicity attendant on trials and (in major cases in many jurisdictions) by the grand jury. Where, however, the outcome is a bargained plea, by definition no extensive public fact-finding process occurs; the only check is the trial judge, who must act on the sparse record ordinarily presented when pleas are taken.

446. *United States v. Jackson*, however, may not have substantially survived *Corbitt v. New Jersey*, 439 U.S. 212 (1978). See *id.* at 228-33 (Stevens, J., dissenting).

447. Or are unable to accept one. Cf. *Pettyjohn v. United States*, 419 F.2d 651, 660 (D.C. Cir. 1969), cert. denied, 397 U.S. 1058 (1970) (Bazelon, C.J., dissenting from denial of rehearing en banc). In *Pettyjohn*, an incarcerated defendant sought to plead guilty to second-degree murder because he found the conditions of his pretrial detention intolerable and the plea, if accepted, would get him into new quarters. *Id.* The trial judge refused the plea and the defendant was convicted of first-degree murder, which carried a mandatory life sentence. *Id.*

448. Prosecutors have themselves on occasion set such standards. See, e.g., Kuh, *Sentencing Guidelines for the Manhattan District Attorney's Office*, 11 CRIM. L. BULL. 62 (1975).

449. See Alschuler, *supra* note 443.

VI. CONCLUSION

In upholding plea bargaining in the 1970 *Brady* Trilogy, the Supreme Court concluded that plea bargaining was a process *sui generis*, wholly divorced from the body of constitutional law previously developed in other contexts. Specifically, the Court refused to consider the plea bargaining system as a whole, insisting instead that the only question that should be considered was the state of mind of the individual pleading defendant at the time he entered his plea. The end result was not law by reason; it was law by fiat.

Since then, the Court has made no substantial progress toward providing reasons. In deciding cases about the constitutional constraints on bargained pleas, the Court has continued to refer back to the Trilogy to provide a foundation for its decisions. However, no foundation is there, and later cases, viewed together, are as unreasoned as the Trilogy and not even as consistent.

The search for reasons, for some principled basis that would not only explain or justify existing decisions but also provide guidance for the future, is not an impossible one. This Article has sketched one plausible principle, and indicated some of the directions in which the law could move were that principle adopted. Other possibilities exist. There has been ample time for consideration and reflection. The Court will have shirked its duty to us all if, in the future, it fails to provide some explanation and justification for its plea bargaining decisions.

To those who cherish the rule of law, it is important that the Court provide reason and explanations. The American criminal process promises extensive safeguards to criminal defendants who plead not guilty and go to trial. But most criminal defendants, in most jurisdictions, never see a trial. The net effect of the Trilogy, and the cases following it, has been to make the plea bargaining process, which determines their fate, a Kafkaesque process entirely ungoverned by the Constitution. If we are serious in our desire to protect criminal defendants—and particularly innocent criminal defendants—from the whims of the marketplace and the impersonality of naked force, we should do more.

