

# Plea Bargaining Abolitionism: A History

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## EDITOR’S NOTE

This article was a solicited contribution to the symposium on pleas in Volume 20, Issue 2.\*\* Due to an oversight by a previous Volume’s editorial board, the article was inadvertently omitted from that issue and is published here instead.

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## INTRODUCTION

In the 1980s, America’s criminal legal system exploded. The number of people in state and federal prisons grew from 329,821 in 1980 to over 700,000 by decade’s end.<sup>1</sup> Racial disparities, already stark in the carceral system of the 1970s and earlier, reached unthinkable levels.<sup>2</sup> By the 1980s, African Americans constituted 12% of the population and 50% of the prisoners.<sup>3</sup> How could a tragedy on the scale of mass

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\*\* See Carissa Byrne Hessick, Introduction to Symposium on Pleas, 20 Ohio S. J. Crim. L. 209 (2023).

<sup>1</sup> Robyn L. Cohen, *Prisoners in 1990*, BUREAU OF JUSTICE STATISTICS BULLETIN 1 (1991).

<sup>2</sup> See Michael Tonry & Matthew Melewski, *The Malign Effects of Drug and Crime Control Policies on Black Americans*, 37 CRIME & JUST. 1, 7 (2008) (“Racial disparities began to rise in the 1960s and then shot up to all-time highs in the 1980s.”).

<sup>3</sup> *Id.*; see also Jonathan Simon, *Racing Abnormality, Normalizing Race: The Origins of America’s Peculiar Carceral State and its Prospects for Democratic Transformation Today*, 111 Nw. U. L. REV. 1625, 1643 (2017) (“By the time the prison population began to rise noticeably in the late 1970s

incarceration happen? Scholarship has focused on the carceral appetite of politicians, criminal justice practitioners, and the public. Rightly so.<sup>4</sup> But mass incarceration took more.

The American legal system has a built-in check against the punitive inclinations of politicians, practitioners, and the public: a labor-intensive constitutional system of criminal adjudication. Before a person can be punished by the state, the “system” must examine their case to ensure that the evidence was legally obtained and establishes guilt beyond a reasonable doubt in the eyes of ordinary people. Yet as mass incarceration wreaked havoc in the 1980s and beyond, these constitutional safeguards stood by powerlessly. They had, over the previous century, been supplanted by a form of adjudication that *was* tailored to punitive fervor.

Plea bargaining did not make mass incarceration inevitable, but it facilitated it in a way that trial-centered methods of criminal adjudication likely never could.<sup>5</sup> Carceral zeal may have been the spark, but plea bargaining was the gas. If only Americans had been warned about plea bargaining before it was too late, maybe the tragedy could have been avoided.

Except that they—we—were warned. In the 1970s, an unlikely assortment of academics, prosecutors, judges, and even a Nixon-administration crime commission tried to rally the country to abolish plea bargaining. They may not have explicitly warned that mass incarceration was around the corner—their ability to predict the future went only so far—but they recognized, and tried to help others see, that the system of plea bargaining that had matured in mid-century American courts was fundamentally unjust.

They did not speak in unison, as the flaws they saw in plea bargaining varied. For some, the problem was that plea bargaining as practiced in late-twentieth century American courts coerced defendants—guilty and innocent alike—into pleading guilty. For others, especially the prosecutors and judges, the problem was that plea bargaining divorced culpability from wrongdoing, undermining the crime control function of criminal law. Meanwhile, sophisticated academic analyses of plea bargaining complained that (among other things) plea bargaining distorted the incentive

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and early 1980s, the carceral state had been greatly enlarged while leaving its racialized conception of abnormality in place and normalizing its racist practices as crime control.”); Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 268 (2008) (“The transformation of prison policy over the last thirty years has produced the mass incarceration of African Americans.”).

<sup>4</sup> See generally ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* (2016).

<sup>5</sup> See Albert W. Alschuler, *Plea Bargaining and Mass Incarceration*, 76 N.Y.U. ANN. SURV. OF AM. L. 205, 232 (2021) (“But in a world without plea bargaining, the prison population probably would be less. For one thing, mass incarceration would have cost more.”) [hereinafter *Mass Incarceration*]; Andrew Manuel Crespo, *No Justice, No Pleas: Subverting Mass Incarceration through Defendant Collective Action*, 90 FORDHAM L. REV. 1999, 2004 (2022) (“Plea bargaining lies at the root of American mass incarceration.”).

structure of every actor in the system. Plea bargaining abolitionists thus brought a diverse array of overlapping concerns. They were united by the sentiment that plea bargaining had extracted the justice out of the criminal justice system.

Plea bargaining abolitionists in the 1970s tried to tell us that something basic had gone wrong with the criminal process. Perhaps predictably, the broader legal profession didn't heed the warning. When prosecutors or judges attempted to formally ban plea bargaining—as they did in Alaska, El Paso, and elsewhere—other prosecutors, judges, and defense lawyers found ways to circumvent them. And when academics decried the injustice of plea bargaining, they were told to be more realistic.

In a previous article, *When Plea Bargaining Became Normal*, I explored the intellectual history of plea bargaining from its discovery by the crime commissions of the 1920s to its normalization in the middle of the twentieth century.<sup>6</sup> This essay picks up plea bargaining's story where that one ended. Part I sets the scene by surveying the legal profession's view of plea bargaining at mid-century. Part II then describes the proposal of the National Advisory Commission on Criminal Justice Standard and Goals, an organization created by President Nixon's Department of Justice, to abolish plea bargaining by 1978. Part III turns to prosecutors and judges in the 1970s who tried to end plea bargaining in their jurisdictions. Part IV examines the work of academics who sought to—and did—put plea bargaining abolitionism on stable intellectual ground. A brief conclusion considers the legacy of 1970s plea bargaining abolitionism.

## I. NEWLY-NORMAL PLEA BARGAINING

To understand the plea bargaining abolitionists of the 1970s, we must first know something of the worldview they spoke, wrote, and worked against. This Part briefly explores the legal profession's prevailing attitudes towards plea bargaining in the middle decades of the twentieth century.<sup>7</sup>

How did the legal profession think about plea bargaining at mid-century? For the most part, it embraced it. Earlier in the twentieth century, the reaction had been frostier. The first commentators to consider plea bargaining, in the 1920s and early 1930s, saw much to condemn. They had thought it facilitated “escape” by defendants from their due punishment that was made possible by prosecutorial “corruption.”<sup>8</sup> Later, plea bargaining found defenders in the Legal Realist movement, who offered responses to the escape and corruption objections.<sup>9</sup> The question was whether the

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<sup>6</sup> William Ortman, *When Plea Bargaining Became Normal*, 100 B.U. L. REV. 1435 (2020).

<sup>7</sup> This Part is drawn principally from Part IV of *When Plea Bargaining Became Normal*. Readers seeking additional details are advised to look there. *See id.* at 1485.

<sup>8</sup> *Id.* at 1460–63.

<sup>9</sup> *Id.* at 1473–79.

legal profession would endorse the Progressive objections or Realist responses. By mid-century, the answer was clear. Plea bargaining, the profession's leading lights had decided, was at least mostly a force for good.

Plea bargaining confers benefits to both the accused and the state, President Johnson's Commission on Law Enforcement and Administration of Justice (the "Katzenbach Commission") explained in *The Challenge of Crime in a Free Society*, because it "relieves both . . . of the inevitable risks and uncertainties of trial" and "imports a degree of certainty and flexibility into a rigid, yet frequently erratic system."<sup>10</sup> The American Bar Association sounded similar themes in its 1967 draft *Standards Relating to Pleas of Guilty*, observing that by "avoiding delay in the disposition of other cases," defendants "increase[d] the probability of prompt and certain application of correctional measures to other offenders."<sup>11</sup> Beyond the benefits plea bargaining offered litigants, mid-century writers contended that the practice was essential—even necessary—to the functioning of modern criminal justice. Donald Newman, author of the highly-touted *Conviction: The Determination of Guilt or Innocence Without Trial*, embraced this perspective. A "steady flow of guilty pleas," he wrote, was "important to the smooth functioning of most criminal courts."<sup>12</sup>

The Supreme Court joined the scholarly and professional embrace of plea bargaining in 1970 with a series of decisions that assuaged lingering uncertainties about the practice's legality.<sup>13</sup> Foremost was *Brady v. United States*, where the Court ruled that Robert Brady had "voluntarily" pleaded guilty to the crime of kidnapping, notwithstanding that he entered the plea to avoid the death penalty. A guilty plea is not invalid, the Court announced, just because the state induced it with a sentencing concession.<sup>14</sup>

To be sure, mid-century scholars, lawyers, and judges were not ignorant of plea bargaining's pitfalls. In 1951, Samuel Dash wrote a powerful account of Chicago's Municipal Court, where he found "bungling" and "very little justice."<sup>15</sup> "The methods used by the prosecutor and the judge to obtain a plea of guilty," Dash observed, "often amount to downright coercion performed in open court."<sup>16</sup> Though lacking Dash's verve, the Katzenbach Commission and Newman likewise recognized at

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<sup>10</sup> PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 135 (1967).

<sup>11</sup> AM. BAR ASS'N PROJECT ON MIN. STANDARDS FOR CRIM. J., *STANDARDS RELATING TO PLEA OF GUILTY 2* (AM. BAR ASS'N, Tentative Draft 1967).

<sup>12</sup> DONALD NEWMAN, *CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL* 29 (1966).

<sup>13</sup> See *North Carolina v. Alford*, 400 U.S. 25 (1970); *Parker v. North Carolina*, 397 U.S. 790 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); *Brady v. United States*, 397 U.S. 742 (1970).

<sup>14</sup> *Brady*, 397 U.S. at 751.

<sup>15</sup> Samuel Dash, *Cracks in the Foundation of Criminal Justice*, 46 ILL. L. REV. 385, 386 (1951).

<sup>16</sup> *Id.* at 393.

least the possibility of coercion in plea bargaining.<sup>17</sup> So did the Supreme Court. Its endorsement of inducements for guilty pleas, the Court noted in *Brady*, did not mean that “guilty plea convictions hold no hazards for the innocent.”<sup>18</sup>

But the question of plea bargaining’s coerciveness was, for leading mid-century jurists and writers, a detail to be rationalized, not a genuine obstacle. Thus they fashioned a plausible-sounding distinction between threats of extra punishment for taking a case to trial, which are not allowed, and promises of leniency for accepting a plea deal, which are.<sup>19</sup> That, along with vague notions that trial courts could recognize coercion when they saw it, sufficed to “solve” the problem.<sup>20</sup>

At mid-century, the prevailing view was that while plea bargaining might be regulated on the margins, it was too late for a sweeping challenge to its propriety. When the Court gave its imprimatur to plea bargaining, Albert Alschuler noted, it “implied that any other course would be unthinkable.”<sup>21</sup> As Alschuler (a leading plea bargaining abolitionist) knew well, other courses were not *actually* unthinkable. They did, however, require the imaginations of practitioners and scholars less enamored of the normal way of doing criminal justice business.

## II. THE ABOLITIONIST COMMISSION

The National Advisory Commission on Criminal Justice Standards and Goals did not originate the idea that plea bargaining should be abandoned rather than amended. Perhaps most prominently, Albert Alschuler staked a claim in 1968 for the “admittedly unorthodox position,” as he put it, “that plea bargaining should be abolished.”<sup>22</sup> While plea bargaining abolition thus had antecedents, the Commission’s endorsement elevated its profile to new heights.<sup>23</sup> It is our starting point.

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<sup>17</sup> See PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *supra* note 10, at 135; NEWMAN, *supra* note 12, at 22–31.

<sup>18</sup> *Brady*, 397 U.S. at 757.

<sup>19</sup> See Ortman, *supra* note 6, at 1495–96.

<sup>20</sup> *Id.* at 1496.

<sup>21</sup> Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 40 (1979) [hereinafter *History*].

<sup>22</sup> See Albert W. Alschuler, *The Prosecutor’s Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 52 (1968) [hereinafter *Prosecutor’s Role*]. For additional broad-based attacks on plea bargaining predating the Commission’s final report, see JONATHAN D. CASPER, *AMERICAN CRIMINAL JUSTICE: THE DEFENDANT’S PERSPECTIVE* (1972); Abraham S. Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, 1 LAW & SOC’Y REV. 15 (1967). As Alschuler noted, however, “even the observers most critical” of plea bargaining, as of 1968, “usually stop[ped] short of total condemnation of plea bargaining as an institution.” *Prosecutor’s Role, supra*, at 51 n.12.

<sup>23</sup> See Raymond I. Parnas & Riley J. Atkins, *Abolishing Plea Bargaining: A Proposal*, 14 CRIM. L. BULLETIN 101, 105 (1978) (“Major impetus for the abolition of plea bargaining came from the National Advisory Commission on Criminal Justice Standards and Goals.”).

The Commission was created in late 1971 as a project of the Law Enforcement Assistance Administration (LEAA), the “fastest-growing federal agency [of] the 1970s.”<sup>24</sup> Attorney General John Mitchell told commissioners when they assembled that their efforts were part of the Administration’s “war on crime,” President Nixon’s “first priority.”<sup>25</sup> The task, Mitchell said, was “nothing less than to provide a working blueprint for the reform of the entire criminal justice system—police, courts and corrections—in this country.”<sup>26</sup> The Commission’s roster reflected an emphasis on state and local institutions, rather than federal ones.<sup>27</sup> Chaired by Russell Peterson, the governor of Delaware, commissioners hailed from state and local law enforcement, prosecutors’ offices, courts, correctional agencies, and the general public.<sup>28</sup>

The Commission delegated the day-to-day work of gathering information and formulating recommendations to subject-matter experts on task forces covering corrections, policing, courts, and more. Plea bargaining fell within the jurisdiction of the Courts Task Force. Led by Daniel Meador of the University of Virginia Law School and assisted by a staff of four lawyers, the Courts Task Force’s fifteen members were prosecutors, court officials, academics, and to round things out, a public defender.<sup>29</sup>

The Task Force began work in early 1972.<sup>30</sup> It would have been a good bet that this group of court insiders would see plea bargaining in the same light as the Katzenbach Commission and American Bar Association had the previous decade—that is, as a necessary practice with many benefits, but in need of moderate reform.<sup>31</sup> It would have been a winning bet too. Meador explained that he began his work believing that “plea bargaining is an inevitable part of the system, but it needed some improvement,”<sup>32</sup> and he found like-minded individuals on his Task Force.<sup>33</sup> The

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<sup>24</sup> HINTON, *supra* note 4, at 2.

<sup>25</sup> John N. Mitchell, Att’y Gen. of the U.S., Before the National Advisory Commission on Criminal Justice Standards and Goals (1971), <https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/11-03-1971.pdf>.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> NAT’L ADVISORY COMM’N ON CRIM. JUST. STANDARDS & GOALS, REPORT ON COURTS 338–340 (1973) (listing commissioners).

<sup>29</sup> *Id.* at 340 (listing task force members).

<sup>30</sup> NAT’L ADVISORY COMM’N ON CRIM. JUST. STANDARDS & GOALS, PROCEEDINGS OF THE NATIONAL CONFERENCE ON CRIMINAL JUSTICE 74 (1973) (remarks of Daniel J. Meador).

<sup>31</sup> *See supra* notes 10–18 and accompanying text.

<sup>32</sup> *Supra* note 30, at 159.

<sup>33</sup> *Id.* (“[T]he point has not been stressed enough that the task force itself was quite strongly in favor of plea bargaining.”).

Task Force's report to the Commission argued that "reforms could be implemented that would render plea negotiations not only acceptable but valuable."<sup>34</sup>

The Commission disagreed, strongly. It set forth its view in Standard 3.1 of its Courts Report. "As soon as possible, but in no event later than 1978," Standard 3.1 declared, "negotiations between prosecutors and defendants—either personally or through their attorneys—concerning concessions to be made in return for guilty pleas should be prohibited."<sup>35</sup> The Commission did not stop with explicit bargaining. Standard 3.1 further provided that prosecutors' sentencing recommendations "should not be affected by the willingness of the defendant to plead guilty." And a defendant's guilty plea "should not be considered by the court in determining the sentence to be imposed."<sup>36</sup> The Commission sought nothing less than an end to plea bargaining in all its forms.

The public record is sparse about the process the Commission followed in rejecting the plea bargaining recommendation of its Courts Task Force. Meador presented the Task Force's proposals—covering a wide range of subjects—to commissioners on November 15, 1972. There followed a "lively debate on the merits" of plea bargaining, the meeting's minutes reflect, along with a decision to discuss the matter more the next day. On November 16, the Commission decided to "condemn plea bargaining as it now exists," but not to call for wholesale abolition.<sup>37</sup> The mixed verdict did not sit well with some commissioners, so the question was raised anew at the Commission's meeting the next month. "Again plea bargaining was a critical problem for many of the Commissioners," the minutes from December 13 recorded, adding—almost in passing—that the Commission "reconsidered its earlier position and approved a standard calling for the elimination of plea negotiation within 5 years."<sup>38</sup>

What led the Commission to reject not only the position of its Task Force, but also the Katzenbach Commission, the American Bar Association, and the settled views of the legal profession? The only available "insider" account comes from Meador. As he explained it, the Courts Task Force and the Commission represented different "worlds."<sup>39</sup> Where the Task Force was composed of experts on courts, the

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<sup>34</sup> NAT'L ADVISORY COMM'N ON CRIM. JUST. STANDARDS & GOALS, *supra* note 28, at 49.

<sup>35</sup> *Id.* at 46.

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

<sup>37</sup> *Summary of Minutes, San Diego, California*, INST. CIVIC LEADERSHIP & DIGITAL MAYORAL ARCHIVES (Nov. 15-17 1972), <https://uindy.historyit.com/item.php?id=362269> [<https://perma.cc/PUD7-BMLN>].

<sup>38</sup> *Summary of Minutes, Washington, D.C.*, INST. CIVIC LEADERSHIP & DIGITAL MAYORAL ARCHIVES (Nov. 15-17 1972), <https://uindy.historyit.com/item.php?id=362270> [<https://perma.cc/3RSX-BUBB>].

<sup>39</sup> NAT'L ADVISORY COMM'N ON CRIM. JUST. STANDARDS & GOALS, *supra* note 30, at 159 (remarks of Daniel J. Meador).

Commission was populated with generalists. Meador reported that it did not “bruise [his] ego” to find out that “people who work in other areas of the criminal justice system, not to mention the general public, the informed public, do see things differently.”<sup>40</sup> He attributed the push for abolition to two groups of commissioners: police and corrections officials, on the one hand, and “laymen,” on the other.<sup>41</sup>

The Commission attached a nuanced and thorough denunciation of plea bargaining to Standard 3.1 in its final report. After candidly acknowledging that its position was “decidedly” a “minority” view,<sup>42</sup> the Commission divided the discussion into two segments. The first explained why plea bargaining serves “no legitimate function.”<sup>43</sup> The Commission offered several responses to the idea that eliminating plea bargaining would overwhelm courts. “Lack of resources,” the Commission said, starting on an idealistic note, “should not affect the outcome of the processing of a criminal defendant.”<sup>44</sup> The Commission also questioned whether abolition would be as costly as plea bargaining’s “apologists” maintained.<sup>45</sup> In a system without plea bargaining, prosecutors would no longer have reason to overcharge cases. Often, the Commission predicted, defendants would plead guilty of their own accord when confronted with reasonable charges. Eliminating overcharging, moreover, would “increase the fairness and rationality of the processing of criminal defendants.”<sup>46</sup>

Having dismissed the putative benefits of plea bargaining, the Commission turned to the costs, which it found “unacceptable.” The “major cost” was “reduced rationality in processing criminal defendants.”<sup>47</sup> Instead of outcomes being determined by evidence, “horse-trading” provides the rules of decision in criminal cases.<sup>48</sup> That harms defendants, some of whom “suffer from the resulting irrationality.”<sup>49</sup> It also, the Commission emphasized, impairs “the public interest in disposition of cases to serve its interests.”<sup>50</sup> But plea bargaining’s faults go further. The Commission pointed to the “burden [plea bargaining] inevitably places upon the

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> NAT’L ADVISORY COMM’N ON CRIM. JUST. STANDARDS & GOALS, *supra* note 28, at 46.

<sup>43</sup> *Id.* at 48.

<sup>44</sup> *Id.* at 46.

<sup>45</sup> *Id.* at 46–47.

<sup>46</sup> *Id.* at 47.

<sup>47</sup> *Id.* at 48.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

exercise of the rights involved in trial.”<sup>51</sup> By offering a punishment discount to defendants in exchange for a guilty plea, the prosecutor is effectively “pa[y]ing” the defendant for his “failure to assert his right to make the State go to the trouble of obtaining an appropriate disposition.”<sup>52</sup> The principal “individual victim” is the defendant who *does* go to trial, is convicted, and “suffers a substantially more severe sentence than he would have received had he pleaded guilty.”<sup>53</sup> Innocent defendants suffer too. “To the extent [constitutional] rights are rendered nonoperative by the plea negotiation system,” the Commission observed, “innocent defendants are endangered.”<sup>54</sup> Remarkably, given the Commission’s mission and membership, its reasons for condemning plea bargaining had focused at least as much on defendants’ due process interests as on crime control.

The Commission’s plea bargaining polemic earned immediate notice. “End of Plea Bargaining in 5 Years Among Hundreds of Changes Urged in Study,” a page one headline in the *New York Times* announced on January 15, 1973.<sup>55</sup> But how was it received by the legal profession? That reaction will figure in Part III, which explores concrete attempts efforts to abolish plea bargaining in specific jurisdictions. But the profession’s immediate reaction came much more quickly.

In late January 1973, fifteen-hundred delegates descended on the Washington Hilton for a four-day National Conference on Criminal Justice. The delegates, from all fifty states and five federal territories, were there, the Commission explained, as “representatives of the State and local criminal justice community.”<sup>56</sup> The conference’s purpose was to familiarize delegates with the Commission’s proposals and to “examine the crime problem broadly.”<sup>57</sup> While the Commission’s reports were not yet ready, delegates received a more than six-hundred-page “Working Papers” document with many of the findings and recommendations.<sup>58</sup> The Working Papers included the Commission’s proposal to abolish plea bargaining,<sup>59</sup> which attracted enormous attention from delegates, almost all of it negative.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *U.S. Crime Report Calls for Reform: End of Plea Bargaining in 5 Years Among Hundreds of Changes Urged in Study*, N.Y. TIMES, Jan. 15, 1973, at 1. Reports mentioning the Commission’s proposal also appeared in the front pages of the *Washington Post* and the *Chicago Tribune*. Sanford J. Ungar, *U.S. Prison Systems Called ‘Failure’ in Curbing Crime*, WASH. POST, Jan. 15, 1973, at 1; John O’Brien, *Panel Seeks to Abolish Plea Deals*, CHICAGO TRIB., Jan. 13, 1973, at 2.

<sup>56</sup> NAT’L ADVISORY COMM’N ON CRIM. JUST. STANDARDS & GOALS, *supra* note 30, at 1.

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

<sup>58</sup> NAT’L CONF. ON CRIM. JUST.: WORKING PAPERS (1973).

<sup>59</sup> The draft of the discussion of Standard 3.1 in the *Working Papers* was substantially identical to that in the Commission’s final courts report. The only significant substantive difference was that the

The incendiary nature of the plea bargaining proposal was unmistakable by the conference's first afternoon, when delegates divided into breakout groups organized by professional affiliation. Plea bargaining dominated the sessions for courts.<sup>60</sup> That was no surprise to conference organizers, who had expected an "adverse reaction" to the proposal and wanted the breakout sessions to provide an opportunity for "venting."<sup>61</sup> And venting there was. Nancy Goldberg captured the mood: "During one session, a participant wishing to speak in support of the Commission's recommendation was shouted down by the prominent jurist chairing the session in a fashion alien to either Robert's, Sturgis' or any other Rules of Order."<sup>62</sup>

Conference attendees were again divided by profession for dinner on the Conference's first night. Before turning over the microphone to that evening's speaker, Richard Velde, an LEAA executive, commented on the sessions earlier in the day. "From what I understand," he quipped, "perhaps this meeting this evening should more appropriately be called the Convention of the District of Columbia Chapter for the Society of the Preservation of Plea Bargaining in America."<sup>63</sup>

The speaker Velde introduced was Arlen Specter, then the district attorney of Philadelphia and less than a decade from beginning his service in the Senate. Specter's address was perhaps the more forceful argument against plea bargaining ever by a prominent political figure. It set the stage for rebuttals at the conference and beyond.

Specter began by establishing his crime-fighting bona fides. "Americans," he told them crowd, were looking for "answers to the problem of violent crime which confronts the nation."<sup>64</sup> It was, he asserted, the "shameful legacy of the 1960s when our population grew by 13 percent while the incidence of serious crime in America increased by 148 percent."<sup>65</sup> He laid blame partly at the feet of a justice system

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final report added a paragraph on the plea bargaining experience in Philadelphia. *Compare* NAT'L ADVISORY COMM'N ON CRIM. JUST. STANDARDS & GOALS, *supra* note 28, at 46–49, *with* NAT'L CONF. ON CRIM. JUST.: WORKING PAPERS (1973), *supra* note 58, at Ct-42-Ct-45.

<sup>60</sup> The intra-professional breakout sessions were held on both the first and second afternoons of the conference. The Proceedings summarize the two meetings together, so it is not possible to identify what was said on the first day versus the second day. NAT'L ADVISORY COMM'N ON CRIM. JUST. STANDARDS & GOALS, *supra* note 30, at 300.

<sup>61</sup> *Id.*

<sup>62</sup> Nancy E. Goldberg, *Pre-Trial Diversion: Bilk or Bargain?*, 31 NLADA BRIEFCASE 490, 490–91 (1973). Goldberg does not identify which session the shouting occurred at, but a courts breakout session seems the most likely venue for such an outburst.

<sup>63</sup> NAT'L ADVISORY COMM'N ON CRIM. JUST. STANDARDS & GOALS, *supra* note 30, at 125.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 126.

“where criminals too seldom go to trial, too frequently evade conviction, and too rarely go to prison.”<sup>66</sup>

While Specter’s rhetoric early in the address reflected a profoundly pro-carceral posture, when he turned to reform his stance became more balanced. He identified delay in bringing cases to trial as “the most pressing problem facing the prosecuting attorney of a large city.”<sup>67</sup> To address it, he advocated three reforms, each of which, he claimed, had worked in Philadelphia: (i) prosecutorial screening of cases prior to arrest, (ii) noncarceral diversion (to probation) in nonviolent cases, and (iii) low-level courts to handle misdemeanor cases without juries. The objective, Specter explained, was to decrease caseloads so that courts could concentrate their time and efforts on “the cases which require a determination of innocence or guilt and call for tough sentences.”<sup>68</sup>

For those serious cases, Specter insisted, there should be no plea bargaining. The Commission (which he served on) had been “correct and courageous in demanding an end to plea bargaining.”<sup>69</sup> Like the Commission, he grounded his objections to plea bargaining in the languages of both crime control and due process. From the crime control perspective, he complained that plea bargaining undermines deterrence, because “the violent criminal . . . is often encouraged to rob or to rape again,” and rehabilitation, because “[s]erving time on a charge which has little relation to reality corrodes and complicates the task.”<sup>70</sup>

Specter’s more surprising objection (coming from a “tough on crime” district attorney) sounded in a different register. “[I]n practical application,” Specter told the audience, “plea bargaining often turns into a sophisticated form of the coerced confession.”<sup>71</sup> When a defendant must choose between extended pretrial incarceration and immediate release with a plea, he explained, “that really is a very coercive procedure.”<sup>72</sup> Foreshadowing an analogy that John Langbein would make famous at the end of the decade,<sup>73</sup> Specter compared plea bargaining to the judicial use of torture. While “[w]e have all condemned the rack and thumb-screw confessions of 15th century Spain,” Specter observed, “I believe the 20th century counterpart of plea bargaining has similar, very coercive overtones in practice.”<sup>74</sup>

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 127.

<sup>69</sup> *Id.* at 127.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> See John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3 (1978).

<sup>74</sup> NAT’L ADVISORY COMM’N ON CRIM. JUST. STANDARDS & GOALS, *supra* note 30, at 127.

The next courts session was the following morning. The panel featured a trio of speakers representing the three branches of the courts profession—judges, prosecutors, and defense lawyers. Each stuck up for the plea bargaining status quo against Specter’s attacks.<sup>75</sup> The prosecutor, William Cahalan of Wayne County, Michigan (Detroit), spoke first and at greatest length. After declaring his disagreement with the Commission’s proposal to abolish bargaining, Cahalan responded to several points the Commission and Specter had raised.

Recall first Specter’s claim that prosecutors should screen cases and the Commission’s contention that prosecutors should file reasonable charges, not necessarily the most serious charges available. Cahalan dissented. He denied that a criminal charge ought to be based on a prosecutor’s personal belief that the defendant would be convicted of the offense at trial. That is because, Cahalan argued, charging decisions are “based upon, in almost every instance, a one-sided presentation of the case,” and gathering more information “would be very cumbersome.”<sup>76</sup> Cahalan thus aligned himself with the view that the prosecutor’s job is simply to “present the facts to the court and to the jury.” In the meantime, if “the defendant is willing to admit that he did what he is charged with,” by all means “take a plea.”<sup>77</sup>

Cahalan’s logic was curious. The idea that prosecutors do—and apparently should—file charges based on a “one-sided presentation” raises questions about what sort of investigations were being conducted under Cahalan’s supervision. More importantly, perhaps without meaning to, Cahalan endorsed conviction without adjudication. Prosecutors need not adjudicate cases to charge them, since that is a job for judges and juries. But when a defendant “is willing to admit that he did what he is charged with,” then judges and juries need not adjudicate either! It would be a neat trick but for Specter’s and the Commission’s explanations of the reasons why a defendant’s admission of guilt, when induced by punishment concessions, might not be entirely reliable.

Cahalan did not completely ignore the possibility that innocent defendants might sometimes have reason to plead guilty. It could happen, he allowed, but the “proper consideration” was “how many?”<sup>78</sup> In any event, Cahalan saw nothing to worry about since a plea colloquy—where a judge establishes a factual basis for a plea—is “a much better safeguard” than a jury trial anyway. “You’re not going to get innocent people pleading guilty,” Cahalan insisted, if you “have a court rule which requires the defendant to tell it like it was and go into detail about what happened.”<sup>79</sup> If Cahalan was aware that the Supreme Court had ruled more than two

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<sup>75</sup> A fourth panelist, a corrections expert, steered clear of the subject.

<sup>76</sup> *Id.* at 150.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 151.

<sup>79</sup> *Id.*

years earlier that no such “court rule” is constitutionally required,<sup>80</sup> he hid the knowledge well.<sup>81</sup>

Finally, Cahalan rejected the Commission’s view that “plea bargaining should be abolished because it discourages the assertion of constitutional rights.”<sup>82</sup> He did not deny the premise—that plea bargaining does, in fact, discourage defendants from asserting constitutional rights. Instead, he implored his audience to “never forget” that the “primary purpose of our system” is “the determination of guilt or innocence,” not “try[ing] every debatable issue.”<sup>83</sup> Discouraging defendants from asserting their constitutional rights was thus a benefit of plea bargaining, not a cost.

The defense lawyer, John Cannel, a deputy public defender in New Jersey, spoke next. He offered two reasons why it would be a “mistake to throw the [negotiated] plea away.”<sup>84</sup> First, he alluded briefly to the cost-savings of plea bargaining. Second, and more interestingly, he compared plea bargaining to insurance:

If a guy is willing to admit a charge, and the prosecutor is willing to dismiss another charge because he’s not sure he can prove it, you’ve got a kind of insurance for both sides that the guy is going to be convicted of something, but he’s not going to be convicted of something he won’t admit.<sup>85</sup>

Cannel’s argument prefigured the law and economics analysis of plea bargaining that would become popular in (some) academic circles in the 1980s and 1990s.<sup>86</sup> It emphasized that plea deals are, holding everything else about the system fixed, in the private interest of the prosecutor and the defendant. (Which they must be, or prosecutors and defendants wouldn’t enter into them.) Absent from Cannel’s insurance analogy was reflection on whether plea bargaining serves the system or society

<sup>80</sup> See *North Carolina*, 400 U.S. at 25–40 (1970).

<sup>81</sup> NAT’L ADVISORY COMM’N ON CRIM. JUST. STANDARDS & GOALS, *supra* note 30, at 151. Cahalan also took on the Commission’s contention that “prosecutors overcharge in order to gain plea leverage,” replying: “There’s no proof of that.” As counterevidence, he cited statistics showing that in Wayne County charges were reduced at the preliminary examination stage in only 0.4% of cases. He apparently thought that the statistics spoke for themselves, as he offered no explanation of how or why they disproved overcharging. Perhaps Cahalan believed that overcharging refers only to filing charges unsupported by evidence. That was certainly not the sense in which the Commission had used the concept. See *supra* note 28 and accompanying text.

<sup>82</sup> NAT’L ADVISORY COMM’N ON CRIM. JUST. STANDARDS & GOALS, *supra* note 30, at 151.

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

<sup>84</sup> *Id.* at 154.

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

<sup>86</sup> See Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289 (1983); see also Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L. J. 1909 (1992).

well. That, not the private interests of litigants, had been the primary focus for the Commission and Specter.

The judge, Sydney Hoffman of the Superior Court in Philadelphia, was the last of the trio to speak. He was also the bluntest. He was “astounded” to learn that “whether we should or should not have plea bargaining is a live subject in the United States.”<sup>87</sup> The very idea of “advocating the abolition of plea bargaining” seemed, to him, “almost asinine,” though he professed that he did not “like to use such a strong word.”<sup>88</sup> Observing that he had been a lawyer and a judge for thirty-six years and that his father was a lawyer for “many, many years before that,” Judge Hoffman declared that “[w]e have been happily plea bargaining, as far as I know, ever since the founding of the country.”<sup>89</sup> Hoffman may or may not have been right that advocating the abolition of plea bargaining was “almost asinine,”<sup>90</sup> but his historical claim was simply wrong. Plea bargaining was unknown at the founding.<sup>91</sup> His assumption otherwise betrays the human penchant to mistake as natural what is merely normal.

If there was a question about whether the trio’s views were representative of conference attendees, it was dispelled on the conference’s final day, when delegates met in state caucuses.<sup>92</sup> Abolition of plea bargaining was discussed in most, and, in the majority, criticized or even scorned.<sup>93</sup> North Carolina’s readout is representative, though pithier than most: “Standard 3.1 . . . was viewed universally with disapproval.

<sup>87</sup> NAT’L ADVISORY COMM’N ON CRIM. JUST. STANDARDS & GOALS, *supra* note 30, at 158.

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

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

<sup>90</sup> *Id.* If Hoffman was right, then writing a history of such advocacy fifty years later must count as fully—not just almost—asinine.

<sup>91</sup> *See History, supra* note 21, at 7–11.

<sup>92</sup> In reality, there was no such lingering question. At the plenary session the evening of January 25, LEAA Administrator Jerris Leonard spoke briefly to introduce Governor Peterson, who would introduce the guest speaker, Justice Rehnquist. Leonard seemed irritated by the amount of oxygen that the plea bargaining issue had consumed at the conference. He told delegates, who had apparently been demanding a parliamentary mechanism to disapprove of the Commission’s proposal to abolish plea bargaining, to “blame me” for not including such a mechanism at the conference. NAT’L ADVISORY COMM’N ON CRIM. JUST. STANDARDS & GOALS, *supra* note 30, at 40. He “hope[d] that would allay the fears of some of you who would like to argue ad nauseum the question of plea bargaining.” *Id.* Later, he harangued the delegates that the “Commission is not offering its work to us just to be nitpicked to death.” *Id.* at 41.

<sup>93</sup> *Id.* at 322 (Alabama); *id.* at 324 (Alaska); *id.* at 330–31 (Colorado); *id.* at 339 (Georgia); *id.* at 340 (Hawaii); *id.* at 342–43 (Idaho); *id.* at 344–45 (Illinois); *id.* at 346 (Indiana); *id.* at 347 (Iowa); *id.* at 350 (Kansas); *id.* at 350 (Kentucky); *id.* at 353 (Louisiana); *id.* at 355 (Maine); *id.* at 361 (Michigan); *id.* at 362–63 (Minnesota); *id.* at 365 (Mississippi); *id.* at 366 (Missouri); *id.* at 372 (Nevada); *id.* at 373 (Vermont); *id.* at 378 (New Mexico); *id.* at 380–81 (New York); *id.* at 382 (North Carolina); *id.* at 383 (North and South Dakota); *id.* at 385 (Ohio); *id.* at 387 (Oregon); *id.* at 391 (Rhode Island); *id.* at 392 (South Carolina); *id.* at 394 (Texas); *id.* at 399 (Virginia); *see also id.* at 390 (Puerto Rico).

The abolition of plea negotiation in North Carolina was thought to be without merit.”<sup>94</sup> There were a handful of outliers. The Delaware delegates, for instance, “agreed with the Abolition of Plea Negotiation . . . as the only path to take in good conscience.”<sup>95</sup> But they were exceptions proving the rule. The legal profession, as represented by conference delegates and speakers (Specter aside), had stood firm in defending plea bargaining from the abolitionist critics on the Commission.

### III. PROSECUTORS AND JUDGES AGAINST PLEA BARGAINING

Talking about plea bargaining abolition in a high-level national commission is one thing. Trying it is another. In the 1970s, prosecutors and, in one case, judges sought to end plea bargaining either across-the-board or in particular categories of cases. This Part describes their efforts and the—ultimately successful—resistance that they encountered. Part III.A explores the abolitionists’ policies and rationales. Part III.B turns to the backlash.

#### A. Prosecutorial and Judicial Abolition

In the first half of the 1970s, several jurisdictions around the United States experimented with targeted plea bargaining bans. Oakland County, Michigan, may have been the first.<sup>96</sup> When L. Brooks Patterson took office as prosecuting attorney

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<sup>94</sup> *Id.* at 382.

<sup>95</sup> *Id.* at 333. It may not have been a coincidence that the Commission’s chair, Russell Peterson, had been the governor of Delaware.

<sup>96</sup> Oakland County’s “quasi-experiment” with plea bargaining was the subject of a 1976 article by Thomas Church. See *Plea Bargains, Concessions and the Courts: Analysis of a Quasi-Experiment*, 10 LAW & SOC’Y REV. 379 (1976). Church, however, gave the county and its prosecuting attorney fictitious names—Hampton County and Robert Walker. Church described Hampton County as a largely suburban county adjacent to a major industrial Midwestern city where a newly elected prosecutor, Walker, took office in 1973. *Id.* at 378–79. As an Oakland County resident, Hampton County was immediately recognizable to me. In a 2011 interview, moreover, then-former prosecuting attorney L. Brooks Patterson recounted his anti-plea bargaining activities with details matching Church’s article. See Interview by Bill Ballenger with L. Brooks Patterson, Former Prosecuting Attorney, Oakland County (Nov. 10, 2011), <https://www.mipoliticalhistory.com/wp-content/uploads/2019/04/Patterson-L-Brooks.pdf>. Contemporaneous newspaper clippings located in Patterson’s archives, housed at the Bentley Historical Library at the University of Michigan, likewise corroborate that “Hampton” County is Oakland County. On the ethics of “blowing the whistle” on the location of jurisdictions anonymized in criminal justice research, see Albert W. Alschuler, *Implementing the Criminal Defendant’s Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 1028 n. 442 (1983) (“There have been too many books and articles about Metro City, Metropolitan Court, and Westville and not enough about places on the map.”) [hereinafter *Implementing*]. In this instance, any concerns seem more than mitigated by the passage of almost fifty years. Patterson, who would go on to serve as the County Executive for Oakland County for more than twenty-five years, died in 2019. See John Wisely, *L. Brooks Patterson Dies After Leading Oakland County for a Generation*, DETROIT FREE PRESS (Aug. 3, 2019), <https://www.freep.com/story/news/local/michigan/2019/08/03/l-brooks-patterson-death-obituary/3497059002/> [ <https://perma.cc/YGK5-EYSY>].

in January 1973, he prohibited assistant prosecutors from plea bargaining in drug cases.<sup>97</sup> He explained the policy, which made good on a campaign pledge not to do “deals with dope pushers,” in a memo to staff. “The unfettered use of plea bargaining by assistant prosecutors,” Patterson wrote, “contributes to the loss of confidence in the system.”<sup>98</sup> Later that year, the district attorney in Maricopa County, Arizona (Phoenix), Moise Berger, adopted his own plea bargaining ban, which applied to murder, manslaughter, and robbery charges.<sup>99</sup> Berger later explained in the *ABA Journal* that he’d done so because plea bargaining is a “system that, on the whole, is unnecessary and corrupts the system of justice.”<sup>100</sup> In Multnomah County, Oregon (Portland), district attorney Harl Haas received a \$395,000 grant from the LEAA to support a “No Plea Bargain Project.”<sup>101</sup> The grant funded an “Impact Unit” of six prosecutors who, starting in 1974, handled residential burglaries, armed robberies, and major “fencers” without plea bargaining, or at least without charge bargaining. Haas noted in a report that the “Impact Unit sought to dispel the conventional wisdom” that plea bargaining was necessary to avoid “clogged trial dockets, excessive delays, and inefficiency.”<sup>102</sup>

By 1975, plea bargaining bans targeting particular categories of crime were thus nothing new. That year, officials in two jurisdictions—El Paso County, Texas and the state of Alaska—were ready for more ambitious steps.<sup>103</sup> They would attempt to ban plea bargaining wholesale.

The chief abolitionists in El Paso were Judges Sam Callan and Jerry Woodard, who together handled the county’s felony docket.<sup>104</sup> For Callan and Woodard, the road to plea bargaining abolition began with negative press coverage.<sup>105</sup> The El Paso district attorney had adopted a blanket policy of recommending prison (rather than

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<sup>97</sup> Church, *supra* note 96, at 379–80.

<sup>98</sup> *Id.* at 380. Over the next two years, Patterson added armed robbery and carrying a concealed weapon to the ban.

<sup>99</sup> See Moise Berger, *The Case against Plea Bargaining*, 62 A.B.A. J. 621, 623 (1976).

<sup>100</sup> *Id.* at 621.

<sup>101</sup> See MULTNOMAH CNTY. DIST. ATTY’S OFF., *LIMITING THE PLEA BARGAIN IN MULTNOMAH COUNTY* (1979).

<sup>102</sup> *Id.* at 6.

<sup>103</sup> According to a student note published in the *Iowa Law Review* in 1975, the county prosecutor of Black Hawk County, Iowa attempted a similar across-the-board plea bargaining ban in 1974. See Note, *The Elimination of Plea Bargaining in Black Hawk County: A Case Study*, 60 IOWA L. REV. 1053 (1975). Unfortunately, the note does not disclose enough detail about the prosecutor’s policy or the motivations behind it to consider it in detail.

<sup>104</sup> See Robert A. Weninger, *The Abolition of Plea Bargaining: A Case Study of El Paso County, Texas*, 35 UCLA L. REV. 265, 272 (1987).

<sup>105</sup> See Sam W. Callan, *An Experience in Justice without Plea Negotiation*, 13 L. & SOC’Y REV. 327, 330–31 (1979).

probation) in all burglary cases,<sup>106</sup> which the judges opposed on principle.<sup>107</sup> The disagreement may not seem like a *casus belli* for upending how criminal cases were handled in their courts, but when Callan and Woodard granted probation to low-level burglars over prosecutors' objections, the local media portrayed them as weak on crime.<sup>108</sup> That, to the judges, was unpardonable.<sup>109</sup>

Their remedy was to ban sentence bargaining in their courts. They couldn't, of course, prohibit prosecutors and defense attorneys from speaking with one another about their cases. But they could do the next best thing by ignoring whatever the attorneys might have to say. That was their approach. In November 1975, they told the district attorney that they would no longer consider prosecutors' recommendations at sentencing.<sup>110</sup> Instead, they would apply a "points" system—a crude forerunner to modern guidelines systems—to determine the sentences of defendants who pleaded guilty.<sup>111</sup> The judges aimed to eliminate the negotiation of pleas, but not guilty pleas themselves. Callan acknowledged that the points system could "be interpreted as containing an inducement to plead guilty—that is, a threat that the sentence will be harsher unless the defendant pleads guilty," though he denied that he or Woodard would "punish a defendant for exercising his right to plead innocent and be tried by a jury."<sup>112</sup>

In Part II, we saw that the abolitionism of the National Advisory Commission drew on a blend of due process and crime control values. This was not the Texas judges' approach. Callan rejected that coercion in plea bargaining was anything to worry about.<sup>113</sup> The problems with plea bargaining, he explained, are its leniency,

<sup>106</sup> See Howard C. Daudistel, *On the Elimination of Plea Bargaining: The El Paso Experiment*, in PLEA-BARGAINING 59–63 (William F. McDonald & James A. Cramer eds., 1980).

<sup>107</sup> For instance, Callan later wrote, probation was appropriate for a "seventeen-year-old boy with no record [who] had broken into a laundromat and stolen cigarettes." See Callan, *supra* note 105, at 330. The judges had a second reason for opposing the district attorney's police: Texas juries, who have sentencing authority, almost always granted probation to non-violent first-time felons. *Id.*

<sup>108</sup> See Weninger, *supra* note 104, at 275.

<sup>109</sup> See Callan, *supra* note 105, at 330–31.

<sup>110</sup> See Weninger, *supra* note 104, at 276.

<sup>111</sup> See *id.* at 289; see also Callan, *supra* note 105, at 332–33. Not to be outdone, the district attorney upped the ante the next month, banning all plea bargaining (including charge bargaining) in El Paso County. Weninger, *supra* note 104, at 276.

<sup>112</sup> Callan, *supra* note 105, at 332–34. Callan made an exception, however, for cases where a "defendant insisted on trial when he had no plausible defense." *Implementing*, *supra* note 96, at 944 n.75. Those defendants, Callan told Albert Alschuler in 1976, "ought to receive a more severe sentence." *Id.*

<sup>113</sup> Callan, *supra* note 105, at 327; see also Weninger, *supra* note 104, at 302 ("[T]he judges initiated the ban on sentence negotiation, not because they opposed guilty pleas as inherently coercive and favored a system relying heavily on adjudication, but primarily because they disapproved of the district attorney's sentencing policies toward guilty plea defendants in burglary cases.").

the public distrust it engenders, and the authority it takes away from judges.<sup>114</sup> “On balance,” Callan wrote, appropriating Blackstone, “it seems to me better that a criminal go free than that he receive unwarranted leniency in exchange for a guilty plea.”<sup>115</sup>

A different—or at least more balanced—perspective informed the only statewide attempt to abolish plea bargaining. Alaska was not an obvious candidate for plea bargaining innovation. Its delegates to the National Conference on Criminal Justice in 1973 had rebuffed the National Advisory Commission’s proposal to abolish plea bargaining by 1978. Their criminal justice system, the delegates explained, “works adequately” and “the additional manpower and resources [abolition] would require would render [it] totally unfeasible.”<sup>116</sup> Alaska’s delegates did, however, recommend that a “pilot program be run *somewhere* to determine its feasibility and relative cost.”<sup>117</sup> They likely did not expect to host such a pilot program only two years later.

In late 1974, Avrum Gross was named Attorney General of Alaska by Republican governor Jay Hammond.<sup>118</sup> He was an unusual pick. For one thing, Gross had not been in Alaska all that long. Born in New York and raised in New Jersey, Gross went to the University of Michigan for law school. Before heading east to work on Wall Street, he decided to take (in his words) “a couple of years off for a lark” and “well, why not try Alaska?”<sup>119</sup> Gross was also not a Republican. Hammond described him as a “long-haired, hippie-type Democrat from New York.”<sup>120</sup> Hammond hired him anyway, in part because he saw it as his “obligation to appoint the best legal talent available.”<sup>121</sup>

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<sup>114</sup> Callan, *supra* note 105, at 327–28.

<sup>115</sup> *Id.* at 328–29.

<sup>116</sup> NAT’L ADVISORY COMM’N ON CRIM. JUST. STANDARDS & GOALS, *supra* note 30, at 324.

<sup>117</sup> *Id.* (emphasis added).

<sup>118</sup> See Michael L. Rubinstein & Teresa J. White, *Alaska’s Ban on Plea Bargaining*, 13 L. & SOC’Y REV. 367, 368 (1979).

<sup>119</sup> See Jeremy Hsieh, *Avrum Gross: Gov. Hammond’s “Long-Haired Hippie” Ally, Attorney General and In-House Antagonist*, KTOO (Jun. 6, 2018), <https://www.ktoo.org/2018/06/06/avrum-gross-gov-hammonds-long-haired-hippie-ally-attorney-general-and-in-house-antagonist/> [<https://perma.cc/TSW7-3ECZ>].

<sup>120</sup> *Id.* Though not mentioned by Hammond, Gross had helped stand up Alaska’s ACLU chapter. *Former Alaska Attorney General Avrum Gross Dies At 82*, ANCHORAGE DAILY NEWS (May 9, 2018), <https://www.adn.com/alaska-news/2018/05/09/former-alaska-attorney-general-avrum-gross-dies/> [<https://perma.cc/ZYG7-P7RV>].

<sup>121</sup> Hsieh, *supra* note 119.

The unified structure of Alaska's Department of Law gave Gross substantial control over prosecution in Alaska.<sup>122</sup> In many states, prosecutors are elected at the state or local level and have significant independence from state-level officials.<sup>123</sup> Alaska was different. A chief district attorney in each judicial district reported to the deputy attorney general for criminal affairs, who in turn reported to Gross.<sup>124</sup>

In 1975, Gross used that authority to try to eliminate plea bargaining. He set forth his policy and the reasons for it in two detailed memos. In the first, dated July 3, Gross began by signaling that the policy was the product of careful deliberation. He noted the "lengthy and heated discussions" he and the prosecutors working for him had the week before, adding that he had since given the topic "a great deal of additional thought" and talked it over with Governor Hammond.<sup>125</sup> Gross then explained the new policy.

District attorneys and their assistants, he ordered, would henceforth "refrain from engaging in plea negotiations with defendants."<sup>126</sup> Gross frankly acknowledged to his subordinates that the policy would not "necessarily reflect all of your concerns," and it would mean additional work.<sup>127</sup> While he promised to seek additional resources, his basic message was that the effort was worth making. "In return," Gross wrote,

[H]opefully we will be doing away with a technique which is generally considered, at least by a substantial segment of the public, as one of the least just aspects of the present justice system. It will also to a substantial degree put sentencing back in the courts, where I think it belongs, instead of it being a product of a negotiated arrangement.<sup>128</sup>

While the July 3 memo squarely forbade *sentence* bargaining, its direction to prosecutors about *charge* bargaining was muddled.<sup>129</sup> Gross remedied that in the

<sup>122</sup> See Michael L. Rubinstein & Teresa J. White, *Plea Bargaining: Can Alaska Live Without It*, 62 JUDICATURE 266, 267 (1979).

<sup>123</sup> See Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537, 1548 (2020).

<sup>124</sup> See Rubinstein & White, *supra* note 118, at 267.

<sup>125</sup> CHARLES H. ILIFF ET AL., ALASKA JUDICIAL COUNCIL INTERIM REPORT ON THE ELIMINATION OF PLEA BARGAINING 75 (1977).

<sup>126</sup> *Id.* Gross explained that while he had considered barring prosecutors from making sentencing recommendations following a guilty plea, to make sure that prosecutors didn't secretly negotiate the content of the recommendations with defense counsel, he had decided to stop short of such a drastic measure. *Id.* at 75–46.

<sup>127</sup> *Id.* at 77.

<sup>128</sup> *Id.*

<sup>129</sup> The July 3 memo said that "negotiations with respect to multiple counts and the ultimate charge will continue to be permissible under Criminal Rule 11" provided that the charge matches the

follow-up memo, dated July 24. In it, he recognized that with sentence bargaining eliminated, there “will be a great temptation to charge heavily under the assumption that you can later reduce the charge in exchange for a guilty plea.”<sup>130</sup> He implored prosecutors not to do so, as it would “violate the spirit of what we are trying to do, which is to insure that people are charged fairly, tried fairly and sentenced fairly for offenses that they have committed.”<sup>131</sup> Initial charging decisions should be lowered, he instructed, only “when the level of proof warrants.”<sup>132</sup>

The July 24 memo contained other directions to prosecutors on the nuts-and-bolts of the new policy, from case screening (be careful),<sup>133</sup> to trial procedures (be efficient),<sup>134</sup> to what to do when judges attempted to negotiate the sentence with the defense lawyer in chambers (attend but do not participate).<sup>135</sup> Gross also reflected on the historic nature of what they were attempting. The policy, he observed, had captured the attention of newspapers in Washington and New York.<sup>136</sup> He even enclosed, for the prosecutors’ “reading pleasure,” the National Advisory Commission’s justifications for abolishing plea bargaining.<sup>137</sup> “If we can do this” he entreated, “if we can really make a change in the system to effectively eliminate sentence bargaining, the office will have accomplished something really meaningful.”<sup>138</sup> “I hope we can do it,” he added.<sup>139</sup>

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law and proof, but also that “while there continues to be nothing wrong with reducing a charge, reductions should not occur simply to obtain a plea of guilty.” *Id.* at 76. As the Alaska Judicial Council was quick to point out in its final report, it is unclear what any of that means. See MICHAEL L. RUBINSTEIN ET AL., THE EFFECT OF THE OFFICIAL PROHIBITION OF PLEA BARGAINING ON THE DISPOSITION OF FELONY CASES IN ALASKA CRIMINAL COURTS: FINAL REPORT 19 (1978).

<sup>130</sup> ILIFF ET AL., *supra* note 125, at 80.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 81.

<sup>133</sup> *Id.* at 79.

<sup>134</sup> *Id.* at 81–82.

<sup>135</sup> *Id.* 83.

<sup>136</sup> *Id.* at 78. Gross did not cite the newspaper stories he had seen, but one was likely *Alaska Ending Plea Bargaining To Raise Confidence in Justice*, N.Y. TIMES, Jul. 12, 1975, at 8.

<sup>137</sup> ILIFF ET AL., *supra* note 125, at 78. The enclosure has been lost to history, but it is likely the text accompanying Standard 3.1. See *supra* notes 42–48 and accompanying text.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

### B. Plea Bargaining Strikes Back

Did they do it? Did the abolitionists succeed in ridding their jurisdictions (wholly or partially) of plea bargaining? Some declared victory.<sup>140</sup> Their declarations are relevant data points, but coming from political actors, a heavy dose of skepticism is warranted.

Before we can evaluate what happened, we must consider what success means in the context of a ban on plea bargaining. It could mean simply that prosecutors, defense lawyers, and judges ceased openly negotiating charges or sentence. That would be a very thin conception of abolition. It might make sense if the central concern with plea bargaining was lawyers talking to each other. That was not, however, the National Advisory Commission's criticism we saw in Part II.<sup>141</sup> It will not be the academic criticism of plea bargaining we see in Part IV either.<sup>142</sup> And it was not the objection to plea bargaining raised by abolitionist officials. All focused on the toxic effects—for crime control, due process, or both—of using punishment concessions to lure defendants to plead guilty.

Understood in *that* light, the primary endpoint for success must be whether the jurisdiction quit offering punishment concessions to induce defendants to plead guilty. A secondary endpoint is whether the jurisdiction achieved a new equilibrium in case processing or, alternatively, found itself mired in new delays and backlogs. On *these* metrics, did abolitionists in Oakland County, Multnomah County, El Paso County, and the state of Alaska abolish plea bargaining?<sup>143</sup> They did not. The interesting questions pertain to what—or who—stopped them.

Consider first Oakland County, Michigan, where the hard-charging district attorney, L. Brooks Patterson, prohibited plea bargaining in drug cases in 1973.<sup>144</sup> In practice, the policy amounted to a ban on prosecutors dropping the top charge against a defendant.<sup>145</sup> Thomas Church crunched the numbers on what happened next. As one might expect, guilty pleas to a reduced charge dropped dramatically in drug cases. Of the drug cases initiated and disposed of in 1972, the last year before

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<sup>140</sup> E.g., Jay Matthews, *Alaska Finds It Can Do Without Plea Bargaining*, WASH. POST, Dec. 11, 1981, at E11; Berger, *supra* note 99; MULTNOMAH CNTY. DIST. ATTORNEY'S OFF., *supra* note 101.

<sup>141</sup> See *supra* notes 42–48 and accompanying text.

<sup>142</sup> See *infra* Part IV.B.

<sup>143</sup> In each jurisdiction mentioned in the text, one or more external reviewers evaluated the anti-plea bargaining programs. The analysis here is drawn primarily from those evaluations. I have, however, not located any external review of the anti-plea bargaining program in Maricopa County, Arizona. Because the only information we have to go on there is the district attorney's self-congratulatory account in the *ABA Journal*, see Berger, *supra* note 99, Maricopa County is not discussed further.

<sup>144</sup> See *supra* notes 96–98 and accompanying text.

<sup>145</sup> Church, *supra* note 96, at 380.

the new policy, 81% ended in guilty pleas to a reduced charge. For cases initiated in 1973, that figure fell to 10%.<sup>146</sup>

So far, so good—prosecutors had gotten Patterson’s message, at least mostly.<sup>147</sup> (And indeed, an assistant prosecutor who *didn’t* get the message and plea bargained with a narcotics defendant was fired “on the spot.”<sup>148</sup>) But prosecutors are not the only officials who can offer inducements for guilty pleas. As Church explained, in the aftermath of Patterson’s policy, Oakland County saw a shift from prosecutor-centered bargaining to judge-centered bargaining. In approximately half of the criminal courtrooms in the county, he found that judges engaged in sentence bargaining in cases covered by Patterson’s policy, but only in those cases.<sup>149</sup> The judges did not dirty their hands by bartering with defense lawyers, nor were the concessions placed explicitly on the record. A defense attorney explained to Church how it worked.<sup>150</sup> He would describe his client’s case and background to the judge in chambers and then ask whether the judge would consider granting probation. If he would, the lawyer confirmed that the defendant would be allowed to withdraw his plea if the judge changed his mind. Through meetings like this, Church observed, judges could “fill the void left by the abdication of the prosecutor from his position of ascendancy in the bargaining process.”<sup>151</sup>

Judges were thus one source of backlash against Patterson’s anti-plea bargaining stance. Defense lawyers, whom Church described as the policy’s “most severe critics,” were another.<sup>152</sup> While they sometimes framed their objections in high-minded, client-centered terms, Church found that when he pressed, their gripes were more parochial. It was not just that their fee structures made trials unprofitable, though that played a role.<sup>153</sup> Before the ban, defense attorneys could convince their clients that “favorable” plea offers were the result of their hard work. Now, without actually going to trial, they had no way to convince their clients that they had done anything of value. As an assistant prosecutor told Church, “I guess what we’re really doing is making it difficult for attorneys to justify their fee to their clients.”<sup>154</sup>

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<sup>146</sup> All statistics in this paragraph are from *id.* at 383 tbl. 1.

<sup>147</sup> *But see infra* note 155 and accompanying text.

<sup>148</sup> Wm. L. Willoughby, *Plea Bargaining Down, But Not Out, Patterson Admits*, DAILY TRIB. (June 11, 1973).

<sup>149</sup> Church, *supra* note 96, at 386–87.

<sup>150</sup> *Id.* at 387.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 392.

<sup>153</sup> *Id.* at 392–3.

<sup>154</sup> *Id.* As for appointed counsel, an attorney told Church that two factors—fee schedules and the need to keep trial-averse judges happy—“inhibit . . . the vigor of the defense.” *Id.* at 394.

Even prosecutors found ways to circumvent their boss's policy. Church observed that they retained "tools for inducing pleas," such as the strategic use of habitual offender charges.<sup>155</sup> All three sectors of the criminal court—judges, defense lawyers, and prosecutors—thus worked together to circumvent Patterson's anti-plea bargaining policy. A circuit judge summarized the situation in an interview with Church. "When faced with an unpleasant policy," the judge noted, "resourceful attorneys, assistant prosecutors and judges will generally find acceptable ways to get around it."<sup>156</sup>

The story in Multnomah County, Oregon, was not altogether different than in Oakland County. Recall that District Attorney Harl Haas named his anti-plea bargaining initiative the "No Plea Bargain Project."<sup>157</sup> That was exactly how he touted it. A *Reader's Digest* story in 1975 described Multnomah County's program as "[b]y far the most ambitious effort to limit plea bargaining" then in existence.<sup>158</sup> "The rule," the story explained, is "no plea bargaining," with the only *de minimis* exceptions.<sup>159</sup>

The reality was otherwise, a 1976 report by Abt Associates revealed.<sup>160</sup> "In fact," the report explained, "negotiations do occur between the DA and defense counsel."<sup>161</sup> The disconnect between rhetoric and reality arose from Haas's definition of plea bargaining as limited to "instances where defendants plead guilty to lesser or 'other' charges."<sup>162</sup> That form of plea bargaining—*i.e.*, charge bargaining—*did* decrease in cases covered by the project. But "[o]ther forms of negotiation" continued, sometimes at "even higher level[s]."<sup>163</sup> If ending plea bargaining means ending inducements to plead guilty, it did not happen in Portland. Haas hadn't really tried.

Charge bargaining was (mostly) abolished in Oakland and Multnomah Counties, but sentence bargaining quickly provided a substitute. In El Paso, on the other

<sup>155</sup> *Id.* at 388.

<sup>156</sup> *Id.* at 400; see also Albert W. Alschuler, *Review of Criminal Violence, Criminal Justice*, 46 U. CHI. L. REV. 1007, 1034 (1979) (explaining that Church's study "demonstrated that, when a prosecutor changes only the form of plea bargaining, plea bargaining in some form is very likely to continue") [hereinafter *Criminal Violence*].

<sup>157</sup> See *supra* notes 101–102 and accompanying text.

<sup>158</sup> Irwin Ross, *Plea Bargaining—A Grave Threat to Justice*, READER'S DIGEST 9, 15–16 (Jan. 1975).

<sup>159</sup> *Id.* at 16.

<sup>160</sup> ABT ASSOCIATES, INC., EXEMPLARY PROJECT VALIDATION REPORT: MULTNOMAH COUNTY NO-PLEA BARGAINING UNIT (1976).

<sup>161</sup> *Id.* at 24.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 15–16.

hand, sentence bargaining was in the crosshairs of Judges Callan and Woodard. What happened when they tried to ban it? For one thing, the proportion of convictions attributable to trials doubled. According to an analysis by Robert Weninger, whereas trials accounted for 24% of convictions prior to the ban, they were 48% of convictions after.<sup>164</sup> Still, more defendants pleaded guilty after than ban than were found guilty at trials. Were they induced to do so?

Observers agreed that prosecutors in El Paso did not induce guilty pleas after the ban went into effect.<sup>165</sup> But what about Callan and Woodard themselves—did they trade sentencing concessions for guilty pleas? They did not do so openly.<sup>166</sup> Still, if they sentenced defendants who went to trial more harshly than defendants who pleaded guilty, the effect could be the same.<sup>167</sup>

We saw above that the judges hedged in their public pronouncements about sentencing differentials for pleas and trials.<sup>168</sup> In the ban's aftermath, a difference of opinion emerged between outside scholars and El Paso defense lawyers. Outsiders saw evidence of sentencing differentials. Weninger arrived at that conclusion via regression analysis of pre- and post-ban sentencing.<sup>169</sup> Alschuler got there by way of interviews. After speaking with prosecutors, defense lawyers, probation officers, and the judges themselves, Alschuler was "not convinced that implicit judicial plea bargaining had been eliminated."<sup>170</sup> But he found that defense attorneys *were* convinced that Callan and Woodard did not sentence defendants more harshly when they elected to go to trial.<sup>171</sup> In fact, they insisted on the point.<sup>172</sup>

We will not be able to resolve the difference between El Paso defense lawyers and the external analysts. It is possible (though skepticism is necessary) that inducements to plead guilty really were taken off the table in El Paso County in the mid-1970s. What about abolitionism's secondary endpoint? Did the system find a new post-plea bargaining equilibrium? No, and so the experiment was short-lived. The criminal docket in the county quickly became congested. From 219 active cases at

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<sup>164</sup> See Weninger, *supra* note 104, at 292.

<sup>165</sup> See *id.* at 296; *Implementing*, *supra* note 96, at 944; Daudistel, *supra* note 106, at 65.

<sup>166</sup> See Weninger, *supra* note 104, at 289–90.

<sup>167</sup> *Id.* at 300–301.

<sup>168</sup> See *supra* note 112 and accompanying text.

<sup>169</sup> See Weninger, *supra* note 104, at 301 ("The quantitative analysis suggests the existence of a guilty plea discount in the periods both before and after the ban.").

<sup>170</sup> *Implementing*, *supra* note 96, at 944.

<sup>171</sup> *Id.*

<sup>172</sup> Alschuler asked these defense lawyers why they recommended guilty pleas to their clients. "A common response," he found, "was that in many cases the evidence is so overwhelming that it is simply hopeless to take the case to trial." *Id.*

the end of 1975, there were 767 cases pending by late 1978.<sup>173</sup> In response to the docket “crisis,”<sup>174</sup> the judges of El Paso County decided that henceforth they all (not just Callan and Woodard) would preside over criminal cases.<sup>175</sup> Since most of them, as the law of averages would suggest, did not share Callan and Woodard’s views, the judicial “prohibition on plea bargaining sustained,” Weninger notes, “serious erosion.”<sup>176</sup>

Did Alaska take to Attorney General Gross’s plea bargaining ban any better? Not really. The policy succeeded, an analysis by the Alaska Judicial Council showed, in cutting off explicit sentence bargaining between prosecutors and defense lawyers.<sup>177</sup> But it wasn’t popular. Judges announced their hostility before the policy even took effect. As Gross reported to subordinates in his July 24 memo, judges told him they “might attempt a new form of plea bargaining” between themselves and defense lawyers in chambers.<sup>178</sup> Gross asked them “to give the system a fair try,”<sup>179</sup> but many negotiated directly with the defense anyway until 1977, when the Alaska Supreme Court told them to stop.<sup>180</sup> One judge was particularly outspoken in an interview with Alaska Judicial Council researchers, telling them that it was “silly of the state not to plea bargain.”<sup>181</sup> This judge took it upon himself to do (what he saw as) the state’s work for it. “I can’t try all the cases I get,” he explained, “so I read the complaints looking at the seriousness of the charges and then try and bargain the weak cases.”<sup>182</sup>

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<sup>173</sup> Weninger, *supra* note 104, at 277–278.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 305–06.

<sup>176</sup> *Id.* The district attorney had initiated his own separate ban on bargaining. *Id.* at 309–310. As a practical matter, this too partially broke down after criminal jurisdiction was redistributed among the larger group of judges. *Id.* at 308. Yet despite the district attorney’s promise to fire any prosecutor who engaged in it, none actually was. *Id.* at 309–310. One assistant prosecutor told Weninger that a hardline position in support of the plea bargaining ban could hurt one’s prospects in the private sector. “You didn’t want to get the reputation of the president of the Hitler youth movement,” the prosecutor said. *Id.* at 310–11.

<sup>177</sup> See Rubinstein & White, *supra* note 118, at 26.

<sup>178</sup> Iliff et al., *supra* note 125, at 83.

<sup>179</sup> *Id.*

<sup>180</sup> See *State v. Buckalew*, 561 P.2d 289 (Alaska 1977).

<sup>181</sup> Iliff et al., *supra* note 125, at 18.

<sup>182</sup> *Id.* To be sure, judicial attitudes were not universally against the policy. Some judges “expressed the opinion that the policy was a ‘healthy change’ since it encouraged a more thorough and professional approach to case preparation and was conducive to a generally higher quality of legal representation for both sides.” *Id.* at viii.

The Alaska Judicial Council researchers also found evidence that Gross's policy was unpopular in the defense community.<sup>183</sup> Defense lawyers complained about having to put in more work on their cases.<sup>184</sup> "I rarely get a charge reduction," one lawyer protested, "unless I throw out an indictment or suppress evidence."<sup>185</sup> Defense lawyers also objected to the economics of practice under the ban. "Criminal law is not a profit-making proposition," an experienced defense lawyer said, "unless you have plea bargaining."<sup>186</sup> This particular lawyer was one of the lucky few whose clients had pre-paid legal services plans, so he received his hourly rate for all his work. But for the hapless private lawyer without access to such funds—which was most of them—he remarked, "I don't know how he can get along."<sup>187</sup>

As their grouching suggests, defense lawyers and judges were unable to fully nullify Gross's prohibition on plea bargaining. The number of trials went up even while the average case disposition time went down, as some defendants pleaded guilty earlier than they might have under the prior plea bargaining regime.<sup>188</sup> And, as already noted, sentence bargaining between the prosecution and the defense did end with the policy.<sup>189</sup>

But charge bargaining was a different story. Recall that after some confusion in Gross's first memo about whether charge bargaining was allowed, the second memo clarified that it was not.<sup>190</sup> The Alaska Judicial Council researchers nonetheless found, based on statistical analyses of a sample of cases, that "there was little change in patterns of charge adjustment between the year before the policy and the year after it."<sup>191</sup>

Beyond charge bargaining, Alaska defendants were incentivized to plead guilty by the widespread perception—and often the reality—that judges would sentence defendants convicted at trial more harshly than defendants who pleaded guilty. Defense lawyers believed—and so presumably told their clients—that this was so. One

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<sup>183</sup> As Alaska is not a large state (by population), researchers were able to speak with a majority of Alaska defense lawyers, judges, and prosecutors. *See* Rubinstein & White, *supra* note 118, at 268.

<sup>184</sup> *See* Rubinstein et al., *supra* note 129, at 42.

<sup>185</sup> *Id.* at 42.

<sup>186</sup> *Id.* at 39.

<sup>187</sup> *Id.* at 40.

<sup>188</sup> Rubinstein & White, *supra* note 118, at 270–73.

<sup>189</sup> *See supra* note 176 and accompanying text.

<sup>190</sup> *See supra* notes 129–132 and accompanying text.

<sup>191</sup> Rubinstein et al., *supra* note 129, at 27. There was reason to suspect that the system may have been especially bad for defendants represented by public defenders. *Id.* at 37. One prosecutor opined that "[t]he public defender clients are not getting any break for their pleas, but 80 per cent of them still plead [guilty] anyway." *Id.* at 37–38. "I think," he added, "these clients may be getting screwed." *Id.* at 38.

offered a concrete example to the Alaska Judicial Council researchers. He described a recent client who was charged with burglary.<sup>192</sup> The lawyer predicted that if his client “exercised all his constitutional rights,” he’d go to jail.<sup>193</sup> So he advised him to “stay in cooperative mode” and plead guilty. The client did and received probation.<sup>194</sup>

Alaska judges didn’t exactly deny sentencing defendants convicted at trial more harshly than those who pleaded guilty. One, the Alaska Judicial Council report explained, “characterized the decision to go to trial as a conscious gamble,” such that there was “nothing wrong in making a loser pay the price.”<sup>195</sup> Judges might not have made the differentials explicit—at least after the state supreme court told them not to in 1977—but inducements need not be explicit to be effective.<sup>196</sup>

Gross’s plea bargaining policy may have had salutary effects on Alaska’s plea bargaining system, particularly in encouraging prosecutors to screen cases carefully. But between charge bargaining and plea-trial sentencing differentials, it stopped short of abolishing inducements to plead guilty. And, like the El Paso experiment, it was short-lived. Gross left office in 1980. Though his no-plea bargaining policy formally survived his tenure, as a practical matter it departed with him.<sup>197</sup> As the authors of a 1991 “reevaluation” of the plea bargaining ban by the Alaska Judicial Council explained, changes to the policy made by Gross’s successors, in combination with revisions to Alaska law governing criminal offenses and sentencing, “created an environment conducive to widespread charge bargaining.”<sup>198</sup> The formal ban had become, a prosecutor told them, a “ban ‘in name only.’”<sup>199</sup> The legal profession had again triumphed over plea bargaining abolitionism.

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<sup>192</sup> *Id.* at 85.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 92.

<sup>196</sup> The Alaska Judicial Council also conducted a statistical analysis of sentencing differentials, finding that they existed “in sentences for crimes involving violence, including robbery, rape, felonious assaults, and the like,” but not for property crimes. *Id.* at 88. Questions have been raised about other aspects of the Council’s statistical analysis, however, so it is hard to have a great deal of confidence in that aspect of the report. See Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652, 726–30 (1981) (identifying problems with Council’s analysis of sentencing severity) [hereinafter *Changing Plea*]; see also NATIONAL RESEARCH COUNCIL, RESEARCH ON SENTENCING: THE SEARCH FOR REFORM I 187 (Alfred Blumstein, et al. eds., 1983) (“The credibility of the study’s statistical analyses is doubtful, as are the conclusions deriving from the statistical data, but the rich interview data provide a firmer basis for the study’s major conclusions.”). Hence the emphasis here is mostly on the information from its interviews rather than the quantitative analysis.

<sup>197</sup> Teresa White Carns & John Kruse, *A Re-Evaluation of Alaska’s Plea Bargaining Ban*, 8 ALASKA L. REV. 27, 35 (1991).

<sup>198</sup> *Id.* at 37.

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

## IV. PLEA BARGAINING ABOLITIONISM IN THE ACADEMY

So far we have seen demands and attempts to abolish plea bargaining during the 1970s from the National Advisory Commission and an assortment of criminal justice practitioners at the state and local levels. There was one more major venue of abolitionist energy—the academy. Scholars in the 1970s gave plea bargaining abolition a theoretical grounding and sophistication that practitioners and politicians did not. But their fundamental message was simple: plea bargaining robs the criminal justice system of rationality and justice.

The leading figure was Albert Alschuler. As noted above, in 1968 Alschuler announced his “unorthodox position” that “plea bargaining should be abolished.”<sup>200</sup> In eight major articles published over the next fifteen years, he would expound that position, in the process becoming the loudest and clearest voice for plea bargaining abolition in or out of the legal academy.<sup>201</sup> But, as we will see, his voice was far from solitary.

Before we dig in, two notes about the scope of this Part. First, our principal focus will be on legal scholars who, like Alschuler, urged that the practice of plea bargaining be torn down. There was a larger universe of scholars who thought plea bargaining should be reformed.<sup>202</sup> Just as police and prison abolitionists today draw a line between abolishing carceral institutions and reforming them,<sup>203</sup> so too did

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<sup>200</sup> *Prosecutor’s Role*, *supra* note 22, at 52.

<sup>201</sup> The principal articles are Alschuler, *supra* note 22; Albert W. Alschuler, *The Defense Attorney’s Role in Plea Bargaining*, 84 YALE L.J. 1179 (1975) [hereinafter *Defense Attorney’s Role*]; Albert W. Alschuler, *The Supreme Court, the Defense Attorney, and the Guilty Plea*, 47 U. COLO. L. REV. 1 (1975) [hereinafter *The Supreme Court*]; Albert W. Alschuler, *The Trial Judge’s Role in Plea Bargaining*, 76 COLUM. L. REV. 1059 (1976) [hereinafter *Trial Judge’s Role*]; Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for “Fixed” and “Presumptive” Sentencing*, 126 U. PENN. L. REV. 550 (1978) [hereinafter *Sentencing Reform*]; *History*, *supra* note 21; *Changing Plea*, *supra* note 196; *Implementing*, *supra* note 96. Alschuler published two book reviews touching on plea bargaining during this period as well. See Albert W. Alschuler, *Review of One Just Man*, 12 CRIM. L. BULLETIN 629 (1976) [hereinafter *One Just Man*]; *Criminal Violence*, *supra* note 156. Alschuler was on the faculty of the University of Texas from 1966 until 1976, save a year working for the Assistant Attorney General in charge of the Criminal Division at the Department of Justice and a year as a fellow at the University of Chicago. See *Faculty Profile of Albert Alschuler*, UNIV. OF CHI. LAW SCH., <https://www.law.uchicago.edu/faculty/alschuler> [<https://perma.cc/5MYH-AHXN>] (last visited Mar. 4, 2023). In 1976, he joined the faculty of the University of Colorado. Most of the work we will consider was published during his tenure at Colorado. He would later spend more than twenty years on the faculty of the University of Chicago. *Id.*

<sup>202</sup> See John Langbein, *Torture and Plea Bargaining*, 58 PUBLIC INTEREST 43, 43 (1980) (“The general theme of much of the current writing is that although, arguably, plea bargaining might be in need of various operational reforms, the basic institution is natural, inevitable, universal, and just.”).

<sup>203</sup> See Jamelia Morgan, *Responding to Abolition Anxieties: A Roadmap for Legal Analysis Reviews*, 120 MICH. L. REV. 1199, 1208–9 (2022); Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 114 (2019).

scholars in the 1970s distinguish abolishing plea bargaining from reforming it.<sup>204</sup> Second, we won't define the "1970s" strictly. The first wave of plea bargaining abolition scholarship did not strictly abide decadal boundaries, so, in this section, we'll treat the late 1960s and early 1980s as part of a "long 1970s."<sup>205</sup>

### A. Abolitionist Scholars

So what were the bases for the academic abolitionists' view that plea bargaining produces irrationality and injustice? They were motivated by some of the same concerns we have already seen, but the scholarly attack on plea bargaining went deeper and broader. I will divide it into three categories, though they overlap and have blurry boundaries. Academic opponents of plea bargaining in the 1970s argued that plea bargaining (i) is impermissibly coercive, (ii) distorts the roles and functions of each set of actors in the justice system, and (iii) is inconsistent with constitutional law and core notions of justice. There was a fourth part to their argument—that plea bargaining is not inevitable—but we will save that until after exploring academic defenses of plea bargaining.

#### 1. Coercion

First, academic abolitionists focused, naturally, on plea bargaining's coerciveness. Writing in *Ethics* in 1976, for instance, philosopher Kenneth Kipnis compared two scenarios.<sup>206</sup> In the first, a person is confronted by a gunman demanding his money. In the second, a prosecutor offers an innocent defendant charged with rape a plea to simple battery and a sentence of probation. "[I]f one had to choose," Kipnis argued, it "would be reasonable" to prefer being the robbery victim, since at least he can sue the gunman later.<sup>207</sup> "[W]e must seek a better way," Kipnis implored.<sup>208</sup> Peter Zimroth, then on the New York University law faculty, made a similar argument in a 1972 *New York Times Magazine* essay. Even if plea bargaining was reformed, he told readers, "defendants who plead guilty will get a break in sentencing

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<sup>204</sup> See Jonathan D. Casper, *Reformers v. Abolitionists: Some Notes for Further Research on Plea Bargaining Philosophical Implications*, 13 LAW & SOC'Y REV. 567, 567 (1979) (examining what "the continuing debate between 'abolitionists' and 'reformers' suggest about directions for future research").

<sup>205</sup> While I'm not the first to use the term "long 1970s," e.g., THE 'LONG 1970S': HUMAN RIGHTS, EAST-WEST DÉTENTE AND TRANSNATIONAL RELATIONS (Poul Villaume et al. eds., 2017), I'm likely the first to use it in the context of plea bargaining abolition scholarship.

<sup>206</sup> See Kenneth Kipnis, *Criminal Justice and the Negotiated Plea*, 86 ETHICS 93, 97–98 (1976).

<sup>207</sup> *Id.* at 99.

<sup>208</sup> *Id.* at 106.

simply because they plead guilty.”<sup>209</sup> “As long as that is so,” he explained, “there will be a strong element of coercion in the system.”<sup>210</sup> We have seen the coercion objection to plea bargaining raised before.<sup>211</sup> While the academic version added sophistication,<sup>212</sup> we will do better to dwell on more novel aspects of the scholars’ case against plea bargaining.

## 2. Role Distortion

Second, academic abolitionists—Alschuler, in particular—focused on how plea bargaining distorts the incentives of judges, prosecutors, and defense lawyers. Alschuler wrote three articles on this theme, one for each subprofessional group.<sup>213</sup> The work was based on interviews he had conducted in ten major cities in 1967 and 1968, which he described as a “kind of legal journalism.”<sup>214</sup> All told, the articles run nearly three-hundred law review pages, so we can do little more here than gesture to their flavor.

The first, in 1968, tackled the prosecutor’s role. Everyone agrees, Alschuler posited, that criminal punishment “should be based on penologically relevant considerations.”<sup>215</sup> Yet under plea bargaining it often is not, because prosecutors face pressures to make deals based on considerations lacking legitimate penological significance. For example, imagine that a prosecutor realizes, after charging a case, that there is an evidentiary problem such that the defendant would probably be acquitted at trial. Because the prosecutor’s incentive, Alschuler explained, is to “get something from every defendant,”<sup>216</sup> his response will be to make a “generous” offer. But that means that no matter the defendant’s guilt or innocence, the punishment is guaranteed to be wrong! Either it will be too generous, if the defendant is guilty, or unjust,

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<sup>209</sup> Peter Zimroth, *101,000 Defendants Were Convicted of Misdemeanors Last Year. 98,000 of Them Had Pleaded Guilty—To Get Reduced Sentences*, N.Y. TIMES MAG., May 28, 1972, at 14.

<sup>210</sup> *Id.*

<sup>211</sup> See *supra* notes 16–17, 74 and accompanying text.

<sup>212</sup> See, e.g., *The Supreme Court*, *supra* note 201, at 59–70; Kenneth Kipnis, *Plea Bargaining: A Critic’s Rejoinder Philosophical Implications*, 13 LAW & SOC’Y REV. 555 (1979).

<sup>213</sup> See *Prosecutor’s Role*, *supra* note 22; *Defense Attorney’s Role*, *supra* note 201; *Trial Judge’s Role*, *supra* note 201.

<sup>214</sup> *Defense Attorney’s Role*, *supra* note 201, at 1181. Alschuler recognized that his evidence was hearsay but reckoned that even “hearsay tends to become credible when similar observations are reported by persons with different and opposing roles in the criminal justice system and by persons in independent jurisdictions across the nation.” *Id.*

<sup>215</sup> *Prosecutor’s Role*, *supra* note 22, at 57.

<sup>216</sup> *Id.* at 60.

if he is innocent. Alschuler's point was not that plea bargaining yields overly punitive outcomes,<sup>217</sup> but that it produces irrational results.

Seven years later, Alschuler published the next piece of the trilogy, on defense lawyers.<sup>218</sup> He was, by then, more strident. The article is a forceful challenge to the assumption of plea bargaining's supporters—including in the judiciary—that “criminal defense attorneys will, almost invariably, urge their clients to choose the course that is in the client's best interests.”<sup>219</sup> Alschuler argued that this is simply untrue, because plea bargaining is “necessarily destructive of sound attorney-client relationships.”<sup>220</sup> For retained counsel, the “path to personal wealth” for most defense lawyers is a high-volume practice, and the “way to handle a large volume of cases is, of course, not to try them but to plead them.”<sup>221</sup> Public defenders lack *that* economic incentive, but their daily proximity to prosecutors can also misalign their allegiances. “[W]hen adversaries in the criminal justice system become too close,” Alschuler observed, “they may choose to help each other at the expense of the persons and the interests that they have been hired to serve.”<sup>222</sup> These problems, Alschuler wrote, cannot be corrected by “procedural tinkering or some appeal to professional ideals,” but rather “may reflect the intolerable nature of the system itself.”<sup>223</sup>

The final part of the trilogy, published in 1976, targeted judges.<sup>224</sup> Alschuler canvassed four judicial “types” he had seen in his travels. In Houston he found judges who rubber stamped prosecutors' sentence recommendations.<sup>225</sup> These judges, he observed, “remained aloof from the unseemly business of bargaining,” but at the “price” of “abdicat[ing] their judicial power.”<sup>226</sup> Judges in the federal courts, by contrast, didn't bargain directly *or* empower prosecutors to do so. Instead, they “simply sentence[d] defendants who are convicted at trial more severely than defendants who plead guilty,” and the effect was the same.<sup>227</sup> A third group, in the

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<sup>217</sup> *Id.* at 112.

<sup>218</sup> *Defense Attorney's Role in Plea Bargaining*, *supra* note 201.

<sup>219</sup> *Id.* at 1180.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 1128.

<sup>222</sup> *Id.* at 1210.

<sup>223</sup> *Id.* at 1313.

<sup>224</sup> *Trial Judge's Role*, *supra* note 201.

<sup>225</sup> *Id.* at 1063–64.

<sup>226</sup> *Id.* at 1065.

<sup>227</sup> *Id.* at 1076.

state trial courts of Chicago, bargained sharply with defense counsel in chambers.<sup>228</sup> Alschuler illustrated this type with the example of a narcotics defendant with a plea offer on the table of two to five years. In chambers, the judge told his lawyer that if he was convicted at trial, the sentence would be ten to twenty years. The judge explained: “He takes some of my time—I take some of his. That’s the way it works.”<sup>229</sup> A final judicial type was similar to the Chicagoans, but less explicit. These judges “spoke in hints, suggestions, euphemisms and predictions,” Alschuler explained, while avoiding “any promise that would provide a firm, legally enforceable basis for reliance in entering a plea of guilty.”<sup>230</sup> Alschuler criticized all four types, of course. He also offered reform suggestions for how to structure judicial participation to facilitate a “less nonsensical plea bargaining system.”<sup>231</sup> In so doing, he reflected on the irony of an abolitionist proposing reform. “Discussion of ‘reform,’” he noted wryly, “is likely to sound almost surrealistic to a person who considers plea bargaining itself corrupt—rather like discussion of whether a club should be cloaked in velvet and, if so, of what color.”<sup>232</sup>

### 3. Constitutional Law and Fairness

Another component of academic plea bargaining abolitionism painted the practice as incompatible with constitutional law and, even more, with basic ideals of fairness. The arguments sometimes took doctrinal form. Thus, a 1970 student note in the *Harvard Law Review* argued that plea bargaining should be abolished because it violates the unconstitutional conditions doctrine.<sup>233</sup> Alschuler agreed in a 1975 article that also excoriated the Supreme Court’s then-recent cases on the defense lawyer’s role in plea bargaining as “essentially hypocritical.”<sup>234</sup>

The arguments were not, however, confined to doctrine. Opponents of plea bargaining also offered normative arguments that would resonate even were the Constitution silent on criminal procedure. Thus John Langbein, in an article analogizing plea bargaining to torture, contended that the practice “undermines a moral postulate of the criminal justice system so basic and elementary that in past centuries Anglo-American writers seldom bothered to express it: Serious criminal sanctions should only be imposed when the trier has examined the relevant evidence and found the

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<sup>228</sup> *Id.* at 1087.

<sup>229</sup> *Id.* at 1089.

<sup>230</sup> *Id.* at 1092.

<sup>231</sup> *Id.* at 1122–49.

<sup>232</sup> *Id.* at 1122.

<sup>233</sup> See Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387 (1970).

<sup>234</sup> See *The Supreme Court*, *supra* note 201, at 64 (unconstitutional conditions); *id.* at 71 (“essentially hypocritical”).

accused guilty beyond a reasonable doubt.”<sup>235</sup> The Harvard Law Review note struck this note as well, observing that “plea bargaining is inherently destructive of the values of the trial process, for it is designed to prevent trials.”<sup>236</sup>

Related to this theme was the argument that the legal system must confront the systematic injustice of plea bargaining directly, rather than trying to hide it away. That sentiment led Alschuler to applaud *North Carolina v. Alford*, where the Court held that judges may accept guilty pleas from defendants who insist that they are innocent.<sup>237</sup> Alschuler had no trouble understanding why many would “sympathize with a ‘rule’ against permitting defendants to plead guilty when they claim to be innocent.” But he found such a rule “unconscionable” in light of the pressures placed upon defendants—guilty and innocent alike—to plead guilty.<sup>238</sup> Indeed, Alschuler would have gone even further than the *Alford* Court to recognize a “right of the innocent to plead guilty.” “This position may be terrifying,” he acknowledged, but it is at least faithful to the system’s logic.<sup>239</sup>

### B. *Scholars Against Abolition*

How did defenders of plea bargaining respond to these abolitionist attacks? They recognized that a response *was* required. We were not yet in a world where a writer could blithely assert that “for better or worse, abolition is politically a non-starter,” and move on to more pressing matters.<sup>240</sup>

Only a few of plea bargaining’s defenders in the 1970s, however, were prepared to defend plea bargaining as a matter of philosophical first principles. Thomas

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<sup>235</sup> Langbein, *supra* note 202, at 55; John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204, 205 (1979) (“We know that plea bargaining lacks foundation in our constitution and in our legal traditions . . .”).

<sup>236</sup> Note, *supra* note 233, at 1397–98; *see also* Parnas & Atkins, *supra* note 23, at 105 (“[H]ow can a democratic system of government tolerate a process whereby those citizens who choose to exercise their rights . . . remain charged with criminal conduct bearing greater potential punishment than the lesser charges and punishments these same individuals are offered . . . if they will but forego the exercise of their constitutional rights?”); CASPER, *supra* note 22, at 81–82 (“The peculiar and somewhat hypocritical nature of a system which is based upon the presumption of innocence, due process values, and the criminal trial, but which in practice is a game of plea-bargaining, is reinforced by what is known as the cop-out ceremony.”); *Criminal Violence*, *supra* note 156, at 1029–30 (“Few institutions could be more congenial to the times than one that says: ‘Our elaborate adjudicative machinery is a waste.’”).

<sup>237</sup> *See Defense Attorney’s Role*, *supra* note 201, at 1292; *Alford*, 400 U.S. at 25–40 (1970).

<sup>238</sup> *Defense Attorney’s Role*, *supra* note 201, at 1296–97.

<sup>239</sup> *Id.* Alschuler later expanded on these views in an exchange with Stephanos Bibas. Compare Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361 (2003) with Albert W. Alschuler, *Straining at Gnats and Swallowing Camels: The Selective Morality of Professor Bibas*, 88 CORNELL L. REV. 1412 (2003) [hereinafter *Straining at Gnats*].

<sup>240</sup> *See* William Ortman, *Probable Cause Revisited*, 68 STAN. L. REV. 511, 554 (2016).

Church, who we met earlier as the author of the study on abolition in Oakland County, Michigan,<sup>241</sup> was perhaps the most prominent.<sup>242</sup> In an article published in a special issue of *Law & Society Review* dedicated to plea bargaining, Church set out to show that trading sentencing concessions for guilty pleas need not violate “the tenets of rationality in the penal law nor the constitution.”<sup>243</sup>

From a due process perspective—which Church understood to mean the viewpoint of an innocent defendant—trials are both uncomfortable and unpredictable.<sup>244</sup> Plea bargains, he maintained, are a way for innocent defendants to avoid them, just as civil settlement allows litigants to short-circuit the expense and risk of trial. As for crime control, Church understood the concern to be excessive leniency. Yet, Church argued, we must “come to grips with” the fact that prosecutors in the “vast majority” of cases believe that defendants are “factually guilty.”<sup>245</sup> They have a problem in a world without plea bargaining, because our constitutional criminal procedure “contains significant protections” for the accused, and those protections prevent prosecutors from convicting some of the people that they believe to be guilty.<sup>246</sup> Plea bargains, on this view, allow prosecutors to bypass the constitutional protections, but at the cost of some punishment. “Given the recent discussion of the importance of sure (although not necessarily harsh) punishment for effective deterrence of criminal behavior, a choice for more conviction is, at the very least, not inherently irrational,” Church wrote.<sup>247</sup>

Church’s defense of plea bargaining came with an important caveat. It depended on four “theoretical assumptions,” though only the first need detain us. “First,” Church explained, “those cases that go to trial must be decided on the merits, without penalizing the defendant for not pleading guilty.”<sup>248</sup> He elaborated: “trial

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<sup>241</sup> See Church, *supra* note 96; see also notes 96–98 and accompanying text.

<sup>242</sup> Thomas W. Church, Jr., *In Defense of “Bargain Justice,”* 13 LAW & SOC’Y REV. 509 (1979); see also *Changing Plea*, *supra* note 196, at 686 (describing Church’s article as “the most thoughtful, articulate defense that I have seen of the propriety of resolving disputes through compromise”). Alschuler’s praise for the article should not, however, be mistaken for agreement. Church observed that the “essay benefited from a lively exchange with Albert Alschuler,” but Church “regret[ed] to report that he remains unconvinced.” Church, *supra*, at 509.

<sup>243</sup> Church, *supra* note 242, at 512. The Law and Society Review issue published papers from a conference on plea bargaining held in French Lick, Indiana in the summer of 1978. The conference was organized by Alschuler, Church, and Malcolm Feeley to, as Feeley wrote, break down disciplinary silos separating plea bargaining scholars and “shape the agenda for a second generation of plea bargaining studies.” Malcolm M. Feeley, *Foreword*, 13 LAW & SOC’Y REV. 197 (1979).

<sup>244</sup> Church, *supra* note 242, at 514.

<sup>245</sup> *Id.* at 517.

<sup>246</sup> *Id.* at 518.

<sup>247</sup> *Id.* at 519.

<sup>248</sup> *Id.* at 520.

sentences must be objectively *deserved* according to whatever sentencing philosophy is embodied in the penal code.”<sup>249</sup> Church offered no argument that trial sentences in American criminal courts *actually* reflected a coherent sentencing philosophy, much less one “embodied in the penal code.” Nor did he entertain the possibility that plea bargaining *was* the “sentencing philosophy” of American criminal law. He treated plea bargaining as exogenous to criminal law, rather than as a factor in determining its content.

Church’s philosophical response to plea bargaining abolitionism was unusual.<sup>250</sup> More typical rejoinders privileged pragmatic concerns. Many opponents of abolition declared that abandoning plea bargaining would cost too much.<sup>251</sup> They were certain that legislatures would never appropriate the necessary funds. Arthur Rosett and Donald Cressey were adamant on the point. “[I]t is unreasonable,” they insisted, “to believe that legislatures would ever fund that massive influx of resources necessary for full trials of even one half of the cases now coming into courthouses.”<sup>252</sup>

The pragmatic defense of plea bargaining went further. Plea bargaining is permanent, defenders argued, because the people who operate criminal courtrooms—judges, prosecutors, and defense lawyers—find it useful.<sup>253</sup> “As long as the prosecutor retains discretion to charge various offense, and the judge has power to impose various sentences,” Rosett and Cressey maintained, “negotiation in some form seems inevitable.”<sup>254</sup> Thus even if an official with apparent authority “banned” bargaining, insiders would inevitably find ways around the ban. Explicit bargaining might disappear, but compromise would always reemerge *sub rosa*.<sup>255</sup> The fate of the plea bargaining bans we saw in Part III was fodder for the argument. As

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<sup>249</sup> *Id.* at 520.

<sup>250</sup> For another example, also from the French Lick conference, see Conrad G. Brunk, *The Problem of Voluntariness and Coercion in the Negotiated Plea*, 13 LAW & SOC’Y REV. 527 (1979). A third example is Pamela Utz, who wrote in 1978 that: “[p]lea bargaining is best understood as an adaptive process in which prosecutor, defense attorney, and judge attempt to rationalize the penal code and infuse a sense of realism in the implementation of absurdly excessive rules and procedures. PAMELA J. UTZ, *SETTLING THE FACTS: DISCRETION AND NEGOTIATION IN CRIMINAL COURT* 139 (1978).

<sup>251</sup> See *Implementing*, *supra* note 96, at 953 n.37 (collecting citations).

<sup>252</sup> ARTHUR I. ROSETT & DONALD RAY CRESSEY, *JUSTICE BY CONSENT: PLEA BARGAINS IN THE AMERICAN COURTHOUSE* 166 (1976).

<sup>253</sup> E.g., MILTON HEUMANN, *PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS* 156 (1978).

<sup>254</sup> ROSETT & CRESSEY, *supra* note 252, at 164.

<sup>255</sup> HEUMANN, *supra* note 253, at 158 (“[T]hough it might be possible to proscribe ‘explicit plea bargaining . . . , it would be impossible to proscribe what we might call ‘implicit plea bargaining.’”).

defenders of plea bargaining pointed out, circumvention was precisely what had happened when officials tried to prohibit plea bargaining.<sup>256</sup>

For plea bargaining's most ardent defenders, this factor—that insiders will do what they must to preserve plea bargaining—made abolition outlandish rather than just unlikely. Some could barely contain their derision. “[T]o speak of a plea bargaining-free criminal justice system,” Milton Heumann wrote, “is to operate in a land of fantasy.”<sup>257</sup> The problem with plea bargaining abolitionism was that it failed to account for how the criminal courts *really* work.<sup>258</sup> Heumann went further than most:

Perhaps in the best of all worlds, only a criminal justice system without plea bargaining can function with dignity; and perhaps that is something that philosophically inclined observers should continue to speculate about. But, in the real world, the argument that plea bargaining can be eliminated is illusory, and efforts to develop and implement plans to abolish plea bargaining are pointless expenditures of time and money.<sup>259</sup>

James Eisenstein and Herbert Jacob agreed, though with slightly less scorn. “There is little point in analyzing reforms that have no chance of being implemented,” they said, pointing to the National Advisory Commission’s proposal to end plea bargaining by 1978 as “the best example.”<sup>260</sup>

But why, on the academic defenders’ view, were criminal court insiders *so* committed to plea bargaining that they would stand in the doorway of attempts to abolish it? One fairly obvious answer was that plea bargaining facilitates getting through the daily run of cases.<sup>261</sup> A less obvious but potentially more important answer was that in the eyes of judges, prosecutors, and defense lawyers, most criminal cases simply don’t deserve the full process contemplated by the Constitution. As court personnel are socialized into the business, Heumann explained, they “learn and are taught that . . . approximately 90 percent of the defendants in the court are factually guilty” and “of these, a sizeable percentage have no grounds to contest the

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<sup>256</sup> *E.g.*, Church, *supra* note 242, at 510 (noting that the “‘abolitionist’ literature coexists with a growing body of behavioral research on criminal courts whose common theme is the extraordinary resistance of court systems to change”).

<sup>257</sup> HEUMANN, *supra* note 253, at 162.

<sup>258</sup> *E.g.*, ROSETT & CRESSEY, *supra* note 252, at 167 (“[The National Advisory Commission’s proposal] certainly was not based on even a perfunctory examination of courthouse organization.”).

<sup>259</sup> HEUMANN, *supra* note 253, at 166; *see also id.* at 156 (professionals “learn that most defendants are factually and legally guilty, and each finds plea bargaining to be a ‘realistic’ and beneficial way of disposing of these defendants’ case”).

<sup>260</sup> JAMES EISENSTEIN & HERBERT JACOB, FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS 307 & 311 n.7 (1977).

<sup>261</sup> *See, e.g., id.* at 30–38.

state's case."<sup>262</sup> Heumann postulated that the professionals "recognize the factual culpability of many defendants, and the fruitlessness, in terms of case outcomes, of going to trial," yet he denied that "[t]hese perceptions . . . necessarily add up to a negation of the legal tenet of the presumption of innocence."<sup>263</sup> Going even further, Rosett and Cressey suggested that in cases with obvious outcomes, trials would be not just wasteful but affirmatively detrimental, because officials would "look[] for shortcuts to avoid the interminable demonstration of the obvious."<sup>264</sup> Without plea bargaining, they claimed, the "presumption of innocence" would "be modified by experience to a presumption of guilt."<sup>265</sup>

The notion that constitutional criminal procedure is wasted in most criminal cases raises questions that plea bargaining's academic defenders did not answer. It may have appeared to courthouse insiders that most defendants had no legal leg to stand on, but were they right? The academic defenders of plea bargaining had no way to reliably confirm their impressions.<sup>266</sup> And in any event, the central question remained—even if Heumann's interlocutors were correct about the distribution of guilty defendants, without trials how does one distinguish the 90% of defendants who are guilty from the 10% who are not?

### C. The "Inevitability" of Plea Bargaining

Abolitionists resisted the claim that plea bargaining is inevitable. The point was developed towards the end of our period, in response to the arguments we have just seen from plea bargaining's defenders. In 1983 and 1984, Alschuler and his soon-to-be University of Chicago colleague, Stephen Schulhofer, each published major articles on alternatives to the plea bargaining system.<sup>267</sup>

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<sup>262</sup> HEUMANN, *supra* note 253, at 156.

<sup>263</sup> *Id.*

<sup>264</sup> ROSETT & CRESSEY, *supra* note 252, at 165.

<sup>265</sup> *Id.* In contemporary jargon, defending plea bargaining on the grounds that it preserves the presumption of innocence is trolling *par excellence*.

<sup>266</sup> See Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1044 (1984) (observing that Heumann did not "appear to doubt . . . the ability of individuals immersed in complex social relationships to provide accurate descriptions of their world"). "In an attempt to check whether actual cases" matched the 90% guilty rate he had heard from defense lawyers, Heumann "reviewed the files of eighty-eight defendants represented by the public defenders of one of the superior courts" in his study. HEUMANN, *supra* note 253, at 60. His "overall impression" of the files aligned with his interviewees, as there was not, in his estimation, "much the defense attorney could do to win" in "many of the cases." *Id.* at 60-61. From Heumann's description of the public defender case files he had access to, however, it is unclear how much exculpatory material was included. *Id.* at 20 (describing contents of files). Heumann also acknowledged that the files he reviewed "may overrepresent the percentage of hopeless cases." *Id.* at 186 n.12.

<sup>267</sup> See *Implementing*, *supra* note 96; Schulhofer, *supra* note 266. Alschuler joined the Chicago faculty in 1985. See *Faculty Profile of Albert Alschuler*, UNIV. OF CHI. LAW SCH.,

To the claim that abolishing plea bargaining would be too expensive, Alschuler argued that the costs had been grossly inflated,<sup>268</sup> in large part because the actual budgetary footprint of criminal courts was tiny. Even if it had to be doubled or tripled, it would still be small in comparison to other social institutions. “This sort of investment,” Alschuler implored, “need not inspire panic.”<sup>269</sup> To make things concrete, Alschuler appraised the expense, as of 1983, of providing a three-day jury trial to every felony defendant who wanted one. Applying conservative estimates (*i.e.*, erring on the side of higher rather than lower costs), he tagged it at \$843 million.<sup>270</sup> That would be a “3.2% increase in civil and criminal justice expenditures,” Alschuler noted, or about one-third of the “cost-overrun on [Lockheed’s] C-5A aircraft.”<sup>271</sup>

On the defenders’ sabotage point—*i.e.*, that criminal justice insiders would inevitably sabotage any effort to abolish plea bargaining—Alschuler accepted the premise. Some number of prosecutors, judges, and defense lawyers *would* violate a plea bargaining ban, just as some people violate the ban on murder and others violate the ban on robbery.<sup>272</sup> Abolishing plea bargaining, Alschuler clarified, means abolishing *lawful* plea bargaining. He asked his readers not to be so cynical as to assume that “large numbers” of “America’s men and women of the law” would “not only would break the law to achieve their goals, but also that they would lie about this violation.”<sup>273</sup>

In the second half of the article, Alschuler accepted (for sake of argument only) that we are unwilling to pay the price of a full-scale constitutional trial for every defendant who wants one. What, he asked, if we streamline the trial process? Might we be prepared to trade plea bargaining for trial-lite and at least *some* adjudication?<sup>274</sup> It was in this vein that he turned to the criminal justice systems of Philadelphia and Pittsburgh, where trials were common and relatively few defendants

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<https://www.law.uchicago.edu/faculty/alschuler> [<https://perma.cc/5MYH-AHXN>]. Schulhofer arrived a year later. See *Faculty Profile of Stephen J. Schulhofer*, N.Y. UNIV. LAW SCH., <https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.biography&personid=20270> [<https://perma.cc/G6L4-6832>]. Although Schulhofer’s article was published in 1984 and thus somewhat difficult to characterize as from the “early” 1980s, it was based on field research conducted in 1982. See *supra* note 266. In any event, these articles are as far as I will stretch the idea of a “long 1970s.”

<sup>268</sup> See *Implementing*, *supra* note 96, at 979–1048.

<sup>269</sup> *Id.* at 941.

<sup>270</sup> *Id.* at 948. That works out to about \$2.5 billion in 2022 dollars. See *Inflation Calculator*, U.S. INFLATION CALCULATOR, <https://www.usinflationcalculator.com> [<https://perma.cc/XK7X-Q72G>].

<sup>271</sup> *Implementing*, *supra* note 96, at 948.

<sup>272</sup> *Id.* at 961.

<sup>273</sup> *Id.* at 964.

<sup>274</sup> *Id.* at 956–961.

pleaded guilty.<sup>275</sup> In both cities, defendants regularly waived their right to a jury and proceeded to rapid trials before judges, where, if convicted, they would receive a punishment similar to what they could have expected after pleading guilty.<sup>276</sup> Thus, while defendants often waived a constitutional right, it was the right to a jury rather than the right to a trial of any kind. That's the difference, Alschuler maintained, "between seriously attempting to determine what happened and merely splitting the difference."<sup>277</sup>

Philadelphia's criminal courts were also the subject of Schulhofer's 1984 contribution to the cause.<sup>278</sup> Though Philadelphia had not tried to abolish plea bargaining, Schulhofer argued that its jury-waiver system offered a blueprint for how to do it.<sup>279</sup> He and his research assistants observed Philadelphia courtrooms in 1982, amassing data on 320 felony cases.<sup>280</sup> In the sample, 44% of defendants pleaded guilty, but only a small fraction of the pleas represented negotiated dispositions.<sup>281</sup> Schulhofer expected to find "tacit inducements" to plead guilty and searched for evidence of them, but located none.<sup>282</sup>

For defendants who pleaded not guilty, on the other hand, there *were* clear inducements to waive a jury, as post-jury trial sentences were much heavier than post-bench trial sentences.<sup>283</sup> The bench trials were, as Alschuler had noted, quick. In the courtrooms that handled ordinary felonies, an outright majority of bench trials lasted between thirty minutes and an hour, while only 2% went more than three hours and 18% were over in less than thirty minutes.<sup>284</sup> Nonetheless it was clear to Schulhofer after watching the trials and speaking with the participants that all but a handful (seven, to be exact) were genuine adversarial processes and not, as some earlier

<sup>275</sup> *Id.* at 1024

<sup>276</sup> *Id.* at 1029.

<sup>277</sup> *Id.* at 1035. He did not, however, uncritically endorse the practice. Because it pressured defendants to waive a jury, it "had much in common with plea bargaining and was disturbing for some of the same reasons." *Id.* at 1042. Yet if we are in the position of picking between "disturbing" systems, there was, for Alschuler, no question which is worse. *Id.*

<sup>278</sup> Schulhofer, *supra* note 266.

<sup>279</sup> *Id.* at 1093–94.

<sup>280</sup> *Id.* at 1053–54.

<sup>281</sup> *Id.* at 1058. Schulhofer found that sentencing agreements "were involved in only 15% of the guilty plea cases." *Id.* Prosecutors dismissed "unimportant counts" more frequently, but this had no effect on sentencing. *Id.*

<sup>282</sup> Rather, most defendants who pleaded guilty did so because their cases were "utterly hopeless." *Id.* at 1060.

<sup>283</sup> *Id.* at 1062–63.

<sup>284</sup> *Id.* at 1066.

observers had suggested, “slow pleas of guilty.”<sup>285</sup> Schulhofer summarized what he and his team found in Philadelphia: “In America’s fourth-largest city, there are relatively few inducements to plead guilty, most felony defendants do in fact claim a trial, and their cases are resolved in genuinely contested adversary proceedings.”<sup>286</sup> “These findings,” he added, understating for effect, “cast some doubt on the widespread belief that case pressure or the behavioral dynamics of criminal litigation make plea bargaining inevitable.”<sup>287</sup>

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To be clear, the notion that plea bargaining would help enable a massive and unprecedented expansion of the carceral state—as it did in the 1980s and 1990s—was not part of the academic argument for abolition in the 1970s. Scholars did not explicitly warn about the looming danger of mass incarceration, though Alschuler came close when cautioning against determinate sentencing reform proposals popular in the late 1970s.<sup>288</sup> But scholars *did* claim that America’s criminal justice apparatus had come unmoored from its foundations, with calamitous consequences for fundamental values of justice, freedom, and law itself. In the “move from adversariness [to cooperation],” Schulhofer observed, “only one thing is lost—the vigorous probing and questioning that, in their very unpleasantness, have been thought to serve a crucial function in the preservation of freedom.”<sup>289</sup> Noting Daniel Webster’s pronouncement that “‘law’ would hear before it condemned, proceed upon inquiry, and render judgment only after trial,” Alschuler remarked that the legal profession had “lost sight of Webster’s kind of law.”<sup>290</sup> While they may not have been able to predict the future, abolitionists warned us about plea bargaining.

#### CONCLUSION: THE LEGACY OF PLEA BARGAINING ABOLITIONISM

In the end, the plea bargaining abolitionism of the 1970s did not end the practice. Guilty plea rates climbed through the 1980s, 1990s, and into the twenty-first

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<sup>285</sup> *Id.* at 1067–68.

<sup>286</sup> *Id.* at 1086–87.

<sup>287</sup> *Id.* at 1087.

<sup>288</sup> See *Sentencing Reform*, *supra* note 201. While these reforms were intended to be progressive, Alschuler warned, they could make plea bargaining even more coercive. *Id.* at 554. And once the political winds changed, he wrote, “[p]olitical forces may push sentencing reform away from the humanitarian objectives of its authors and towards a sterner model.” *Id.* at 569. That is, of course, exactly what happened in the era of mass incarceration.

<sup>289</sup> Schulhofer, *supra* note 266, at 1105.

<sup>290</sup> *Implementing*, *supra* note 96, at 1049–1050.

century.<sup>291</sup> A few more jurisdictions tried plea bargaining bans during that period, without meaningful success.<sup>292</sup> Alschuler himself wrote in 2013 that the “time for a crusade to prohibit plea bargaining ha[d] passed.”<sup>293</sup>

We’ll obviously never know what would have happened if plea bargaining abolitionists *had* persuaded judges, prosecutors, and defense lawyers that punishment without adjudication offers efficiency and convenience, but not justice. Logic suggests, however, that a less efficient and convenient legal system would have been less capable of satisfying the carceral appetite of mass incarceration. It is not difficult to imagine that a system that gave defendants unfettered access to trials would, at the very least, have grown its prison population more slowly in the 1980s and 1990s than ours did. Plea bargaining’s efficiency, moreover, generates its own carceral demand.<sup>294</sup> In a world where plea bargaining abolitionists had succeeded, would the architects of mass incarceration have grown frustrated by the slow pace of the criminal justice process? If so, would they have sought out non-carceral means to their policy ends?

The movement to abolish plea bargaining in the 1970s did not succeed, but it matters in at least two ways. First, if ever again there is interest in restoring constitutional criminal procedure, it offers practical lessons about what does and what does not work. For instance, as Part III made abundantly clear, prohibiting either sentence bargaining or charge bargaining, but not both, does not work.<sup>295</sup> Jury waiver systems do, as we saw in Part IV, but come with their own set of tradeoffs.<sup>296</sup>

Until the day for a new “crusade to prohibit plea bargaining” arrives, if it ever does, the legacy of abolitionism—and especially of the reaction to it—will be as a cautionary tale. Recall how the legal profession responded to plea bargaining abolitionism. We saw that at the National Conference on Criminal Justice, after the National Advisory Commission and Arlen Specter offered impassioned entreaties on the injustice of plea bargaining, speakers and delegates reflexively defended the status quo, seemingly unable to fathom a different way of doing things. In jurisdictions with plea bargaining bans, we saw judges, defense lawyers, and line prosecutors sabotage (mostly) well-intentioned policies in the name of self-interest and backed

<sup>291</sup> See Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 91 fig. 1 (2005).

<sup>292</sup> See, e.g., Roland Acevedo, *Is A Ban on Plea Bargaining an Ethical Abuse of Discretion? A Bronx County, New York Case Study*, 64 FORDHAM L. REV. 987, 988 (1995); CANDACE MCCOY, POLITICS AND PLEA BARGAINING 33-40 (1993).

<sup>293</sup> Albert W. Alschuler, *Lafler and Frye: Two Small Band-Aids for a Festering Wound*, 51 DUQ. L. REV. 673, 706 (2013) [hereinafter *Lafler and Frye*].

<sup>294</sup> See Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV. 183, 195 (2014) (“Rising caseloads can be partly a consequence of more plea bargaining—a rebound effect—rather than a cause.”).

<sup>295</sup> See *supra* Part III.B.

<sup>296</sup> See *supra* notes 274–287 and accompanying text.

by seemingly intractable professional norms. And in the academy, when abolitionist scholars demonstrated and documented the injustice of the guilty-plea system, we saw that many of their respondents privileged the pragmatic and revered the realistic. They accepted what practitioners told them essentially at face value—as with the claim that a “sizeable percentage” of defendants have no defenses worth mounting.<sup>297</sup> And they insisted that their conception of what was trumped questions of what should be.

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<sup>297</sup> See HEUMANN, *supra* note 253, at 156; *see also supra* note 266 and accompanying text.