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THE SUPREME COURT, THE DEFENSE ATTORNEY, AND THE GUILTY PLEA*

ALBERT W. ALSCHULER**

On May 4, 1970, the Supreme Court rejected challenges to guilty-plea convictions in three cases—McMann v. Richardson,1 Parker v. North Carolina,2 and Brady v. United States3—and in each case the Court emphasized that the defendant had been represented by counsel at the time that he decided to plead guilty. The cases presented two basic issues—first, the validity of a guilty plea induced by the prospect that a coerced confession would be used at trial and, second, the validity of a guilty plea induced by the prospect that an unconstitutional death penalty would be imposed following a trial.4 Although the Court never made the proposition explicit, it apparently concluded that a competently counseled guilty plea could be presumed to be knowing and voluntary. Accordingly, the critical issue in each case was the effectiveness of the legal representation that the defendant had received.5

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4. The confession issue was presented by McMann and the death penalty issue by Brady. Parker, the remaining case of the trilogy, combined the two issues: The defendant alleged that his guilty plea had been motivated both by an involuntary confession and by an unconstitutional statute that authorized capital punishment only if a defendant stood trial. The Supreme Court discussed the confession issue in McMann and Parker and the death-penalty issue in Brady; the Brady discussion made it unnecessary to address the capital-punishment issue in Parker.
5. Although the view that a competently counseled guilty plea can be presumed a voluntary plea was merely implicit in the Court's analysis, the Court clearly expressed the equation between a competently counseled plea and a knowing plea. 397 U.S. at 770-71, 774, 797-98. Three years after the guilty-plea trilogy, moreover, the Court wrote in Tollett v. Henderson, 411 U.S. 258, 267 (1973): When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he . . . may only attack the voluntary
I have argued elsewhere that the Court’s opinions, all of which were authored by Mr. Justice White, reflected an unduly optimistic view of the quality of advice that defense attorneys customarily provide in the plea-negotiation process. This article explores the Court’s legal craftsmanship, its apparent objectives, and the soundness of its ultimate equation of the requirement that a guilty plea be entered knowingly and voluntarily with the requirement that a defendant receive the effective assistance of counsel. I conclude that the Court has abandoned desirable concepts of waiver in guilty-plea cases and has given unjustified weight to the presence of counsel. The Court’s manifest reluctance to upset the institution of plea bargaining has led it into disingenuous analysis that is inconsistent with its usual approach to problems of waiver.

I. McMann v. Richardson, Some Related Cases, and the Requirement of a Knowing Waiver

A. The Court’s Opinion

McMann v. Richardson\(^1\) presented three separate cases, in each of which the United States Court of Appeals for the Second Circuit had ordered an evidentiary hearing on a federal habeas corpus petition. Each of the defendants had sought relief from a New York state conviction and alleged that his guilty plea had been induced by the threat that an unconstitutionally obtained confession would be used against him at trial. The New York procedure in effect at the time of the defendants’ convictions permitted even an involuntary confession to come before the jury. The jury was merely instructed to disregard this evidence if it found that the confession had been improperly obtained.\(^8\) The guilty pleas were entered prior to Jackson v. Denno,\(^9\) in which the Supreme Court ruled this New York procedure unconstitutional and the Jackson decision was applied retroactively to afford relief to defendants who had been convicted at trial under the unconstitutional procedure.\(^10\)

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and intelligent character of the plea by showing that the advice he received from counsel was not within the [range of competence demanded of attorneys in criminal cases].


8. A trial judge in New York could keep a confession from the jury if he found it involuntary as a matter of law, but the judge could not make such a finding if critical facts were in dispute or if differing inferences could be drawn from undisputed facts.


10. Jackson was itself a federal habeas corpus proceeding, and in that sense the decision was retroactive from its inception. Although the Court did not expressly consider the question of retroactivity in Jackson, a number of Supreme Court opinions prior to McMann confirmed

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The defendants in *McMann* alleged that the New York procedure, by precluding fair hearings on the voluntariness of their confessions, had influenced their decisions to plead guilty. The defendants claimed that they were as much the victims of this unconstitutional procedure as defendants who had stood trial and therefore asked that their guilty pleas be set aside.

The Supreme Court's analysis of this situation was involved and elaborate. The Court assumed that the defendants had confessed involuntarily and would not have pleaded guilty had they not confessed. In the Court's words, "We are dealing with a defendant who deems his confession crucial to the State's case against him and who would go to trial if he thought his chances of acquittal were good . . . ." Without referring specifically to New York's pre-*Jackson v. Denno* procedures, the Court considered whether an involuntary confession which "trigger[s]" a plea of guilty should render the plea invalid.

The Court observed that although the defendants' confessions may have been involuntary, the defendants themselves probably had proceeded on a different hypothesis:

> For the defendant who considers his confession involuntary and hence unusable against him at a trial, tendering a plea of guilty would seem a most improbable alternative . . .

A more credible explanation for a plea of guilty by a defendant who would go to trial except for his prior confession is his prediction that the law will permit his admissions to be used against him by the trier of fact. At least the probability of the State's being permitted to use the confession as evidence is sufficient to convince him that the State's case is too strong to contest and that a plea of guilty is the most advantageous course.12

As the Court saw it, a defendant who had pleaded guilty because his confession might be used at trial could claim no more than that he and his counsel had mistakenly assessed the admissibility of the confession.13 The Court concluded that a competently counseled defendant could fairly be required to endure the consequences of this mistake:

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11. 397 U.S. at 768.

12. *Id.* at 768-69.

13. *Id.* at 769.
In the face of unavoidable uncertainty, the defendant and his counsel must make their best judgment as to the weight of the State's case. Counsel must predict how the facts, as he understands them, would be viewed by a court. . . . Questions like these cannot be answered with certitude; yet a decision to plead guilty must necessarily rest upon counsel's answers, uncertain as they may be. . . . In our view a defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession.14

The Supreme Court then recognized that this analysis did not fully resolve the problem in McMann. Under the procedure in effect at the time of the defendants' pleas, a competent attorney would not have regarded a defendant's confession as "unusable against him at trial" simply because the confession was involuntary. The New York courts did, in effect, permit involuntary confessions to be used at trial. Jackson v. Denno had held the state's evidentiary procedures unconstitutional for that very reason. In the Supreme Court's view, however, New York's unconstitutional procedures were only another factor for the defendant and his lawyer to consider in choosing an advantageous plea. Although a defendant who had decided to stand trial would now be entitled to the benefit of the Supreme Court's decision in Jackson, "[i]t is no denigration of the right to trial to hold that when the defendant . . . admits his guilt, he does so under the law then existing."15 The Court concluded:

For the respondents successfully to claim relief based on Jackson v. Denno, each must demonstrate gross error on the part of counsel when he recommended that the defendant plead guilty instead of going to trial . . . . Such showing cannot be made, for [various courts including the Supreme Court had upheld the New York procedure at the time of the defendants' pleas].16

B. A Problem of Craftsmanship: Was the McMann Opinion Directed to the Cases Before the Court?

In the main, the Supreme Court seemed to address a hypothetical case very different from any of the cases before it. In all three cases, the issue was whether the defendants had alleged sufficient

14. Id. at 769-70.
15. Id. at 774.
16. Id. at 772-73.
facts in their habeas corpus petitions to entitle them to evidentiary hearings and, if so, on what issues. Largely ignoring the allegations of the defendants’ petitions, however, the Court proceeded from the simple and indisputable fact that the defendants had pleaded guilty. If the defendants had pleaded guilty for reasons independent of the threat to use their confessions at trial, this threat could offer no basis for relief. If, however, the threat to use the confessions had induced the defendants’ pleas, the defendants must have thought that the confessions would be admissible or at least that the chance of their use was sufficient to make a bargained plea seem advantageous. At most, therefore, the defendants could claim that they had been mistaken in their assessment of the admissibility of the confessions.

Even as a theoretical matter, this canvassing of the various possibilities was less than exhaustive. Mr. Justice White’s opinion painted a picture of deliberate strategic decision-making: A defense attorney had assessed at least cursorily the chances that a defendant’s confession might be received in evidence; he had advised the defendant of these chances; and the defendant, acting on the basis of the lawyer’s possibly mistaken advice, had decided to waive his right to challenge the confession’s admissibility. This analysis disregarded the sort of case in which a defendant has not considered the issue at all—in which he has assumed without reflection that any confession would insure his conviction and in which his attorney has done nothing to disabuse him of this error. In terms of traditional concepts of waiver, the difference between this second kind of case and the kind that the Supreme Court considered is clear. In the kind of case the Court considered, a defendant has deliberately compromised a disputed legal issue—the voluntariness of his confession. He has knowingly, if perhaps unadvisedly, sacrificed his legal rights to gain the advantages of a plea agreement. In the second sort of case, a defendant unaware of any realistic chance of challenging the admissibility of his confession has not knowingly sacrificed this right to gain some advantage. The Court’s analysis therefore seems inapplicable to his situation.

Although the Supreme Court did not expressly foreclose the possibility that a defendant in this second sort of case might secure relief on the ground that he had been denied the effective assistance of counsel, the Court implied that this relief would not be available.

17. Of course the defendant’s knowledge even in this situation is less than perfect. He does not know whether the trial court would ultimately hold his confession voluntary or involuntary. Nevertheless, he might know the situation as well as anyone could know it in advance of litigation, and his case therefore seems very different from that of a defendant who does not realize that the law excludes involuntary confessions from evidence or that his own confession might qualify.
Thus, although the Court recognized that "gross" misadvice might establish a denial of the constitutional right to counsel, it did not suggest that an attorney's failure to advise the defendant of the possible invalidity of his confession would make a guilty plea invalid. Moreover, after asserting that it was necessary for each of the defendants to show "gross error on the part of counsel," the Court added flatly, "Such showing cannot be made . . . ." The reason for this conclusion was the Court's view that, under its decisions, the defense attorneys might reasonably have foregone their claims that the defendants' confessions were inadmissible. Whether the attorneys had actually made this "reasonable judgment" and whether the defendants had knowingly waived their rights were apparently irrelevant to the Court's analysis.

The habeas corpus petitions in McMann revealed that all of the cases before the Court belonged in the category that it ignored rather than the category that it considered. The petitions not only left open the possibility that the defendants had pleaded guilty in ignorance of their rights, they expressly contradicted the Court's picture of strategic consultation between the defendants and their attorneys. Each defendant set forth specific facts designed to show that his attorney had not adequately advised him. The advice that the first defendant had allegedly received from his attorney was simply that the defendant did not "stand a chance due to the alleged confession." On its face, this advice seemed to suggest that even an involuntary confession would automatically insure the defendant's conviction, something that was not true even under the unconstitutional New York procedure. The second defendant maintained that his attorney had conferred with him for only ten minutes prior to his plea of guilty. The attorney had reportedly said that "this was not the proper time to bring up the confession" and that the defendant "could later explain by a writ of habeas corpus how my confession had been beaten out of me." In the third case, the defendant claimed that his attorney, since disbarred, had falsely assured him that his guilty plea would be to a misdemeanor.

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18. 397 U.S. at 772.
19. Of course, a defendant should be given the opportunity to exercise his constitutional rights even when it would be "reasonable" for him not to do so.
20. 397 U.S. at 762.
21. Id. at 763.
22. Id. at 764. It is also worth noting that the habeas corpus petitions did not allege subtle coercive influences that might have made the voluntariness of the defendants' confessions problematic and thereby called for a delicate legal evaluation. The first defendant claimed that he had been beaten, refused counsel, and threatened with false charges unless he agreed to
In the concluding sentences of its *McMann* opinion, the Supreme Court indicated that the last two defendants might be entitled to hearings to determine whether they had been denied the effective assistance of counsel. At least the Court would not “now express disagreement” with the Second Circuit’s ruling that these defendants should be granted hearings on the issue. The allegations of the habeas corpus petitions would, I think, establish a denial of the right to counsel in these last two cases, and might establish a similar denial in the first case as well. At the same time, these allegations would, even under the Court’s analysis, establish that the defendants had not intelligently waived the right to challenge the validity of their confessions. For that reason, the Supreme Court’s discussion of various hypothetical states of mind that might lead to pleas of guilty seemed irrelevant to the cases before the Court. Even on the Court’s assumptions, the defendants should have been granted the hearings that they sought on the grounds that they advanced: Under the circumstances of the cases as alleged in the petitions, the defendants’ involuntary confessions had indeed rendered their guilty pleas invalid. The defendants complained, not that they and their lawyers had made a mistaken strategic judgment, but that they had not knowingly sacrificed or compromised their rights in any way.

Of course it is appropriate for a reviewing court to address itself to the principles of decision that the court below employed, and it was on this basis that the Supreme Court seemed to justify its intricate analysis in *McMann*. The Court asserted, “It was the Court of Appeals’ view that a plea of guilty . . . is not voluntary if it is the consequence of an involuntary confession,” and most of the Court’s

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23. The Court indicated that the defendant in this first case might be entitled to a hearing on his claim that the trial judge had threatened to impose the maximum sentence if he were convicted following a plea of not guilty. The Court did not, however, discuss whether the allegations of the habeas corpus petition might establish a denial of the right to counsel—whether, in other words, the petition might meet the standards set forth in the *McMann* opinion. See 397 U.S. at 765-66, 774-75.

24. *Id.* at 764-65. The Court also said:

The core of the Court of Appeals’ holding is the proposition that if in a collateral proceeding a guilty plea is shown to have been triggered by a coerced confession—if there would have been no plea had there been no confession—the plea is vulnerable at least in cases coming from New York where the guilty plea was taken prior to *Jackson v. Denno* . . . .

*Id.* at 766. With this qualification that the Court added at the end of this sentence, its description of the Second Circuit’s position was accurate, *see United States ex rel. Ross v. McMann*, 409 F.2d 1016, 1023 (2d Cir. 1969), but the Court proceeded for most of its opinion to discuss
opinion was devoted to a refutation of this proposition.

Nevertheless, one looks in vain through the Second Circuit's opinions for any expression of the position that the Supreme Court attributed to it. The Second Circuit's most authoritative pronouncement on the issue was its en banc ruling in *United States ex rel. Ross v. McMann*,25 one of the cases that came before the Supreme Court in *McMann v. Richardson*. A federal district court had refused to consider the possible involuntariness of the defendant's confession on the theory that a guilty plea waives all prior nonjurisdictional defects in the proceedings. The Second Circuit replied that a guilty plea has this effect only when the plea is voluntary, and "[t]he problem is that [certain appellate cases are] being read by the District Courts to say that a coerced confession or other violation of a defendant's right is never relevant to the issue of voluntariness . . . ."26 The appellate court concluded:

The rule should be stated as follows: . . . an allegation that the petitioner's constitutional rights were violated . . . is not, standing alone, sufficient to call the validity of the plea into question, nonetheless . . . the alleged violations are not irrelevant to the issue of the voluntariness of the plea. An alleged violation of constitutional rights is simply another factor to be taken into account in determining the voluntariness of the plea. On the other hand, the fact that the petitioner was represented by counsel and acted after consultation with counsel is also to be given substantial weight in determining the issue of voluntariness of plea.27

This statement seems very different from the assertion that a guilty plea should be set aside whenever the plea would not have been entered had there not been a coerced confession. Indeed, the court of appeals emphasized that a violation of constitutional rights would not, standing alone, call the validity of a guilty plea into question.

In *United States ex rel. Richardson v. McMann*,28 another of the cases that came before the Supreme Court, the Second Circuit said:

The existence or threatened use of a coerced confession may not itself render the guilty plea involuntary. A defendant

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26. *Id.* at 1022 (emphasis in original).
27. *Id.* at 1021.
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who has a basis for claiming that his confession was coerced may nevertheless elect to forego that claim and to plead guilty—whether because of "his own knowledge of his guilt and a desire to take his medicine," . . . because "he also knows that other admissible evidence will establish his guilt overwhelmingly," . . . because he prefers to plead guilty to a lesser charge rather than run the risk of conviction on a more serious charge; or because for some other reason he determines that it is in his best interest to plead guilty.\(^2\)

The Second Circuit thus asserted what the *McMann* opinion went to elaborate pains to demonstrate—a defendant may, for tactical reasons, make a binding waiver of the right to challenge the admissibility of a confession. The fact that subsequent developments might show the waiver to have been unwise would not entitle the defendant to relief. All in all, therefore, the Supreme Court's opinion in *McMann* seemed unrelated to both the factual circumstances of the cases before the Court and the legal principles that the court of appeals had applied in resolving these cases. Were it not for the fact that the Supreme Court did vacate the appellate court's judgments, one would be tempted to regard almost the entire *McMann* opinion as dictum.\(^3\)

C. The Issue the Supreme Court Apparently Regarded as Determinative—Whether a Guilty Plea Should Be Set Aside if "Triggered" By an Involuntary Confession

Ironically, although the Second Circuit had never taken the position that the Supreme Court attributed to it, the Supreme Court itself had come very close to doing so. In *Pennsylvania ex rel. Herman v. Claudy*,\(^3\) the Court had said, “[A] conviction following trial or on a plea of guilty based on a confession extorted by violence or by mental coercion is invalid under the Federal Due Process Clause . . . .”\(^4\) The three Justices who dissented in *McMann* relied on this decision, and Mr. Justice Brennan wrote, “[I]f the coerced confession induces a guilty plea, that plea . . . is the fruit of the State's prior

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29. *Id.* at 53.
30. Only the Court's discussion of *Jackson v. Denno* and its significance seems directed to a bona fide issue in the case.
32. *Id.* at 118. The *McMann* majority distinguished this case by noting that it had involved an uncounseled defendant and by confining the apparently unqualified language of the opinion to that situation. 397 U.S. at 767 & n.12. Compare *Harrison v. United States*, 392 U.S. 219 (1968), in which Mr. Justice White argued in dissent that the majority's reasoning would compel the conclusion that "an inadmissible confession preceding a plea of guilty would taint the plea." *Id.* at 234.
illegal conduct, and thus is vulnerable to attack." 33 The Second Circuit had plainly articulated a narrower rationale for its decisions—a rationale that considered, not only whether an allegedly coerced confession had "induced" a guilty plea, but also whether the defendant had knowingly compromised his claim of coercion or had simply pleaded guilty in ignorance of his rights. 34 Although the Supreme Court never considered this narrower rationale, 35 it seems appropriate to examine the issue on which the majority and the dissent took issue—whether a guilty plea triggered by an involuntary confession should be set aside as "fruit of the poisonous tree."

Analysis can begin with a simple though extreme hypothetical case: A coerced confession has been offered at trial, and the defendant, after having been informed of his right to have the confession excluded, has announced that he prefers to allow the confession into evidence. The confession then leads to the defendant's conviction, and

33. 397 U.S. at 79-80 (Brennan, J., dissenting).
34. An involuntary confession can "cause" a guilty plea in either situation. When a defendant has recognized that the admissibility of his confession is problematic and has made a deliberate decision to compromise the issue, the confession "causes" the plea in the sense that the plea would not have been entered had the defendant not confessed. (Of course one can know that the confession was involuntary only if the defendant is able to disregard the compromise that he has made and to litigate the claim of involuntariness that he has knowingly abandoned, but once this hurdle has been crossed, it can be seen in retrospect that an involuntary confession was a sine qua non of the defendant's plea.) Similarly, a defendant unaware of his rights might not have pleaded guilty had he not erroneously assumed that any confession would insure his conviction; again, the prior violation of his rights, if there was one, can be seen as a "cause" of his plea.
35. Perhaps the Court did not address this rationale because it was beyond any refutation that the Court could provide. In essence, the Second Circuit had held that although a defendant could, by entering a bargained plea, knowingly and voluntarily waive a claim that his confession had been coerced, it was necessary to examine the underlying facts to determine whether he had done so. If, for example, the defendant had been unaware of his legal rights at the time that he pleaded guilty, his plea would not constitute an intelligent waiver. Various district courts had acted as though a guilty plea automatically waived the defendant's rights whatever the circumstances, and the Second Circuit held that a denial of relief on the basis of this theory required reversal. Sensible though it was, the Second Circuit's position would apparently have opened the door to hearings that the Supreme Court was unwilling to provide. For Mr. Justice White and his brethren in McMann, the life of the law has apparently not been logic but experience. (At least it has not been logic.)
The position that the Second Circuit had adopted in its guilty-plea rulings was even more clearly articulated in a Fifth Circuit opinion by Judge John Minor Wisdom:

The [guilty] plea represents the relinquishment of a bundle of defenses, and has no magical implications with regard to finality beyond that. The whole does not exceed the sum of its parts. If one of the component waivers was ineffective because of the inadequate knowledge upon which it was made, the defect is not cured by virtue of the fact that the waiver was made implicitly, as part of a guilty plea.

United States v. Lucia, 416 F.2d 920, 923 (5th Cir. 1969), modified en banc, 423 F.2d 697 (1970), cert. denied, 402 U.S. 943 (1971). (A majority of the Fifth Circuit, en banc, affirmed the result but withdrew the section of Judge Wisdom's opinion containing the above analysis.)
the defendant maintains that his conviction is "fruit of the poisonous tree." He notes that he would not have been convicted were it not for the state's prior illegal action. In this situation, the defendant's conviction would surely be valid. His intervening choice would undoubtedly be held to "dissipate the taint" of the illegal methods by which the confession was obtained.

This illustration is, of course, entirely unreal. In all probability, no defendant would "knowingly and voluntarily" choose to be convicted on the basis of a coerced confession. Nevertheless, the illustration directs attention to an issue that the dissenting Justices seemed to ignore in *McMann*—the quality of a defendant's choice. If, as I believe, bargained guilty pleas are inherently involuntary, they certainly should not "dissipate the taint" of prior violations of a defendant's constitutional rights. The dissenting Justices, however, apparently did not intend to challenge the constitutionality of plea bargaining; and if, in other contexts, a bargained guilty plea is seen as reflecting a voluntary choice, it is difficult to understand why this choice, when made with understanding, should not "dissipate the taint" of the methods by which a coerced confession has been obtained.

If it is permissible for a defendant to compromise the basic issue of his guilt or innocence through plea bargaining, I see no reason why he should be unable to compromise the question of the voluntariness of his confession in the same way. From my perspective, therefore, the constitutional vice in *McMann* did not lie in the fact that coerced confessions were a *sine qua non* of the defendants' pleas but rather in the inherent pressures of the guilty-plea system.

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36. See text accompanying notes 159-232 infra.

37. This statement considers only the dissipating effect of a *bargained* guilty plea, and the defendants in *McMann* did plead guilty to offenses less serious than those with which they were charged initially. Despite the majority's intimations to the contrary, it is doubtful that, in the absence of bargaining, a defendant would choose to plead guilty simply because a confession would probably be held inadmissible. So long as there was any chance that the confession might be excluded, it would apparently be in the defendant's interest to secure a judicial ruling on the issue unless he had been offered some concession for foregoing that right. The question that divided the majority and the dissent in *McMann* therefore seems likely to arise only in the context of guilty-plea bargaining, and I believe that the propriety of this bargaining is ultimately determinative of the issue.

38. I again emphasize that I am referring only to the situation in which a defendant has *knowingly* compromised a constitutional claim through plea bargaining. To ask after the fact whether a constitutional violation was a *sine qua non* of the defendant's plea would make this sort of compromise impossible. The defendant would be permitted to litigate his claim as though the compromise had not been made, and if the claim were upheld, the compromise would be set aside. Under the premises of the guilty-plea system, therefore, the compromise of a constitutional claim should probably "dissipate the taint" of any unconstitutional action that gave rise to the claim. A bargained guilty plea entered in ignorance of the defendant's rights, however, should not be considered an "accord and satisfaction" and should not have this dissipating effect. See text accompanying notes 108-20 infra.
D. A More Basic Issue—The Significance of Jackson v. Denno and Its Retroactive Application (Herein Also of Some Post-Trilogy Decisions That Seem to Depart From McMann)

Once New York's pre-Jackson v. Denno procedures are added to the picture, even a defender of guilty-plea bargaining could reasonably disagree with the ruling in McMann. The defendants in this case confronted not only the inherent pressures of the guilty-plea system (promises of leniency in exchange for their pleas) but threats that, if they stood trial, the trials would not be fair. As a descriptive matter, the defendants and their attorneys may have been required to weigh the prospect of a constitutional challenge to New York's procedures against the advantages of entering pleas of guilty. The significant question, however, is why the defendants and their attorneys should have been required to weigh this factor—why the threat of an unfair trial is a permissible one for the state to inject into the plea-determination process. 39

To say that when a defendant admits his guilt "he does so under the law then existing" is plainly to beg this question. When a constitutional decision is applied retroactively, defendants who have been convicted at trial are afforded relief from the unfair procedures that have brought about their convictions. The fact that these defendants were convicted "under the law then existing" is not regarded as determinative. When exactly the same procedures have brought about the conviction of other defendants on pleas of guilty, it is not at all apparent why they should be denied the same relief. 40

The Supreme Court agreed that a conviction at trial need not "stop the clock" on evolving concepts of justice, but it apparently concluded that a plea of guilty should preclude the application of new judicial insights. In adopting this position, the Court may not have fully considered its implications, and indeed, in post-McMann decisions, the Court has retreated from the seemingly unqualified position that it adopted in McMann.

The departure from McMann began sub silentio in Robinson v. Neil. 41 After the defendant in Robinson had been tried and convicted

39. In fact it seems doubtful that the defense attorneys in McMann considered the possible unconstitutionality of New York's pre-Jackson v. Denno procedures—and even more doubtful that the defendants in McMann secured any discount in their sentences by forgoing challenges to these procedures.

40. McMann illustrates how quickly the Supreme Court can alter its fundamental approach to a basic legal question. The Court first applied a ruling on criminal procedure prospectively in 1965. Linkletter v. Walker, 381 U.S. 618 (1965). Five years later, the Court seemed to hold in McMann that virtually all criminal procedure rulings would be applied only prospectively for all criminal defendants save the small minority who have exercised the right to trial.

of assault and battery in a Tennessee municipal court, a state grand jury returned an indictment against him for assault with intent to murder. Although this indictment was apparently based on the same acts that had been alleged in the municipal court prosecution, the defendant pleaded guilty. At the time of his guilty plea in 1962, he had little basis for a claim that the state's felony prosecution violated the federal constitution by twice placing him in jeopardy for the same offense. The Supreme Court had not yet held the double jeopardy provision of the fifth amendment applicable to the states, and the Court's ruling in *Waller v. Florida* that states and municipalities should not be viewed as separate sovereignties in applying the double jeopardy principle was eight years in the future. Neither the Supreme Court nor the parties, however, adverted to *McMann* or attached significance to the fact that the defendant had pleaded guilty. As they saw it, the question in *Robinson* was simply whether *Waller* should be applied retroactively. When the Court answered this question in the affirmative, it unanimously held that habeas corpus relief would be appropriate. The Court's opinion by Mr. Justice Rehnquist did not suggest that the defendant had pleaded guilty "under the law then existing" or that, because he had been represented by a reasonably competent attorney, his guilty plea foreclosed any inquiry into the merits of his double jeopardy claim.

Of course *Robinson* should not be read as resolving an issue that the Supreme Court did not consider. Nevertheless, the fact that the case proceeded through three tiers of the federal judicial system without advertence to the issue on the part of any lawyer or judge indicates that *McMann*'s concept of "half-retroactivity" does not accord with an intuitive sense of justice and, indeed, does not correspond to the way in which lawyers and judges naturally formulate the issue when a problem of retroactivity is presented.

Although *Robinson*'s departure from *McMann* may have been inadvertent, the Supreme Court considered a similar issue and effectively reaffirmed the *Robinson* result in *Blackledge v. Perry*. Again the defendant had been tried and convicted of misdemeanor assault. Unlike the defendant in *Robinson*, however, he had been convicted in a lower state court and then had sought a trial de novo in a state court of general jurisdiction. Before this trial de novo could be held, a grand jury had indicted the defendant for felonious assault. Al-

though the indictment was based on the conduct that had been alleged in the misdemeanor prosecution, the defendant pleaded guilty.

Without considering the defendant’s double jeopardy claim, the Supreme Court held the felony prosecution unconstitutional as a matter of due process. The Court invoked its 1969 ruling in North Carolina v. Pearce, observing that the prosecutor might have sought the felony indictment to penalize the defendant for asserting his right to a trial de novo. The Court concluded that invalidation of the felony prosecution was necessary to eliminate this possibility of prosecutorial “vindictiveness.”

The Court then considered the state’s argument that the defendant’s competently counseled guilty plea precluded inquiry into the claim that his felony prosecution was unconstitutional. In support of this argument, the state had relied, not only on McMann and the other cases of the guilty-plea trilogy, but also on Tollett v. Henderson, a more recent decision that had held a guilty plea an absolute bar to a claim of unconstitutional racial discrimination in the selection of a grand jury. The Supreme Court concluded that there was a “fundamental distinction” between these prior cases and Perry:

Although the underlying claims presented in Tollett and the Brady trilogy were of constitutional dimensions, none went to the very power of the State to bring the defendant into court to answer the charge brought against him. . . . In the case at hand, by contrast, . . . [h]aving chosen originally to proceed on the misdemeanor charge in the District Court, the State of North Carolina was . . . simply precluded by the Due Process Clause from calling upon the respondent to answer to the more serious charge in the Superior Court. . . . [T]he right that [the defendant] asserts and that we today accept is the right not to be haled into court at all upon the felony charge. . . .

That being so, it follows that his guilty plea did not foreclose him from attacking his conviction in the Superior Court proceedings through a federal writ of habeas corpus.

The Court did not explain the significance of the distinction that it drew. The defendant in Perry was presumably represented by a competent attorney, and this attorney had as much opportunity to

47. See text accompanying notes 84-94 infra.
assert claims that would have precluded the defendant's second trial as he had to assert any other claims. It seems well established that most constitutional claims that can bar a defendant's trial—double jeopardy, speedy trial, and presumably the due process claim involved in Perry itself—can be waived.\textsuperscript{49} If the guilty pleas in the prior cases precluded inquiry into the rights there asserted, it is not apparent why the guilty plea in Perry did not have the same effect.

Indeed, a defendant fully aware of a double jeopardy or due process objection to a pending prosecution might knowingly sacrifice this claim in exchange for sentencing concessions; he might recognize that if a pretrial hearing on his claim resulted in an adverse ruling, his bargaining position would be severely weakened.\textsuperscript{50} Given the premises of the guilty-plea system, this sort of knowing compromise of a disputed legal issue should presumably be upheld, yet the Perry opinion did not discuss the quality of the defendant's choice and thus left open the possibility that even a defendant who had knowingly abandoned a right "not to be haled into court at all" could later undo the compromise and secure relief.

Although the Court may thus have intimated that a guilty plea could never bar inquiry into a claim of the sort that the defendant asserted, it seems very doubtful that the Supreme Court would actually grant relief in a case of knowing waiver. Implicit in the Court's opinion may have been a recognition that Perry was not such a case. In a plain departure from its approach in McMann, the Supreme Court refused to presume a sufficiently knowing waiver simply because the defendant had been represented by competent counsel. It would have been entirely sensible for the Court to recognize that there had not been a knowing waiver. The decision in North Carolina v. Pearce was only four months old at the time of the defendant's guilty plea, and it would not have been apparent, even to a reasonably competent attorney, that a decision restricting a judge's power to impose a more severe sentence following a retrial for the same offense could preclude prosecutions based on possible prosecutorial "vindicativeness" altogether. If the Court was unwilling to apply the McMann fiction in Perry, however, the question remains why it created the fiction in McMann. In McMann, the absence of a knowing waiver or compromise had seemed equally clear.\textsuperscript{51}


\textsuperscript{51} The Supreme Court suggested a second possible distinction between Perry and the
Because the Court offered no explanation of why a right not to be "called to answer" should be treated differently from other rights, it is difficult to tell what rights fall into this apparently exceptional category. One might have thought, for example, that a defendant could not be "haled into court" in the absence of a constitutionally valid indictment, but prior to Perry, Tollett v. Henderson had held that a competently counseled guilty plea foreclosed any inquiry into this issue. The Perry opinion explained that the invalid indictment in Tollett did not prevent the defendant from being called to answer because a new and properly constituted grand jury could have returned a different indictment. Thus, although the defendant in Tollett could not properly have been called to answer in the proceedings that resulted in his conviction, the fact that he could have been called to answer in a different proceeding was apparently enough to foreclose his constitutional claim.

One might also have thought that a successful challenge to the constitutionality of the statute that a defendant had been accused of violating would constitute an absolute bar to his prosecution. This defect could not be remedied by securing a new indictment or even by passing a new, properly drafted statute, for a new statute could not be applied ex post facto to conduct that had occurred prior to its prior cases when it said, "Unlike the defendant in Tollett, Perry is not complaining of 'antecedent constitutional violations' or of a 'deprivation of constitutional rights that occurred prior to the entry of the guilty plea.'" 417 U.S. at 30. Again, however, the Court did not explain what difference this circumstance should make. The defendant's attorney, by filing a motion to dismiss the indictment, could have challenged the "contemporaneous" violation of the defendant's rights as easily as he could have challenged any "antecedent" violation, but he did not do so. If the entry of a plea of guilty precludes inquiry into "antecedent" violations, it is difficult to understand why it does not preclude inquiry into "contemporaneous" violations as well.

If the Court's distinction mattered, moreover, there is a clear sense in which the alleged violation of the defendant's rights in Perry was antecedent to his plea. The Court emphasized that the defendant could not constitutionally have been haled into court, yet the defendant had obviously been indicted and brought into court prior to the entry of his plea. Indeed, by filing a motion to dismiss the proceedings, the defendant could have secured a judicial resolution of his constitutional claim before he pleaded.

Finally, it is not at all apparent that the defendants in the prior cases were complaining of "antecedent" violations of their rights. In McMann, each defendant did, of course, allege that an "antecedent" constitutional violation had occurred at the time that his confession was obtained. It was, however, a somewhat different constitutional violation—one that would occur at trial when the involuntary confession was received in evidence—that had allegedly motivated his plea. This "contemporaneous" or, perhaps, "threatened subsequent" violation supplied the basic grievance. Moreover, there was even more clearly no "antecedent" violation of the defendant's constitutional rights in Brady v. United States, where the defendant claimed that his guilty plea had been induced by the threat that an unconstitutional death sentence would be imposed following a trial.

52. 417 U.S. at 30.
enactment. Nevertheless, Mr. Justice Powell recently filed a dissenting opinion in which Mr. Justice Stewart, the author of the Perry opinion, joined; in it, he rejected the view that a competently counseled defendant who had pleaded guilty could ever challenge the constitutionality of the statute under which he had been prosecuted.

The plaintiffs in Ellis v. Dyson, a federal civil rights action, had previously pleaded nolo contendere to a charge of violating a loitering ordinance. They sought a declaratory judgment that the ordinance was unconstitutional and an order requiring expunction of their records of arrest and conviction. The Supreme Court majority held that the trial court had improperly invoked the abstention doctrine of Younger v. Harris in dismissing the complaint and remanded the case—directing the trial court to consider other possible grounds for dismissal. The majority noted that it had no occasion to consider the effect of the plaintiffs' pleas of nolo contendere in the earlier loitering prosecution.

Mr. Justice Powell contended in dissent, however, that "any relief as to petitioners' previous arrests and convictions is barred by their nolo contendere pleas." He argued that the "scope of collateral attack" in a federal civil rights action could be no broader than that permitted in a habeas corpus proceeding, and he said:

If petitioners had been confined as a result of their nolo contendere pleas and thereafter filed habeas corpus petitions in federal court, there can be no doubt that their petitions should have been dismissed. As noted above, the nolo contendere pleas were equivalent to guilty pleas. It is settled that when defendants plead guilty to state criminal charges, they may not seek federal habeas corpus relief on the basis of constitutional claims antecedent to and independent of the guilty pleas.

The Justice added in a footnote:

Nor is this case like Blackledge v. Perry. In that case the Court stated that the due process right at issue, closely analogous to the constitutional double jeopardy bar, was "the right

55. 421 U.S. at 435. Mr. Justice Rehnquist indicated that he joined the majority opinion only because he read it "as intimating no views . . . contrary to those suggested by my dissenting Brethren" on the issues that they discussed (including the significance of the nolo contendere pleas). Id. at 437. Justice Rehnquist's reading of the majority opinion seems entirely accurate on this point.
56. Id. at 438 (Powell, J., dissenting).
57. Id. at 441.
not to be haled into court at all . . . ,' so that "[t]he very initiation of the proceedings . . . operated to deny [petitioner] due process of law." The Court ruled, therefore, that petitioners' guilty plea did not preclude federal habeas corpus relief. In this case, however, petitioners' claim is that the ordinance under which they had been charged is unconstitutional. The alleged constitutional infirmity thus lies not in the "initiation of the proceedings" but in the eventual imposition of punishment that, assertedly, the State cannot constitutionally exact.\textsuperscript{58}

Even under the ill-defined \textit{Perry} standard, Justice Powell's conclusion seems unwarranted. A successful motion to dismiss a charge filed under an unconstitutional statute would plainly preclude not only a defendant's punishment but his trial. Moreover, the Supreme Court held as early as 1879 that prosecution under an unconstitutional statute constituted a "jurisdictional" error—an error that could be asserted in habeas corpus proceedings even under the restrictive view of habeas corpus jurisdiction then prevalent and that could not be waived even by a guilty plea. The Court said in \textit{Ex parte Siebold}:

\begin{quote}
The validity of the judgments is assailed on the ground that the acts of Congress under which the indictments were found are unconstitutional. If this position is well taken, it affects the foundation of the whole proceeding. An unconstitutional law is void, and is as no law. . . . A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment. . . . \textit{[P]ersonal liberty is of so great moment in the eye of the law that . . . the question of the court's authority to try and imprison the party may be reviewed on habeas corpus} . . . .\textsuperscript{59}
\end{quote}

Despite Justice Powell's assertion that there could be "no doubt" that habeas corpus petitions by persons in the plaintiffs' situation should be dismissed, the \textit{Siebold} doctrine has been consistently ap-

\textsuperscript{58} Id. at 441-42 n.7 (citations omitted).

\textsuperscript{59} 100 U.S. 371, 376-77 (1879). \textit{Siebold} apparently did not present an issue of waiver but merely a question of whether the defendant's claim was cognizable in a habeas corpus proceeding. Nevertheless, answering one question necessarily answered the other, for the concept of "jurisdictional error" was used both to determine what claims could be heard in habeas corpus and to determine what claims could not be waived. For that reason, one virtually never discovers a discussion of waiver in early habeas corpus cases. For an early holding that a guilty plea does not waive an objection to the validity of an indictment, see Fletcher v. State, 12 Ark. 169 (1851).
plied, even in guilty plea cases, throughout the twentieth century. Indeed, in a habeas corpus decision in 1921, the Supreme Court itself resolved a challenge to the constitutionality of a criminal statute on the merits despite the fact that the petitioner had pleaded guilty to violating this law. Before courts began insisting on knowing waivers in constitutional adjudication, the standard judicial rubric was merely that a guilty plea waived nonjurisdictional defects in the proceedings. The doctrine was, in fact, sometimes stated more narrowly: “[A] plea of guilty waive[s] all defenses other than that the indictment charged no offenses under the laws . . . .” That Justices Powell and Stewart would have undone even this basic limitation on the scope of a guilty-plea waiver illustrates how our current dependency on guilty pleas has altered judicial attitudes.

The Court and individual Justices seem to be foundering in their efforts to apply the Perry standard. The Court has apparently recognized that the McMann logic sometimes leads to unacceptable results, but it has not found a meaningful device for separating claims that should survive a guilty plea from claims that should not. It is difficult to perceive any coherent policy in the proposition that a claim for speedy trial may survive a guilty plea while a claim that a defendant has been charged under an unconstitutional statute may not. In affording special status to claims that attack “the very power of the State to bring the defendant into court,” the Supreme Court seemed to reach for something like the concept of “jurisdictional error” that once determined the scope of the habeas corpus remedy in guilty-plea and non-guilty-plea cases alike. Even under that now-abandoned concept, however, the courts were more successful in developing sensible policy than they seem likely to be under the standard of Blackledge v. Perry.

A more thorough-going retreat from McMann seems necessary, and the case that Justice Powell addressed in Ellis v. Dyson—that of a defendant who has pleaded guilty to violating an unconstitutional

60. See, e.g., Gesicki v. Oswald, 336 F. Supp. 371, 374 n.3 (S.D.N.Y. 1971), aff’d, 406 U.S. 913 (1972); Annot., 32 A.L.R. 1054 (1924). Moreover, the Fourth Circuit recently held that under the doctrine of Blackledge v. Perry a defendant could, even following a guilty plea, challenge the constitutionality of the statute that he had been accused of violating. United States v. Bluso, 519 F.2d 473 (4th Cir. 1975).


63. Rice v. United States, 30 F.2d 681 (5th Cir. 1929); accord, Kachnic v. United States, 53 F.2d 312, 315 (9th Cir. 1931).
statute—suggests two basic defects of the *McMann* approach. First, the case illustrates the inequity of *McMann*'s concept of half-retroactivity. A defendant, by his plea, might have admitted conduct that the Supreme Court has subsequently held may not be punished at all. For example, he might have pleaded guilty to entering an interracial marriage at a time when statutes prohibiting miscegenation were considered valid. Were it not for Justice Powell’s opinion in *Ellis*, it would seem almost unthinkable that the Supreme Court would continue to hold this defendant in prison for his constitutionally protected behavior and would reassert its *McMann* contention that “when the defendant . . . admits his guilt, he does so under the law then existing.” Once the Supreme Court has ruled that certain acts or omissions are constitutionally protected, it would be manifestly unfair to apply this ruling retroactively only to defendants who have stood trial, and once this point is recognized in the context of a guilty plea to a charge of violating a retroactively invalidated statute, the practice of treating guilty-plea defendants differently from trial defendants in other retroactivity cases would surely require greater justification than the Supreme Court has provided.

Second, the sort of case that Justice Powell addressed illustrates that even a knowing waiver or a deliberate compromise need not always be conclusive. A defendant charged with miscegenation, with picketing at a shopping center, or with performing a medically safe abortion might have recognized a possible constitutional defense to the charge against him, but after consulting with a highly competent attorney, he might have decided to compromise this substantive constitutional defense through plea bargaining. It might have been only after the entry of his guilty plea that the Supreme Court effectively sustained the contention that he had deliberately abandoned. The defendant, in the face of “unavoidable uncertainty,” might have made an intelligent choice, but it plainly would be unfair—and functionless—to insist that he continue to live with this choice in prison.

In fact, the problem of the guilty plea to an invalid charge has arisen in a number of post-*McMann* cases. In *Leary v. United States*, 4 the Supreme Court effectively invalidated a federal statute that required a person who acquired marihuana to register and pay a tax. The Court concluded that this statute compelled marihuana purchasers to incriminate themselves in violation of the fifth amendment. 5 Lower federal courts then considered a series of cases in

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65. Some early interpretations of *Leary* suggested that the Court had not technically invalidated the Marihuana Tax Act. Instead the Court had created a “complete defense” to
which defendants had pleaded guilty to offenses created by the unconstitutional statute. A few courts, relying on McMann, held that these defendants could properly be punished for their failure to sacrifice fifth amendment rights; they had pleaded guilty "under the law then existing." Most courts, however, apparently recoiled from the prospect of imposing punishment for non-offenses and in effect concluded that the Supreme Court could not have meant what it said. If these courts were correct, it is apparent that the presumed compromise of a constitutional defense need not be conclusive in the light of subsequent judicial developments which show the compromise to have been unfair.

prosecution under the Act—a defense that might be waived by the entry of a plea of guilty. See, e.g., Jones v. United States, 305 F. Supp. 465 (C.D. Cal. 1969), vacated and remanded, 447 F.2d 991 (9th Cir. 1971). This reading of Leary derived support from the Supreme Court's indication that a timely assertion of the privilege against self-incrimination might be required, 395 U.S. at 27, and from the fact that corporations, which do not enjoy the privilege against self-incrimination, could presumably be convicted of violating the Marihuana Tax Act even after Leary. A year after its decision, however, the Court clarified the situation. In an opinion that did not mention Leary specifically, but that did address an analogous situation involving taxes on gambling, the Court made it apparent that Leary would be applied retroactively, and that a non-corporate defendant's failure to pay the marihuana transfer tax would be treated as "constitutionally immune from punishment." The Court's view was plainly that the line of self-incrimination cases that included Leary had "dealt with the kind of conduct that cannot constitutionally be punished in the first instance." United States v. United States Coin & Currency, 401 U.S. 715, 723 (1971). See United States v. Bluso, 519 F.2d 473 (4th Cir. 1975).


67. See, e.g., Flores v. United States, 472 F.2d 569 (6th Cir. 1973); United States v. Broadus, 450 F.2d 639 (D.C. Cir. 1971); Hupert v. United States, 448 F.2d 668 (8th Cir. 1971); Bannister v. United States, 446 F.2d 1250 (3d Cir. 1971); Scogin v. United States, 446 F.2d 416 (8th Cir. 1971); Harrington v. United States, 444 F.2d 1190 (5th Cir. 1971); United States v. Liguori, 430 F.2d 842 (2d Cir. 1970), cert. denied, 402 U.S. 948 (1971).

68. Two variations on the Leary problem merit separate mention. First, a defendant may have been charged with violating a valid criminal statute—one prohibiting the sale of marihuana, for example—and he may then have entered a bargained guilty plea to an offense created by the unconstitutional Tax Act. In this situation, the Tax Act violation would probably have been selected somewhat arbitrarily for reasons of convenience. The defendant would presumably have been willing to plead guilty to any other marihuana-related offense that fit his conduct—so long as it carried a penalty no greater than that of the Tax Act. To grant relief on the basis of Leary would therefore be a serendipity for the defendant; he would, by chance, have entered his plea-of-convenience to an offense that the Supreme Court later held unconstitutional. In such a case, there would, given the premises of the guilty-plea system, be no genuine unfairness in requiring the defendant to adhere to his intelligent compromise of the valid charges against him, and a court might therefore be tempted to deny relief.

This "realistic" analysis would rest, however, upon a recognition that punishment had been imposed for something other than the offense of which the defendant was convicted. The defendant might respond, "I have never admitted anything beyond a failure to pay the marihuana transfer tax—something that the Supreme Court has now held cannot be punished.
II. THE SECOND CASE OF THE TRILOGY, "PARKER V. NORTH CAROLINA: ABANDONMENT OF THE REQUIREMENT OF A KNOWING WAIVER BECOMES A BIT MORE APPARENT"

The significance of the "McMann" opinion becomes more readily apparent when one examines the second case of the guilty-plea trilogy, "Parker v. North Carolina." Like the defendants in "McMann," the defendant in "Parker" alleged in a post-conviction hearing that an involuntary confession had induced his plea of guilty. The Supreme Court upheld the validity of the defendant's plea, saying that "the advice the defendant received was well within the range of competence required of attorneys representing defendants in criminal cases." 70

Certainly I cannot be imprisoned on the theory that I am probably guilty of other crimes or would probably have been willing to plead guilty to other crimes." Most courts have accepted this argument and have granted relief from bargained Marijuana Tax Act convictions. Some of these courts have noted, however, that, absent any violation of the statute of limitations or of the right to a speedy trial, the defendant might still be prosecuted for the crimes with which he was charged initially. See, e.g., Harrington v. United States, 444 F.2d 1190 (5th Cir. 1971); United States ex rel. Ennis v. Fitzpatrick, 436 F.2d 1201 (2d Cir. 1971).

A few courts have adopted the "realistic" view that a defendant can be punished for a non-offense so long as he has agreed to accept this punishment in the process of compromising a more serious charge. When, for example, a defendant who was charged with a more serious crime has pleaded guilty to a Tax Act violation, the current position of the Ninth Circuit is apparently that he should be denied relief. See Gaxiola v. United States, 481 F.2d 383 (9th Cir. 1973). When a defendant who was charged only with a Tax Act violation has pleaded guilty to that offense, however, relief is available. See Navarro v. United States, 449 F.2d 113 (9th Cir. 1971). For another expression of the distinction between defendants who have been charged initially with Tax Act violations and defendants who have been charged initially with more serious crimes, see Ouilette v. United States, 435 F.2d 21 (10th Cir. 1970).

The second variation on the "Leary" problem is the opposite of the first: A defendant, charged initially with violating the unconstitutional Tax Act, has pleaded guilty to a valid lesser offense. (This situation has not in fact arisen in post-Leary litigation because the Tax Act was, in effect, "the bottom of the ladder" for federal marijuana defendants.) Despite the defendant's plea of guilty under a valid statute, one would strongly suspect that he was, in reality, being punished for his constitutionally protected behavior. This "variation" would probably present a stronger case for relief than the first, and as a doctrinal matter, relief might be justified on the theory that the threat of prosecution under an unconstitutional statute rendered the defendant's guilty plea involuntary. But see Parker v. North Carolina, 397 U.S. 790 (1970); Brady v. United States, 397 U.S. 742 (1970).

The problem arises because it is utterly impossible to tell what a conviction represents under the guilty-plea system. When a court wishes to insure that a defendant is not in fact punished for failing to pay a marijuana transfer tax, it must grant relief in several distinct situations—that in which the defendant has been charged with failing to pay the tax and has pleaded guilty to that offense, in which he has been charged with a greater crime and has pleaded guilty to the Tax Act violation, and in which he has been charged with the Tax Act violation and has pleaded guilty to a lesser offense. In the confusion of the guilty-plea system, defendants whose only "crime" is failure to pay the tax are likely to be found in all three categories.

70. Id. at 797-98.
Remarkably, the Court did not reveal what advice, if any, the defendant had received concerning the significance of his confession. Indeed, the Court implied that evidence on this issue might be unnecessary. The Court seemed to suggest that the defense attorney could be presumed to have advised the defendant that his confession would be admissible simply because the defendant had pleaded guilty:

As we understand it, Parker’s position necessarily implies that his decision to plead rested on the strength of the case against him: absent the confession, his chances of acquittal were good and he would have chosen to stand trial; but given the confession, the evidence was too strong and it was to his advantage to plead guilty and limit the possible penalty to life imprisonment. On this assumption, had Parker and his counsel thought the confession inadmissible, there would have been a plea of not guilty and a trial to a jury. But counsel apparently deemed the confession admissible. ... 71

It would have been only a short step for the Court to hold that a defendant can be presumed to have waived his rights intelligently because it would have been foolish for him to waive his rights unintelligently. 72

In Parker, there was no need for the Court to speculate about the tactical significance of the defendant’s plea of guilty. Unlike the defendants in McMann, this defendant had been granted a hearing on his petition for post-conviction relief. The undisputed evidence at this hearing indicated that the defense attorney had not discussed with the defendant the possible invalidity of his confession. Thus, the Supreme Court presumed waiver from a record that expressly contradicted the Court’s conclusion.

The defendant in Parker was only fifteen years old at the time of his arrest, interrogation, and conviction. He was arrested at approximately 11:00 p.m., taken to a police station, and questioned unsuccessfully for one or two hours. The defendant testified:

After the questioning ended, I was put in a cell by myself. There was no light in the cell, but there was a light in the hall, and a little of this light came into the cell. There was a drinking fountain in the cell, but no water in it. I stayed in the cell until the next day, but I don’t know what time it was that I

71. Id. at 796-97 (footnotes omitted).
came out. I didn’t get anything to eat. . . . After being taken from the cell, I was questioned again by one of the officers present in the Court today and by Chief Daniels. . . . I told them I wanted to see my lawyer. . . . They told me to tell them what I did. I told them . . . I signed the confession before I went back in the cell. I stayed there about five minutes and the lawyer came. He was the first person I saw other than a policeman . . . . I saw him about fifteen or twenty minutes . . . . I saw my attorney again the day I was tried. My attorney told me that he would do all he could to help me but there was not much he could do, and about the best thing I could do was plead guilty. He asked me about the confession or statement I had given to the police, and he said that since I had given the confession, there wasn’t much he could do and about the best thing I could do was plead guilty.73

The defendant was asked on direct examination, “Did you give any thought to whether or not the police would be permitted to give this statement in evidence at the trial?” The prosecutor objected to the question on unspecified grounds, and inexplicably the trial court ruled the question improper. The defendant’s post-conviction petition had, however, alleged:

The petitioner formed his decision to plead guilty on the basis of advice by counsel. In arriving at this decision, the petitioner did not consider . . . that he would be able to prevent the involuntary confession which he had made to the police, from being used against him at trial . . . .74

The attorney who had represented the defendant at the time of his conviction testified as a witness for the state at the post-conviction

73. Appendix to the Briefs at 41-42, Parker v. North Carolina, 397 U.S. 790 (1970). The Supreme Court commented, “In the record . . . was an abundance of evidence contradicting Parker’s claim of coercion . . . .” 397 U.S. at 795. In fact, the defendant’s description of the length and circumstances of his interrogation and of the denial of his request for counsel was not contradicted by the record in any material respect. The Supreme Court merely relied upon the defendant’s statements that he had not been subjected to threats or promises (statements that the defendant did not dispute except by mentioning in passing that the police had offered to help him all they could) and upon his delay of several months in raising the issue. The defendant’s testimony concerning his relationship with his attorney was consistent with that of the attorney himself, and although the defendant noted that one of the officers who had interrogated him was “present in the Court today,” that officer was not called as a witness. The credibility of the defendant’s testimony seems unimportant, however, for the Supreme Court was apparently willing to assume the truth of this testimony for purposes of decision. 397 U.S. at 796.

hearing. The attorney readily conceded, "I don't specifically recall that I discussed with [the defendant] at all whether or not the law would permit me to keep his confession out of evidence." 75

The defense attorney did report that once, during the one or two occasions when he had visited the defendant in jail, he had "questioned him . . . as to whether or not he was threatened in any manner, whether any promises were made to him and whether he was scared at the time he made the statement. He told me no threats had been made and no promises had been made, and he said he was not scared." 76

A capable attorney probably would not have regarded this conversation as an adequate investigation of the circumstances surrounding the defendant's confession. Although the Supreme Court did not mention the fact, the defendant's interrogation had occurred after the Court's decision in Escobedo v. Illinois 77 and prior to its decision in Miranda v. Arizona. 78 The law of confessions was plainly in a state of flux, and it was doubtful that a person as young as the defendant could make a valid confession in the absence of counsel and in the absence of any warning of his rights. 79 Indeed, the Supreme Court had indicated as early as 1948 that a confession by a fifteen-year-old defendant would be invalid if the defendant had not been afforded access to counsel. 80

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75. *Id.* at 71.
76. *Id.* at 66-67.
79. The Supreme Court did mention the date of the defendant's interrogation in *Parker,* and an astute observer might therefore have detected the presence of an *Escobedo* issue. The Court, however, did not mention *Escobedo* or the defendant's claim that his request for counsel had been denied; it referred only to his claim of "coercion." One might therefore have fallen into the erroneous assumption that *Parker* was a pre-*Escobedo* case.
80. In Haley v. Ohio, 332 U.S. 596, 599-600 (1948), the Court said: [W]hen, as here, a mere [fifteen-year-old] child—an easy victim of the law—is before us, special care in scrutinizing the record must be used . . . . [A] lad of tender years . . . needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, crush him . . . . No lawyer stood guard to make sure that the police went so far and no farther, to see to it that they stopped short of the point where he became the victim of coercion. No counsel or friend was called during the critical hours of questioning. A photographer was admitted once this lad broke and confessed. But not even a gesture towards getting a lawyer for him was ever made.

The defendant in *Haley* had been arrested at midnight and interrogated until 5:00 a.m. The Court assumed that apart from the length of the interrogation the questioning had not been abusive. Unlike the defendant in *Parker,* moreover, the defendant in *Haley* had been advised that his statement could be used against him and that he had a right to remain silent. The Supreme Court nevertheless ruled the confession involuntary. See also Gallegos v. Colorado, 370 U.S. 49 (1962).
Moreover, the defense attorney apparently did not ask about the length of the defendant’s interrogation, the length of his confinement, whether he had been allowed food and water, whether his relatives had been allowed access to him, how many officers had been present at the interrogation, whether the defendant had ever before been inside a police station, how far he had progressed in school, whether he had a history of mental abnormality, or the circumstances of his arrest. Most importantly, the defense attorney did not ask whether the defendant had requested and been denied access to counsel. Under the Escobedo decision, a request for counsel would have been of critical importance in assessing the admissibility of the confession, and the defendant later testified that the police had, in fact, denied his request for legal assistance. Nevertheless, at the post-conviction hearing, the defense attorney said of the Escobedo decision, “Whether I had read it at that time I don’t know.”

An examination of the record in Parker thus gives one a fairly clear idea of what advice the Supreme Court considered “well within the range of competence required of attorneys representing defendants in criminal cases.” Of course a defendant is not entitled to “perfect” or “errorless” counsel, and whether the defense attorney in Parker was “competent” may, to some observers, be a debatable issue. Even if this issue were resolved against the defendant, however, one fact would not be debatable: the defendant did not knowingly waive his right to challenge the validity of his confession.

In Parker, as in McMann, the Supreme Court maintained that whether a guilty plea constitutes a knowing waiver of a defendant’s rights turns on whether he was competently advised by his attorney. There is nothing inherently illogical about this proposition, but if one chooses to adopt it, he must classify as “incompetent” any advice that does not give the defendant an awareness of his rights sufficient to permit the exercise of a meaningful choice. Although, in this sense, the Supreme Court’s reasoning was circular, the Court was unwilling to complete the circle. Instead, it described as competent advice that plainly left a defendant unaware of his constitutional rights.

83. In accepting the logic of the Court’s equation of a knowing guilty plea with a competently counseled guilty plea, one must set aside the case of a defendant who lacks the mental capacity to understand his attorney’s competent advice. This defendant probably could not be convicted of an offense; he would be classified as incompetent to stand trial or to plead guilty.
A. A Post-Trilogy Decision, Tollett v. Henderson: Abandonment of the Requirement of a Knowing Waiver Finally Becomes Explicit

The Supreme Court's implicit abandonment of the requirement of a knowing waiver in *McMann* and *Parker* rose to the surface when the Court decided *Tollett v. Henderson*\(^84\) three years later. In 1948, the defendant in this case had been indicted for murder by a Tennessee grand jury from which blacks had been systematically excluded. He had pleaded guilty and was sentenced to a prison term of 99 years. The defendant testified that, at the time of his plea, he was unaware of the methods by which grand jurors were selected and did not know of his right to challenge the composition of the grand jury. The defendant's attorney reported that he, too, had been unaware of the unconstitutional exclusion of blacks and said that he had not advised the defendant of his right to seek dismissal of the indictment.

Both a federal district court and the United States Court of Appeals for the Sixth Circuit concluded that the defendant was entitled to habeas corpus relief. Judge Anthony J. Celebrezze's opinion for the court of appeals distinguished the guilty-plea trilogy:

That line of cases did not establish a new general test for examining conduct alleged to constitute a waiver of federal rights; in fact it reemphasized the importance of [the requirement of a knowing waiver]. . . . It did not suggest that a valid guilty plea waived the right to challenge all pre-pleading defects when a defendant neither knew nor could have known of the right at the time he entered his plea.\(^85\)

The Supreme Court, in an opinion by Mr. Justice Rehnquist, reversed the judgment of the court of appeals and observed:

In *McMann v. Richardson*, . . . the Court laid down the general rule by which federal collateral attacks on convictions based on guilty pleas rendered with the advice of counsel were to be governed:

"In our view a defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession. Whether a plea of guilty is unintelligent and therefore vulnerable when motivated by a confession erroneously thought admissible in evidence depends as an initial mat-

\(^84\) 411 U.S.58 (1973).

ter, not on whether a court would retrospectively consider counsel’s advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases.”

In *Tollett*, there was no “misjudgment” by the defense attorney and no “advice.” The attorney was concededly ignorant of the problem, and the Supreme Court ultimately agreed that the guilty-plea trilogy was distinguishable. The Court nevertheless concluded that *Tollett* was sufficiently analogous to *McMann* to warrant the same result. Mr. Justice Rehnquist wrote:

If the issue were to be cast solely in terms of “waiver,” the Court of Appeals was undoubtedly correct in concluding that there had been no such waiver here. But just as the guilty pleas in the . . . trilogy were found to foreclose direct inquiry into the merits of claimed antecedent constitutional violations there, we conclude that the respondent’s guilty plea here alike forecloses independent inquiry into the claim of discrimination in the selection of the grand jury.

The Court did not explain why the defendant's guilty plea, if not a “waiver” of his constitutional rights, foreclosed inquiry into whether those rights had been violated. It merely asserted that “a guilty plea represents a break in the chain of events which has preceded it in the criminal process” and that

[when a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, . . . he may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*.

At the end of its opinion, the Court quoted the statement of a judge of the Tennessee Court of Criminal Appeals that “[n]o lawyer in this State would have ever thought of objecting to the fact that Negroes did not serve on the Grand Jury in Tennessee in 1948.” In light of this statement, the Court concluded, “[T]he chances of respondent’s being able to carry the necessary burden of proof in challenging the guilty plea would appear slim.” The Court nevertheless

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86. 411 U.S. at 264.
87. *Id.* at 266.
88. *Id.* at 267. For a discussion of one possible interpretation of this language—that advanced by Mr. Justice White and three other Justices in *Lefkowitz v. Newsome*, 420 U.S. 283 (1975)—see text accompanying notes 95-107 *infra*.
89. 411 U.S. at 269. The Court reached this conclusion without exploring the reasons
remanded the case for further consideration of this issue—"if it be open to respondent under federal habeas practice . . .".\(^90\)

If the Supreme Court had focused more on the character of the right that the defendant asserted and less on the supposed difference between a plea of guilty and a conviction at trial, I believe that it could have written a sound opinion in support of its result.\(^91\) Defendants may be permitted to challenge the racial composition of grand juries for two basic reasons—to protect their own right to an unbiased determination of probable cause and to advance the public's interest in abolishing racial discrimination in the administration of justice. The Supreme Court has, in fact, permitted defendants to challenge the composition of grand juries even after their conviction by properly selected trial juries,\(^92\) and in this situation, it seems doubtful that the Court's rulings can be explained in terms of insuring fair procedure for the defendants themselves. A finding of guilt beyond a reasonable doubt by a properly constituted trial jury plainly establishes probable cause to place the defendant on trial and more. Defects in the initial determination of probable cause can therefore be seen, in retrospect, not to have affected substantial rights of the defendant.\(^93\)

why few if any lawyers would have "thought of objecting to the fact that Negroes did not serve on the Grand Jury in Tennessee in 1948." If Tennessee lawyers acquiesced in an unconstitutional practice simply because they approved of it or because they would have incurred personal resentment by challenging it, that fact would not suggest that their clients had received the effective assistance of counsel but just the reverse. In *Tollett*, the court of appeals conceded that the defense attorney's performance had been "competent; judged by the time and place at which it was given," but it nevertheless characterized this performance as "grossly inadequate in light of the clearly established law of the period." Henderson v. Tollett, 459 F.2d 237, 242 n.5 (6th Cir. 1972), rev'd, 411 U.S. 258 (1973). *Cf.* The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932) (L. Hand, J.) ("there are precautions so imperative that even their universal disregard will not excuse their omission").

\(^90\) 411 U.S. at 269. Mr. Justice Marshall, in a dissenting opinion joined by Mr. Justice Douglas and Mr. Justice Brennan, emphasized some additional differences between *Tollett* and *McMann*. In *Tollett*, there was no question of evaluating a guilty plea by current law rather than "the law then existing;" indictments by grand juries from which blacks had been systematically excluded had been held invalid for almost 100 years. Mr. Justice Marshall also observed that the guilty-plea trilogy was "premised on the notion of bargain and exchange." *Id.* at 271. Because the defendant in *Tollett* was never informed of his rights, he could not have sacrificed those rights to gain some advantage. The dissent concluded that the defendant had "amply demonstrated that he is entitled to relief on any acceptable theory of voluntariness, right to effective assistance of counsel, or waiver . . . ." *Id.* at 269.

\(^91\) Indeed, the Court could have rejected the defendant's contentions without remanding the case for further proceedings.


\(^93\) See Cassell v. Texas, 339 U.S. 282, 302 (1950) (Jackson, J., dissenting). Mr. Justice Jackson noted that a state is not required to secure a grand-jury indictment before placing a person on trial and that a grand jury need not be unanimous to indict. These facts made it especially doubtful that defects in the composition of a grand jury could be seen as affecting a
To require a fresh determination of probable cause and a new finding of guilt in one sense seems an idle gesture; at the same time, affording this remedy may provide the only effective means of correcting an unconstitutional practice that would otherwise persist.

In Tollett, the defendant had not been convicted by a trial jury, but had pleaded guilty. If what I regard as the inherent dangers of any bargained guilty plea are set aside, the defendant’s plea can be seen as establishing his guilt beyond a reasonable doubt. Defects in the grand jury’s finding of probable cause again seem harmless in the sense that they did not affect substantial rights of the defendant; public administrative interests must apparently become the dominant concern. These public interests were, however, ephemeral or nonexistent in Tollett. The defendant had been indicted 25 years before his case came before the Supreme Court, and there was no reason to suppose that the unconstitutional practices of Tennessee’s past generation still required corrective measures of any kind. Habeas corpus relief in Tollett was therefore unnecessary either to insure fairness to the defendant himself, or to protect public interests. Because this relief would serve no valid function, the lower courts erred in granting it.

This rationale for the result in Tollett would apply equally to a case in which a defendant who had been convicted at trial sought years later to challenge the racial composition of the grand jury that had indicted him. The possible interests of the defendant would remain the same, and so would the public interest in preserving the finality of his conviction. Nevertheless, Tollett expressly left open the possibility that a defendant convicted at trial might later secure habeas corpus relief by challenging the propriety of his indictment. Rather than balance the harms and benefits of affording relief by examining the objectives of the right in question, the Court relied on the magic of a guilty plea to justify its result.

B. Mr. Justice White’s Current View of Tollett and the Guilty-Plea Trilogy

In a recent dissenting opinion joined by three other Justices, Mr.

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defendant’s right to fundamental fairness after his conviction by a unanimous, fairly selected trial jury.

94. 411 U.S. at 260-61 n.1. In a decision announced the same day as Tollett, the Court indicated that a federal defendant convicted at trial would be foreclosed from challenging the composition of the grand jury that had indicted him when he had not raised the issue prior to trial, when the facts giving rise to the challenge were known or discoverable prior to trial, and when no prejudice was shown. Davis v. United States, 411 U.S. 233 (1973) (decision based on Fed. R. Crim. P. 12(b)(2)).
Justice White, the author of the guilty-plea trilogy, offered a more complete explanation of Tollett’s somewhat cryptic language. New York statutes now permit defendants to appeal the denial of motions to suppress unlawfully seized evidence and unlawfully obtained confessions even after the entry of pleas of guilty. These statutes reflect a sensible recognition that rulings on pretrial motions can effectively resolve the case against a defendant and that very little function is served by a trial that a defendant demands solely to preserve his right to appeal pretrial rulings. The issue in Lefkowitz v. Newsome was whether a defendant whose guilty plea in a state court plainly had not waived a federal constitutional claim as a matter of state law would nevertheless be foreclosed from asserting that claim in federal habeas corpus proceedings.

The Supreme Court majority, in an opinion by Mr. Justice Stewart, concluded that the significance of a guilty plea is determined by the law of the jurisdiction that conducts the proceedings in which the plea is entered. The Court observed that in most states:

A defendant who chooses to plead guilty rather than go to trial in effect deliberately refuses to present his federal claims to the state court in the first instance. Once the defendant chooses to bypass the orderly procedure for litigating his constitutional claims the State acquires a legitimate expectation of finality in the conviction thereby obtained. It is in this sense, therefore, that ordinarily “a guilty plea represents a break in the chain of events which has preceded it in the criminal process.”

Because New York had “chosen not to treat a guilty plea as such a ‘break in the chain of events’ with regard to certain types of constitutional claims,” however, a defendant who had pleaded guilty in New York would not be barred from asserting these claims in federal habeas corpus.

Justice White’s dissenting opinion objected that the majority had seriously misread Tollett and the guilty-plea trilogy:

[N]either the petitioner in McMann nor the petitioner in Tollett had “deliberately bypassed” state procedures for raising the coerced confession or grand jury discrimination claims there involved. Indeed, the entire majority opinion rests on the erroneous notion that we refused to hear antecedent con-

95. N.Y. CRIM. PROC. L. §§ 710.20(1)-(3), 710.70(2).
97. Id. at 289.
institutional claims in *McMann* and *Tollett* because the defendants had "bypassed" those claims by pleading guilty. In fact, those decisions were based on the substantive proposition that the defendants' guilt in those cases, and the State's consequent absolute right to incarcerate them, was established by their voluntary and intelligent pleas of guilty. . . . Similarly, here, Newsome's guilt has been established by as reliable a method as is known to the criminal law—his solemn admission of guilt, made in open court. 88

Justice White later reiterated the same theme even more forcefully:

*[T]he [majority's] contentions assume that the *Brady* trilogy was based upon notions of waiver. In other words, it assumes that this Court has in the past refused to set aside "guilty pleas" on the basis of antecedent violations of constitutional rights only because the plea was deemed to have "waived" those rights. This assumption finds some support in the language of those cases, but waiver was not their basic ingredient. . . . [F]ederal constitutional principles simply preclude the setting aside of a state conviction by a federal court where the defendant's guilt has been conclusively established by a voluntary and intelligent plea of guilty. Labels aside, a guilty plea for federal purposes is a judicial admission of guilt conclusively establishing a defendant's factual guilt. Newsome's plea plainly qualifies.* 89

In *McMann*, Justice White had characterized a guilty plea as "a waiver of the right to contest the admissibility of any evidence the State might have offered against the defendant." 100 He had said that if a defendant had pleaded guilty when he considered a crucial confession inadmissible, his plea was "nothing less than a refusal to present his federal claims to the state court in the first instance." 101 These statements aside, Justice White could certainly have written a simpler opinion in *McMann* if the analysis that he offered in *Newsome* had indeed been decisive in the earlier case. There would have been no need to discuss the inherent uncertainty that confronts defendants and their counsel or to explore the significance of an attorney's mistaken strategic judgment. It would have been enough for the Court to have said: "These defendants have solemnly admitted their guilt, and that being so, we do not care what may have happened to them.

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88. *Id.* at 295-98 (footnotes omitted).
89. *Id.* at 299 (footnotes omitted).
100. 397 U.S. at 766.
101. *Id.* at 768.
in the past. The whole purpose of criminal proceedings is to determine whether a defendant is guilty, and once that question is satisfactorily answered in the affirmative, the state's consequent right to incarcerate the defendant is established absolutely."

Surely, however, Justice White and the other dissenters in Newsome would recognize limitations on the view that guilt is all that matters. Even a guilty defendant is entitled in some sense to "know the score" before he is convicted on a plea of guilty. If, to take an extreme example, a prosecutor or trial judge has deliberately misled a defendant concerning the nature of the state's evidence or the sentence that would be imposed following a guilty plea, presumably neither Justice White nor any other member of the Supreme Court would dissent from the view that the resulting guilty-plea conviction was invalid. In this situation, the defendant's plea would provide as reliable a demonstration of his guilt as if the official representations or promises had been true, but few would argue that, because the defendant's guilt was clear, his conviction could not violate the Federal Constitution. The state does not have a "consequent right to incarcerate" a guilty defendant whose waiver of the right to trial has been induced by official deception. Similarly, its right to incarcerate a defendant whose plea has resulted from ignorance of the rights that he would have enjoyed at trial requires greater demonstration than Justice White offered in either Newsome or the guilty-plea trilogy.

Of course, no one suggests that an unattainable perfect knowledge is necessary before a defendant can enter a valid guilty plea. The task of the Court in McMann and Tollett was to draw a line somewhere between perfect knowledge and official deception and to specify the extent to which even a guilty defendant is entitled to "know the score" before waiving his right to trial. For that reason, it would not have constituted an answer to the question raised by these cases to have asserted very forcefully that the defendants' guilt had, after all, been established. The question of waiver was inescapably presented by the cases, and in one form or another, the Court inevitably answered it. Indeed, if guilt were all that mattered, it would be unclear why a defendant should be entitled even to reasonably competent legal advice in resolving the strategic issues that confront him in choosing his plea. Nevertheless, the McMann and Tollett opinions recognized that fairness, even to the guilty, requires some effort on the part of the legal system to insure an awareness of constitutional rights.

Justice White’s dissent in Newsome rested on the contention that a bargained guilty plea conclusively establishes guilt—indeed, that it establishes guilt “by as reliable a method as is known to the criminal law.” In a case like McMann, however, even if one discounts the view that the ordinary pressures of the guilty-plea system are likely to induce the innocent to plead guilty, it is difficult to have confidence in the accuracy of defendants’ pleas. The Supreme Court applied its ruling in Jackson v. Denno retroactively because the New York procedure that permitted even an involuntary confession to come before the jury threatened “the very integrity of the fact-finding process” and posed a “clear danger of convicting the innocent.”

A defendant threatened with conviction at trial despite his innocence might well have entered a bargained plea. He could have recognized that it is better to be an innocent person on probation than an innocent person in prison. Insofar as plea negotiation is a rational process that reflects the probable outcome of a case at trial—that is, insofar as the process conforms to the model articulated in McMann—unfair procedures that affect the accuracy of the fact-finding process at trial are likely to affect the accuracy of guilty-plea convictions as well.

Similarly, a defendant like the defendant in Parker who was unaware that a coerced confession could have been excluded from evidence might have been tempted to enter a bargained guilty plea despite his innocence. The lack of a knowing waiver should itself give rise to concern about the accuracy of a defendant’s conviction when the right that the defendant has unknowingly sacrificed is designed to guard against the danger of wrongful conviction.

Of course not all constitutional rights are designed to promote accurate verdicts at trial, and when a defendant has unknowingly abandoned a right that serves some other purpose, his lack of knowledge does not provide reason to question the accuracy of his conviction. Nevertheless, this circumstance merely points to another difficulty inherent in Mr. Justice White’s analysis. When a defendant who has been convicted at trial is permitted to assert a right that is designed to promote fair law enforcement procedures rather than factually accurate verdicts, there plainly exists no reason to doubt his factual guilt. The Supreme Court has not said that the state’s “right to incarcerate” such a defendant is established by his guilt alone but, to the contrary, has allowed him to vindicate constitutional rights.

which serve values other than protection of the innocent. The defendant in Newsome sought to assert a claim that heroin had been unlawfully seized from his person, and, although his guilt had undoubtedly been clearly established, that fact did not distinguish his case in any way from that of a defendant who had been convicted at trial on the basis of illegally obtained evidence and who could concededly have presented his claim of unlawful seizure in a habeas corpus proceeding.  

Justice White adverted to this difficulty in a footnote:

[I]t may be argued that, unlike some other claims, Fourth Amendment claims are not undercut by a guilty plea in which guilt is solemnly admitted. The short answer to this argument is that it applies as well in the case of States which do not permit appeals from guilty pleas as in the case of those which do, and the argument has therefore already been rejected. Tollett . . .; Brady . . .; McMann . . . More to the point, the deterrent purpose of the exclusionary rule should be furthered at the lowest possible cost to society in terms of freeing the guilty. By precluding defendants who plead guilty from litigating Fourth Amendment issues, we do not seriously detract from the deterrent purpose of the rule (a policeman about to improperly invade someone's privacy can hardly rely upon the erroneous pretrial denial of a suppression motion by a trial judge and the defendant's mistaken decision to plead guilty) and we avoid unnecessarily freeing the guilty.  

Surely, however, McMann and Tollett cannot be read as holding that a guilty-plea defendant's factual guilt precludes him from asserting a fourth amendment claim. McMann, as Justice White recognized, frequently used the language of waiver; a defendant would apparently be barred from asserting a fourth amendment claim, not because his plea established his guilt, but because his competently counseled guilty plea somehow reflected a knowing abandonment of the claim. And Tollett's assertion that a guilty plea, although not a waiver, was a "break in the chain of events which has preceded it" was simply baffling. One could not have known that in a few short sentences the Court had overruled sub silentio its many rulings that guilt or innocence is irrelevant when a claim of unlawful seizure is advanced. If McMann and Tollett had truly held as Justice White contended, moreover, those decisions would have been plainly non-

106. 420 U.S. at 296 n.3 (emphasis in original).
sensical, for the Court would not have offered the slightest distinction between a guilty-plea defendant who was barred from asserting a fourth amendment claim because of his undoubted guilt and a trial defendant who was not barred from asserting a fourth amendment claim because of his undoubted guilt.

Justice White argued that his position would “not seriously detract from the deterrent purpose of the [exclusionary] rule” because a police officer could not anticipate both an erroneous pretrial ruling and a mistaken decision to plead guilty, yet a policeman could surely sense an incentive to violate the Constitution even when he could not foresee the exact mechanism by which his violation of constitutional rights might lead to a conviction. As I have written elsewhere, “An officer should be discouraged from thinking, ‘I know that it is probably illegal to enter this apartment, but the prosecutor may nevertheless be able to make something of the case. He seems able to get some kind of guilty plea from almost every defendant, and I can therefore be reasonably confident that the defendant will be convicted of something.’” 107

Perhaps Justice White’s view was simply that sufficient deterrence is provided when defendants who have been convicted at trial are permitted to retain their fourth amendment rights. He may have concluded that there was no need to extend the same privilege to guilty-plea defendants. It could equally have been argued, however, that sufficient deterrence would be provided if defendants who had stood trial were precluded from asserting their fourth amendment rights while guilty-plea defendants retained them or if blue-eyed defendants were allowed to test the constitutionality of police seizures in habeas corpus proceedings while brown-eyed defendants were not. This sort of analysis plainly would not have offered a principled distinction between guilty-plea and trial defendants, and in any event, the perception that unlawful action will be unproductive some of the time would seem unlikely to deter police misconduct if, under rulings like that suggested by Justice White in Newsome, the same unlawful action would remain productive the rest of the time. Certainly nothing in Justice White’s discussion suggests why, if it is the guilt of guilty-plea defendants that precludes them from asserting fourth amendment claims, the same consideration does not apply with equal force to defendants who have exercised the right to trial.

It bears reiteration that although Justice White’s position in Newsome attracted four votes, it was unmistakably rejected by a

majority of the Court. The majority continued to regard a guilty plea, not simply as an admission of guilt, but as a waiver of fundamental constitutional rights that must in some sense be knowing. Moreover, the majority read McMann and Tollett as embodying this theory of waiver. The analysis in this article has considered the Supreme Court's decisions in these terms, although I do of course agree with Mr. Justice White's recently developed and rather startling position that his opinions in the guilty-plea trilogy are indefensible in terms of traditional waiver concepts.

C. The Merits and Demerits of the Knowing Waiver Concept: Striking a Reasonable Balance

Underlying Tollett and the guilty-plea trilogy is the basic question whether the Supreme Court should adhere to its traditional concept of waiver as an "intentional relinquishment or abandonment of a known right or privilege." 108 The Court said in Tollett, "A guilty plea voluntarily and intelligently entered may not be vacated because the defendant was not advised of every conceivable constitutional plea in abatement he might have to the charge . . . .",109 and in a similar case, the Fifth Circuit raised the prospect that a defense attorney might be required to give each of his clients a course in constitutional law before permitting him to plead guilty.110 In his Tollett dissent, Mr. Justice Marshall maintained that this imagery exaggerated the practical problems that continued insistence upon the requirement of a knowing waiver would involve: the number of potential constitutional violations at issue in an individual case is ordinarily small, and a defense attorney can reasonably be expected to investigate these potential violations and to advise the defendant of his options.111

Moreover, whatever practical difficulties insistence upon a knowing waiver might present, the Supreme Court seemed at most to suggest the incompatibility of this traditional requirement and the guilty-plea system. The Court may have implied that a guilty plea waives so many constitutional rights that it would be impractical or even impossible for a defendant to consider and knowingly relinquish them all. On its face, such a proposition seems to argue as much for abandonment of the guilty-plea system as for abandonment of the requirement of a knowing waiver. Indeed, the presumption might be

109. 411 U.S. at 267.
111. 411 U.S. at 271-72.
that our practices should be molded to fit constitutional ideals rather than our ideals molded to fit current practices.

Nevertheless, the problem of waiver is more complex than an unyielding insistence upon the requirement of a knowing choice may make it seem. Judge Charles E. Moylan, Jr., of the Maryland Court of Special Appeals has written:

The only thing that can be said about constitutional waiver in the abstract is that nothing can be said about constitutional waiver in the abstract. It is as protean in its manifestations as the number of constitutional rights which there are to be waived multiplied by the number of circumstances in which they may be waived. . . . Even a partial cataloguing of its applications illustrates the breadth of the spectrum through which it vacillates—operating at times with fastidious forbearance, at times blithely and summarily, and frequently with coquettish inconstancy. 112

On one side of the problem, a defendant who has no knowledge of a right cannot honestly be said to abandon it by consent, and to deprive a defendant of a right that he has had no realistic opportunity to exercise is always unfair. If constitutional rights are to be meaningful, they must be known, understood, and exercised. Accordingly, a decent legal system should strive to insure an awareness of legal rights whatever their content; to capitalize deliberately upon a defendant's ignorance of his rights is never a legitimate device for obtaining criminal convictions. 113

At the same time, the state has a legitimate interest in bringing litigation to an end. In a legal system with unlimited resources, courts might always remain open to new proceedings in which defendants could assert rights that they had not knowingly abandoned in the past. An affluent society might refuse to balance the benefits of justice to the defendant against the high cost of providing it through as many proceedings as might be necessary. The Supreme Court's habeas corpus decisions have, in fact, come close to endorsing this view. 114 In our current system of justice, however (a system that is too miserly to give most defendants trials at the time of their convictions), this policy seems hypocritical. To pressure most defendants into sacrificing their initial and primary opportunity for a hearing

and then to afford unfettered access to the judicial system for repeated post-conviction proceedings seems a bizarre allocation of resources.

Apart from the problem of resources, a defendant’s delay in the assertion of his rights almost invariably prejudices the prosecution. The state cannot effectively conduct a trial years after the event when critical witnesses have forgotten, died, or disappeared. Of course the state’s obligation is to convict a defendant fairly or not at all, and, by hypothesis, a defendant is prepared to demonstrate—belatedly—that his conviction was unfair. Nevertheless, the state has a legitimate interest in requiring a defendant’s prompt assertion of his rights—so that it can, in fact, conduct a fair trial at a time when it is possible to do so. Although it is always harsh to deprive a defendant of a right that he has had no realistic opportunity to exercise, substantial countervailing interests may sometimes require this result.115

In striking the balance in an individual case, a number of considerations may become relevant. One is the character of the right that the defendant has asserted. A court which permits the belated assertion of a crucial individual right (for example, the right to counsel) need not automatically permit the assertion of a right that seems largely designed to vindicate the interests of persons other than the defendant himself (for example, the right to indictment by a properly selected grand jury).116 Another relevant factor is the severity of the sanction that the trial court has imposed. In the capital case, for example, courts might reasonably afford the defendant every possible opportunity to demonstrate defects in the process that produced his conviction; the sacrifice of procedural regularity might seem unimportant when the stakes are so high.

115. For a more complete listing of the interests served by the doctrine of finality in criminal cases, see Amsterdam, Search, Seizure and Section 2255: A Comment, 112 U. Pa. L. Rev. 378, 383-84 (1964).

116. One might be tempted to read this discussion in terms of the controversy about whether federal habeas corpus should be available to test a defendant’s claim that evidence used against him in a state court was seized in violation of the Constitution. Compare Kaufman v. United States, 394 U.S. 217 (1969), with Schneckloth v. Bustamonte, 412 U.S. 218, 250 (1973) (Powell, J., concurring). I therefore emphasize that the discussion in text concerns the general problem of finality uncomplicated by special problems of federalism. Under our federal system, a litigant should ordinarily be able to secure an adjudication of his federal claims in a federal forum, and this policy may argue for a departure from what would otherwise be sound principles of finality. But see Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441 (1963). Even after a criminal defendant has fully adjudicated his federal claims in state-court proceedings, for example, it might be desirable to afford him access to a federal forum as a matter of right. But cf. Townsend v. Sain, 372 U.S. 293 (1963); 28 U.S.C. § 2254(d) (1970) (state-court fact-finding ordinarily “presumed correct” in federal habeas corpus proceedings).
Finally, a court should examine why the defendant did not assert the right in question at the earliest opportunity. At one extreme might be a case in which the defendant deliberately chose to invite error or to circumvent the orderly administration of justice—a classic case of waiver. At the other extreme might be a case in which both the defendant and his attorney were justifiably unaware of the right and of the possibility of asserting it, as when the right effectively came into existence as the result of a retroactively applied Supreme Court decision after the time of trial. The variety of intermediate situations seems almost unlimited. For example:

The well-educated defendant had every opportunity to assert the right in question but failed to do so; his bypass of orderly trial procedures, although not deliberate, was at least negligent.

The defendant's attorney made a deliberate, intelligent decision to forego the right but did not involve the defendant in the choice. This failure might, in some circumstances, be explained by the fact that consultation with the defendant would have interrupted the progress of an ongoing trial; in other circumstances, however, a reasonable attorney would have informed the defendant of his options.

The defendant himself decided to forego the right but only because of significant pressure. Perhaps the defendant decided not to exercise the right to appeal because—under practices since declared unconstitutional—reversal might have resulted in a new trial and a death sentence. Or perhaps the defendant decided not to challenge the exclusion of blacks from a trial jury because this action would have produced hostility on the part of the white jurors ultimately included in the panel.

This cursory examination of only some of the relevant factors suggests the complexity of the problem—a problem that does not yield to the Supreme Court's assertion that "a guilty plea represents a break in the chain of events which has preceded it in the criminal process." Perhaps, in a legal system very different from ours, guilty pleas could indeed be viewed as blanket waivers of unknown rights. A guilty-plea defendant could fairly be regarded as saying, "I do not care what defenses I may have to the charge. As a matter of consci-

ence, I wish to accept the punishment prescribed for this offense.” In our legal system, however, guilty pleas are usually entered as a matter of tactics, not conscience. Guilty-plea defendants do care what defenses they may have to the charges against them, and a guilty plea entered in ignorance of a right is no more a waiver of that right than is a failure to assert the right at trial.

In some circumstances, despite the lack of a knowing waiver, courts might hold that a defendant should be precluded from asserting a right on the ground that his attempt to assert it came too late. This conclusion should rest, however, on a balance of the costs and benefits of affording relief despite the defendant’s delay in seeking it; a plea of guilty should not be determinative. Indeed, most of the factors that seem relevant in deciding when post-conviction remedies should be available are independent of whether the defendant has pleaded guilty or failed to assert a defense at trial.

When the existence of a bargained plea seems relevant, moreover, it may argue for liberality in allowing the defendant to assert claims that he has unknowingly failed to present in the past. In Parker and Tollett, defendants ignorant of their rights yielded to substantial inducements to forego hearings of any kind. Their position may seem stronger than that of a defendant who was afforded every opportunity to present his defenses but who, through ignorance, failed to do so. To say, as the Supreme Court has, that defendants who have enjoyed one opportunity to assert their rights have a stronger claim on the attention of the courts than defendants who have been pressured to forego any opportunity seems to turn things upside down.120

120. I can think of only one situation in which the existence of a bargained plea might argue against allowing a defendant to raise a claim of which he was ignorant at the time of his conviction. A defendant convicted at trial might be allowed to assert a procedural right belatedly because the denial of this right could have affected the accuracy of the fact-finding process and resulted in the conviction of an innocent person. A defendant convicted on a plea of guilty might be foreclosed from asserting this right on the theory that his plea eliminated any significant doubt concerning the accuracy of his conviction. See Lefkowitz v. Newsome, 420 U.S. 283, 294 (1975) (White, J., dissenting), and text accompanying notes 95-107 supra.

Of course this approach would be justified only when the reason for permitting the belated assertion of a right was to insure the accuracy of a defendant’s conviction, and even then, the approach would present substantial dangers. As I have argued above in greater detail, see text accompanying notes 103-04 supra, a defendant threatened with conviction at trial despite his innocence might be tempted to enter a bargained guilty plea.

Although the Supreme Court has often focused on the extent to which a procedural right affects “the integrity of the truth-determining process” in deciding whether the right should be retroactively applied, e.g., Williams v. United States, 401 U.S. 646, 653 (1971); Desist v. United States, 394 U.S. 244, 249 (1969); Witherspoon v. Illinois, 391 U.S. 510, 523 n.22 (1968), I doubt that the danger of convicting the innocent has in fact substantially motivated the Court’s
D. The Practical Significance of the Court's Substitution of a Competency of Counsel Standard for the Requirement of a Knowing Waiver: A Note on the Supreme Court's Strategy

In the guilty-plea trilogy and in Tollett, the Supreme Court maintained that it had not departed from the traditional rule that a guilty plea, to be valid, must be "a knowing and intelligent act." Rather, the Court's view was that a "plea of guilty based on reasonably competent advice is an intelligent plea." As I have indicated, a knowing waiver can properly be equated with a competently counseled waiver when one adopts a strict enough standard of competence. With this qualification, however, the Supreme Court's proposition seems relatively unimportant. The equation of two constitutional decisions. The violation of a constitutional right—even a very fundamental right—usually does not so alter the nature of the trial process as to give rise to substantial doubt concerning the defendant's guilt. Especially when the right in question is a newly articulated right that was not considered essential to a fair trial a few months earlier, the claim that a unanimous jury verdict might have been inaccurate is likely to seem unpersuasive.

Were the Supreme Court's concern limited to the danger of convicting the innocent, the logical course would be to ask whether, in light of the evidence in the case, there was truly any chance that the defendant might have been inaccurately convicted. The Court has not adopted this approach but has asked only whether "the major purpose of a new constitutional doctrine is to overcome an aspect of the criminal trial which substantially impairs its truth-finding function." Williams v. United States, supra, at 653. Thus the Court would plainly grant retroactive relief to a defendant who had been denied a right designed to promote accurate verdicts even if a dozen bishops had witnessed his crime and the defendant had voluntarily confessed. Ironically, when newly discovered evidence suggests that a defendant convicted in a federal court might, in fact, be innocent, federal judges have usually been reluctant to grant relief. In such a case the defendant must show that the recently discovered evidence would probably lead to an acquittal, and even this showing of probable innocence is not necessarily enough. See, e.g., United States v. Rachal, 473 F.2d 1338 (5th Cir.), cert. denied, 412 U.S. 927 (1973). Moreover, newly discovered evidence suggesting the innocence of a defendant convicted in a state court, no matter how persuasive, does not supply a basis for federal habeas corpus relief. Townsend v. Sain, 372 U.S. 293, 317 (1963).

Through a purportedly neutral analysis of the purpose of a right, the Supreme Court has largely masked the determinative inquiry—how important the right is to the Court's sense that the defendant, whether guilty or innocent, was fairly treated. Contra, Johnson v. New Jersey, 384 U.S. 719, 728 (1966) ("the choice between retroactivity and nonretroactivity in no way turns on the value of the constitutional guarantee involved").

Constitutional rights are not fungible, and there are various levels of injustice. The injustice that warrants relief when a defendant has asserted a right promptly and when a fair retrial is possible may not be sufficient when assertion of the right has been delayed; the balance of cost and benefit does not remain the same. A frank recognition of the inevitability of a subjective judgment concerning the importance of a right would probably aid analysis. Were this approach adopted, however, there would be no basis for a distinction between defendants who have pleaded guilty and defendants who have been convicted at trial. The question in every case would be whether a violation of constitutional rights could have rendered the defendant's conviction so unfair as to justify belated litigation of the issue.

122. See text accompanying note 83 supra.
doctrines matters little when the two doctrines are in fact equivalent. In this situation the underlying problem might be approached as easily through one route as through the other. The Supreme Court's rulings in *Tollett* and the guilty-plea trilogy make it plain, however, that the Court was not engaged in a purely academic exercise. Despite the logical similarity of the two concepts, it makes a great practical difference whether a court approaches a question of waiver in terms of the competence of counsel or in terms of the knowing quality of a defendant's choice.

When the issue is described as the competence of counsel, a court is apparently required to make an ad hominem judgment about a member of the bar. When a court asks about the knowing quality of a defendant's choice, it focuses directly on his state of mind and can thereby avoid, or at least mute, any intimation of professional insult. In practice, judges tend to close ranks when members of the legal profession are threatened, and partly for this reason, courts have usually defined the right to the effective assistance of counsel in narrow terms. Although some courts have articulated more generous standards in the period since the guilty-plea trilogy was decided, most courts refuse relief on grounds of ineffective legal assistance unless the proceedings were "a farce, and a mockery of justice."

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123. See *Beasley v. United States*, 491 F.2d 687, 696 (6th Cir. 1974) ("counsel reasonably likely to render and rendering reasonably effective assistance"); *United States v. DeCoster*, 487 F.2d 1197, 1202 (D.C. Cir. 1973) ("a defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate") (emphasis in original); *West v. Louisiana*, 478 F.2d 1026, 1033 (5th Cir. 1973) (counsel "reasonably likely to render and rendering reasonably effective assistance") (emphasis in original); *Moore v. United States*, 432 F.2d 730, 736 (3d Cir. 1970) ("legal services of the same level of competency as that generally afforded at the bar to fee-paying clients"); *State v. Thomas*, 203 S.E.2d 445, 461 (W. Va. 1974) (counsel exhibiting "the normal and customary skills possessed by attorneys who are reasonably knowledgeable of criminal law").


Chief Judge David L. Bazelon of the United States Court of Appeals for the District of Columbia Circuit has said that most courts are "papering over the problem of inadequate assistance" and that the mockery-of-justice test "is itself a mockery of the sixth amendment." *Bazelon, The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 28 (1973).

Some courts have said that a lawyer's representation is ineffective only when it is the
As Judge Arnold Bauman has observed, "the 'shock the conscience test' . . . appears to survive unimpaired in this remote pocket of constitutional law." The Supreme Court's guilty-plea trilogy tended, if anything, to reinforce this narrow view of the defendant's constitutional right to counsel. The Court sometimes said that the defense attorney's advice must be "competent," sometimes that it must be "reasonably competent," sometimes that it must be "within the range of competence required of attorneys representing defendants in criminal cases," and sometimes that it must not reflect "serious derelictions" or "gross error."

The character of the constitutional doctrine that the _McMann_ opinion made determinative in guilty-plea cases becomes apparent when one examines the tenor of specific lower-court rulings on the effectiveness of counsel. For example, Warren E. Burger, then a Judge of the United States Court of Appeals for the District of Columbia Circuit, wrote in 1958:

Mere improvident strategy, bad tactics, mistake, carelessness or inexperience do not necessarily amount to ineffective assistance of counsel, unless taken as a whole the trial was a "mockery of justice." The specific allegations here are that counsel met with appellant only once, and at that time told him "there is nothing I can do for you," which, appellant alleges, "shows that counsel never considered weighting [sic] the facts in said case, nor due consideration for preparation for trial." Also counsel "deluded" appellant into believing there was nothing to do but plead guilty . . . .

But there was much counsel might have done, appellant now tells us. Counsel might have argued the illegality of the arrest and might have moved to suppress evidence obtained by illegal search and seizure, and illegal confessions. We agree that counsel might have done these things . . . but we do not agree that failure to do so was such ineffective assistance of counsel as to warrant a new trial.

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126. 397 U.S. at 754.
127. _Id._ at 770.
128. _Id._ at 771.
129. _Id._ at 774.
130. _Id._ at 772.
After this general description of the limits of the right to the effective assistance of counsel, Judge Burger's opinion concluded that a distinction should be drawn between cases in which defendants have pleaded guilty and cases in which they have exercised the right to trial:

It must be realized that this is not a case in which proof of guilt depended upon a trial. In such cases, the accused usually relies to a great extent on counsel to conduct an effective defense, because the accused does not know enough of the law to do so himself. . . . But this is not so when he pleads guilty. Here the deed is his own; here there are not the baffling complexities which require a lawyer for illumination; if voluntarily and understandingly made, even a layman should expect a plea of guilty to be treated as an honest confession of guilt and a waiver of all defenses known and unknown. . . . Certainly ineffective assistance of counsel, as opposed to ignorance of the right to counsel, is immaterial in an attempt to impeach a plea of guilty, except perhaps to the extent that it bears on the issues of voluntariness and understanding.

. . . [The appellant has alleged that] counsel's "bad" advice induced him to plead guilty. This, however, does not itself make out involuntariness. It seems likewise clear that the plea was understandingly made. It may be argued that a plea is not understandingly made when defendant is unaware of certain technical defenses which might very well make the prosecutor's job more difficult or even impossible were he put to his proof. However, we think "understandingly" refers merely to the meaning of the charge, and what acts amount to being guilty of the charge, and the consequences of pleading guilty thereto, rather than to dilatory or evidentiary defenses. . . . Appellant . . . pleads only that, unknown to him, he might have been able to suppress the truth as to certain evidence of his crime, and thus perhaps defeat justice.132

It is remarkable that Judge Burger viewed Bill of Rights safeguards as "dilatory defenses," "technical defenses," and "mechanisms for defeating justice." It is also remarkable that, in approaching guilty-plea cases, Judge Burger should have considered voluntariness and understanding determinative and the effectiveness of counsel imma-

132. *Id.* at 709-10 (emphasis in original). For a discussion of the merits of Judge Burger's distinction between guilty-plea cases and trial cases, see Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 *Yale L.J.* 1179, 1267-68 (1975).
terial until, by joining the Supreme Court’s opinions in *Tollett* and the guilty-plea trilogy, he endorsed the opposite view that effective legal assistance is the only significant issue in the guilty-plea case.133

A more striking illustration of the reluctance of some judges to sustain claims of ineffective assistance—especially after guilty pleas—was provided by two decisions of the Texas Court of Criminal Appeals in 1970. In *Ex parte Perry*,134 the defense attorney, a man of advanced age and failing eyesight, “did not have the opportunity to brief and keep abreast with the current law,”135 and as a result, he was appointed only in cases in which guilty pleas seemed likely. In the case before the court, the attorney had conferred with his client for no more than three to five minutes. He had told the client that “if [the client] had signed a confession, he might as well plead guilty.”136 The court remarked, “This is much like the case of *McMann v. Richardson*,”137 and it unanimously reversed a trial judge’s finding that the defendant had been denied the effective assistance of counsel.

The second case, *Ex parte Black*,138 involved an appointed attorney who had never appeared in a contested civil or criminal case but who seemed to represent guilty-plea defendants with great frequency. On the day of the defendant’s plea of guilty to a capital crime, for example, the attorney appeared in nine other felony cases and entered guilty pleas in all of them. Several of this attorney’s prior clients had been awarded new trials and released soon after his “representation” was concluded. In one case, for example, on a day when the attorney had entered only five other guilty pleas, he had entered a plea for a

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133. Of course the equation of a competently counseled guilty plea, on the one hand, and a knowing and voluntary plea, on the other, can be twisted in either direction. If, as in *Parker*, it seems clear that a defendant has not knowingly waived his rights, a court may obscure the issue by saying, “But the advice that he received was well within the range of competence required of attorneys representing defendants in criminal cases.” If, however, a defendant has been denied the effective assistance of counsel, a court may obscure the issue by saying, “But the defendant pleaded guilty knowingly and voluntarily.” See, e.g., *Dukes v. Warden*, 161 Conn. 337, 343-44, 388 A.2d 58, 61-62 (1971), aff’d, 406 U.S. 250 (1972):

Even assuming, arguendo, that there was a denial of the effective assistance of counsel . . . . the only question in this regard presented by this appeal is whether the conflict rendered the plea involuntary and unintelligent. . . . [A] claim of the ineffective assistance of counsel due to an alleged conflict of interest, standing alone, is not sufficient to call the validity of a guilty plea and the judgment of conviction based thereon into question.

135. *Id.* at 215.
136. *Id.* at 216.
137. *Id.*
defendant who was less than seventeen years old and not subject to the trial court's jurisdiction.

In the case before the court, the attorney had entered a guilty plea to capital murder on the same day that he was appointed. The attorney testified that he had advised the defendant of the charge against him, but he had apparently not discussed with the defendant the facts of the case. At the conclusion of a post-conviction hearing, a trial court found that the attorney had "made substantially no investigation of the facts . . . or of the law applicable to the facts."139

The attorney waived the statutory right to a ten-day delay in which to prepare for trial; he waived the right to one day's advance notice of the members of the panel from which the jury that would sentence the defendant would be selected; and he waived the right to a 36-person jury panel in a capital case. The defendant's jury consisted of the first twelve persons summoned by the sheriff. The trial judge charged this jury that it could sentence the defendant to death.

The defense attorney's most notable error occurred during the proceedings before the jury. The attorney raised no objection when the court charged the jurors that the defendant had previously been convicted of a capital offense and that they could consider this fact in assessing punishment. In fact, the defendant's prior conviction was not final and was inadmissible for any purpose. Again the Court of Criminal Appeals, on this occasion over the dissent of Judge W. A. Morrison, reversed a trial judge's determination that the defendant had been denied the effective assistance of counsel. The court cited only the guilty-plea trilogy in support of its position.

It would plainly be improper to attribute to the Supreme Court all of the outrageous things that lower courts have done in the name of its decisions. These Texas rulings are concededly extreme, and it is doubtful they would have met with approval in the Supreme Court.140 These decisions nevertheless suggest the background of hostility to claims of ineffective legal assistance against which the guilty-plea trilogy was written. The Supreme Court did not make it harder for courts like the Texas Court of Criminal Appeals to insulate guilty-plea justice from meaningful judicial review.

In an effectiveness-of-counsel case, a defendant bears a heavy burden even when he has stood trial and when the courtroom performance of his attorney is a matter of record. In a guilty-plea case,

139. Id. at 923 (Morrison, J., dissenting from denial of motion for rehearing).
the defendant's burden is multiplied. A defense attorney's bargaining sessions with prosecutors are not public, and neither are the attorney's conferences with his client. It is extraordinarily difficult for a court to learn the facts of a particular case, and it is also difficult to know what should be expected of an attorney in an unstructured bargaining situation. Even if courts were to evaluate allegations of ineffective assistance of counsel without hostility and bias, the Supreme Court's formula would insure that relief from a guilty-plea conviction would remain a rare event.

Whatever the logic of the Supreme Court's reasoning in the guilty-plea trilogy, the Court plainly had a choice. One alternative was to analyze the validity of guilty pleas in traditional terms by asking whether each plea reflected an understanding relinquishment of the defendant's rights. Another was to shift the inquiry by asking whether the defendant had been competently advised by his attorney. The Court chose the less developed doctrine and the doctrine that tends to reduce the inquiry to ad hominem terms. The three Justices who dissented in *McMann* maintained that the Court had deliberately made this choice on tactical grounds. "Despite the disclaimers to the contrary," they said, "what is essentially involved . . . is nothing less than the determination of the Court to preserve the sanctity of virtually all judgments obtained by means of guilty pleas."141

III. *Brady v. United States* AND THE REQUIREMENT OF A VOLUNTARY WAIVER

A. The Court's Opinion

In *Brady v. United States*,142 the remaining case of the trilogy, the defendant was charged with a capital crime—transporting a kidnap victim in interstate commerce and failing to liberate her unharmed.143 The Federal Kidnapping Act provided, however, that death could be inflicted only after conviction by a jury. If the defendant pleaded guilty or waived his right to jury trial, the statute authorized a maximum penalty of life imprisonment. Confronted with this scheme and with the trial court's refusal to consider a jury-waived trial, the defendant pleaded guilty. It was assumed for purposes of decision that the defendant's fear of the death penalty had significantly influenced his choice.

In 1968, following the defendant's conviction, the Supreme

Court held the penalty scheme of the Kidnapping Act unconstitutional. The Court said in United States v. Jackson that this scheme unfairly encouraged guilty pleas and needlessly penalized assertion of the right to jury trial. The Court later applied its ruling retroactively—to defendants who had stood trial and had been sentenced to death under similar schemes prior to the Jackson decision. Relying on Jackson, the defendant in Brady sought relief from his guilty-plea conviction.

Mr. Justice White's opinion for the Supreme Court concluded that Jackson had "neither fashioned a new standard for judging the validity of guilty pleas nor mandated a new application of the test theretofore fashioned by courts . . . that guilty pleas are valid if both 'voluntary' and 'intelligent.'" The Court held that the failure of the defendant and his counsel to anticipate the ruling in United States v. Jackson did not render the defendant's plea unintelligent. The remaining issue was that of voluntariness.

The Brady opinion recognized that, had the defendant chosen to plead not guilty and face a trial before a jury, his decision might have cost him his life. Still, the Court said:

Often the decision to plead guilty is heavily influenced by the defendant's appraisal of the prosecution's case against him and by the apparent likelihood of securing leniency should a guilty plea be offered and accepted. Considerations like these frequently present imponderable questions for which there are no certain answers . . . .

The voluntariness of the defendant's plea could be determined "only by considering all of the relevant circumstances surrounding it." One of these circumstances was that the defendant had been "represented by competent counsel throughout"—a fact that the Court reiterated at several points in its opinion. The Court maintained that the defendant "had competent counsel and full opportun-

144. 390 U.S. 570 (1968).
145. Pope v. United States, 392 U.S. 651 (1968). Although the defendant in Pope had not been convicted under the same statute as the defendant in Jackson, the constitutional defect of both statutes was the same. The Government conceded in Brady that a defendant sentenced to death under either statute would be entitled to retroactive relief. Brief for the United States at 8, Brady v. United States, 397 U.S. 742 (1970).
146. 397 U.S. at 747.
147. Id. at 756-58. The Court's analysis of this issue largely duplicated its analysis in McMann.
148. Id. at 756.
149. Id. at 749.
150. Id. at 743.
ity to assess the advantages and disadvantages of a trial as compared with those attending a plea of guilty . . . ." 151 There was no evidence that the defendant "was so gripped by fear of the death penalty . . . that he did not or could not, with the help of counsel, rationally weigh the advantages of going to trial against the advantages of pleading guilty."

Although the Court did evaluate the merits and dangers of granting leniency to guilty-plea defendants in general terms, 153 it plainly attached special significance to the presence of counsel.

The weight that the Court gave to the presence of counsel became especially apparent in its discussion of Bram v. United States, 154 an 1897 Supreme Court decision. Bram had held that an out-of-court confession could not be received in evidence unless it was "free and voluntary: that is, . . . not . . . extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight . . . ." 155 The defendant's admission of guilt in Brady had, of course, been obtained by a promise that was more than slight: The Kidnapping Act assured him that his guilty plea would preclude the infliction of capital punishment. The Supreme Court distinguished Bram, however, primarily on the ground that the defendant in that case had confessed without the advice of counsel. The Court said:

Bram dealt with a confession given by a defendant in custody, alone and unrepresented by counsel. In such circumstances, even a mild promise of leniency was deemed sufficient to bar the confession, not because the promise was an illegal act as such, but because defendants at such times are too sensitive to inducement and the possible impact on them too great to ignore and too difficult to assess. But Bram and its progeny did not hold that the possibly coercive impact of a promise of leniency could not be dissipated by the presence and advice of counsel . . . . 156

The three Justices who dissented in McMann also dissented from the majority's analysis in Brady, although they did concur in the Court's result. 157 These Justices noted that the majority had read the

151. Id. at 754.
152. Id. at 750. But cf. Brown v. United States, 256 U.S. 335, 343 (1921) (Holmes, J.) ("Detached reflection cannot be demanded in the presence of an uplifted knife.").
153. 397 U.S. at 751-53. From my perspective, the Court's general evaluation of plea bargaining was far from persuasive. Discussion of this portion of the Court's opinion would, however, carry this Article far from its central theme.
154. 168 U.S. 532 (1897).
155. Id. at 542-43.
156. 397 U.S. at 754.
157. 397 U.S. at 799 (Brennan, J., dissenting in Parker v. North Carolina, and concurring in Brady). For a discussion of the ground of the concurrence in Brady, see note 186 infra.
decision in *United States v. Jackson* to stand for a nonsensical proposition: a federal statute was unconstitutional because it encouraged guilty pleas that were perfectly valid. The statute exerted an unconstitutional influence, but defendants who had yielded to this pressure were not entitled to relief. Only defendants who had resisted the unconstitutional influence could have their sentences set aside.\(^{158}\)

**B. A Problem of Craftsmanship: The Court's Treatment of *Bram v. United States* and the Analogy to Out-of-Court Confessions**

As the dissenting Justices demonstrated, the *Brady* opinion undid in large measure a decision that the Court had announced only two years before. What may be less apparent is that *Brady* also effectively overruled almost 200 years of confession law.\(^{159}\) *Bram v. United States* was not the first decision to adopt the rule that a confession must not be "obtained by any direct or implied promises, however slight."\(^{160}\) In 1896, for example, in *Wilson v. United States*,\(^ {161}\) the Supreme Court said that a confession would be "inadmissible if made under any threat, promise, or encouragement of any hope or favor."\(^{162}\) The Court added, "the true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort."\(^{163}\) Similarly, in an 1884 decision, *Hopt v. Utah*,\(^ {164}\) the Court said that a confession, to be voluntary, must be "uninfluenced by hope of reward or fear of punishment."\(^{165}\)

It explained:

> [T]he presumption upon which weight is given to [confessions], namely, that one who is innocent will not imperil his safety or prejudice his interests by an untrue statement, ceases when the confession appears to have been made either in consequence of inducements of a temporal nature, held out by one in authority, touching the charge preferred, or because of a threat or promise by or in the presence of such person . . . .\(^ {166}\)

\(^{158}\) Id.

\(^{159}\) When critics have suggested that the Supreme Court under Chief Justice Burger might retreat from some of the Court's decisions under Chief Justice Warren, they have underestimated the power of the Court's imagination. *See also* Ellis v. Dyson, 421 U.S. 426 (1975) (Powell, J., dissenting) (discussed at notes 53-69 supra).

\(^{160}\) 168 U.S. at 542-43.

\(^{161}\) 162 U.S. 613 (1896).

\(^{162}\) Id. at 622.

\(^{163}\) Id. at 623.

\(^{164}\) 110 U.S. 574 (1884).

\(^{165}\) Id. at 584.

\(^{166}\) Id. at 585.
The rule that the Supreme Court reiterated in these cases was, indeed, at least as old as a 1783 English decision which had held inadmissible any confession obtained “by promises of favour.” Thus, when the Brady opinion declared that United States v. Jackson had “neither fashioned a new standard for judging the validity of guilty pleas nor mandated a new application of the test theretofore fashioned by courts,” it spoke the truth.

Because the rule historically applied in evaluating out-of-court confessions would, once extended to guilty pleas, render all bargained pleas invalid, some observers have searched for distinctions between guilty pleas and confessions. For example, Chief Judge Joseph C. Hutcheson of the United States Court of Appeals for the Fifth Circuit once wrote:

[T]he dissenter[s] fall into the fatal basic error of declaring, in the teeth of the authorities . . ., that a plea of guilty is the same as an extra judicial confession of guilt and is to be regarded and dealt with in accordance with the rules governing confessions . . . . [T]he exact contrary of this is true. A plea of guilty is not a confession; it is a conviction.

The fact that a guilty plea “is a conviction” while a confession, however incriminating, is merely evidence does not suggest that guilty pleas should be governed by more lenient standards than confessions. To the contrary, that “a confession only wounds while a guilty plea kills” seems all the more reason to insure that the guilty plea is voluntary. The only authority upon which Chief Judge Hutcheson relied, the Supreme Court’s opinion in Kercheval v. United States, seemed to make exactly that point. In Kercheval, the Court distinguished guilty pleas from “mere” extra-judicial confessions, and the Court advanced this distinction to support its conclusion that “a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences.” The other distinctions that legal scholars have advanced between guilty pleas

170. 274 U.S. 220 (1927).
171. Id. at 223. See also Boykin v. Alabama, 395 U.S. 238, 242 & n.4 (1969) (“A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction . . . . It supplies both evidence and verdict, ending the controversy.”); United States ex rel. Codarre v. Gilligan, 363 F.2d 961, 966 (2d Cir. 1966) (“The entry of a plea of guilty demands even more stringent safeguards than are required for confession.”).
and out-of-court confessions seem equally unpersuasive,\textsuperscript{172} and it is

\textsuperscript{172} One commentator once distinguished guilty pleas from confessions by saying: A confession is an averment that certain facts occurred, and is used as evidence in a fact-finding proceeding—trial—whose whole purpose is to determine whether the facts actually occurred. The nature of the trial proceeding requires that consideration be given to evidence . . . only to the extent that it has probative value. On the other hand, the guilty plea is not necessarily an admission that the defendant engaged in a criminal incident, but is a conclusion that there is sufficient evidence for a judge or jury to find that he did so.


This argument seems to rest on the proposition that courts should not be reluctant to convict innocent defendants on their pleas of guilty. If that is not the contention, it is hard to understand why reliability should be important only in cases involving out-of-court confessions—or why a court need not be concerned with whether a guilty plea, which serves as a complete substitute for proof, has "probative value."

Although the requirement of voluntariness was originally justified on the ground that it tended to insure the reliability of confessions, the Supreme Court has recognized that this rationale can no longer be persuasive in a day when courts exclude plainly trustworthy evidence obtained as the "fruit" of involuntary confessions. See Rogers v. Richman, 365 U.S. 534 (1961). The basic purpose of the requirement of voluntariness today is to protect the privilege against self-incrimination and to insure the meaningful quality of a defendant's choice. See Malloy v. Hogan, 378 U.S. 1, 7 (1964). This policy surely applies to guilty pleas as well as to out-of-court confessions.

In an unpublished address to the National Legal Aid and Defender Association in 1967, Professor Anthony G. Amsterdam suggested that the distinction between guilty pleas and confessions "lies at a human level." Professor Amsterdam noted that when a prosecutor seeks to use a confession against a person on trial, the confession can work only to the person's disadvantage. A strict view on the admissibility of confessions therefore cannot harm a criminal defendant. When the propriety of a guilty plea is litigated, however, it may be very much in the defendant's interest to have the plea ruled voluntary. If a judge were to reject a defendant's plea solely because it had been induced by a promise of leniency, the defendant might reasonably respond, "I appreciate your Honor's concern for my state of mind, but I really want to enter this plea."

As Professor Amsterdam would probably recognize, this argument has little to do with the concept of voluntariness. Because defendants today are commonly threatened with severe sentences if they exercise the right to trial, they "really want" to enter their pleas. If the defendants were threatened with shooting or dismemberment, moreover, they would probably be even more vigorous in contending that their guilty pleas should be held voluntary. An argument based on what a person may want with a gun at his head knows no limit, and Professor Amsterdam's distinction could therefore lead to the abolition of any requirement of voluntariness in guilty-plea cases.

In addition, Professor Amsterdam seems to elevate a procedural accident into a substantive distinction. It has been customary to litigate the validity of a guilty plea as soon as it is presented. Any coercive forces that have caused the defendant to plead guilty are still operating, and because they are still operating, the defendant considers it in his interest to have his plea accepted. This situation would be duplicated if a court were established to litigate the voluntariness of a confession the moment it escaped a suspect's lips. If officers who had coerced the confession were standing by, the suspect might reasonably announce that he wanted his confession upheld.

With both guilty pleas and confessions, litigation can occur after coercive forces have abated. When a defendant does challenge the validity of his guilty plea, he has presumably decided that it is in his interest to have the plea rejected. At this point in time, Professor
fortunate that the Supreme Court did not rely on these distinctions in *Brady*. The relevant distinction for the Court was simply between confessions given in the presence of an attorney and confessions given without legal assistance.

The common-law doctrine reiterated in *Bram v. United States* was not, however, qualified on its face by a requirement that a suspect be in custody and unrepresented by counsel, nor had the rule ever been subject to this qualification in practice. The Supreme Court's decision in *Wilson* held that the rule extended to confessions before a magistrate, and other courts applied the rule to confessions obtained in the presence of counsel and even to guilty pleas that were the product of suggestions by retained attorneys that waiver of the right to trial might lead to more lenient treatment by the courts.

Amsterdam's contention loses any force that it might have had. Finally, from a broader perspective, Professor Amsterdam's argument seems to beg the question. A defendant who enters a guilty plea may desire to have the plea accepted, but the reason for his desire is usually a recognition that a more severe sentence would follow rejection of the plea. The goal of applying the historic concept of voluntariness to guilty pleas would be to change this reality, so that exercise of the right to trial would not be an onerous alternative. If a defendant's punishment were not to vary with his plea—if his punishment, whatever the method of disposition, were to be based on what treatment would best serve the correctional purposes of the criminal law—his choice could be truly voluntary. The problem posed by Professor Amsterdam would simply disappear. The significant question is not whether defendants should be forced to choose one horn of the dilemma rather than the other. It is whether they should be confronted with the dilemma in the first place.


Of course confessions obtained in the presence of counsel have always been rare events. Quite apart from these exceptional incidents, the early decisions indicate that *Brady's* qualification of the common-law rule was inconsistent with its spirit. Some courts maintained that any promise made anywhere by anyone (presumably even a defense attorney) would render a confession involuntary. See, e.g., *Commonwealth v. Knapp*, 26 Mass. 505, 9 Pick. 496 (1830); *Johnson v. State*, 89 Miss. 773, 42 So. 606 (1907). Other courts insisted that the promise must proceed from a "person in authority." See 1 S. *Greenleaf, The Law of Evidence* § 223 (16th ed. 1899). If a promise did come from a person in authority, however, it would invalidate a confession even when it reached a suspect, not in custody, through an intermediary. See *Searles v. Ohio*, 6 Ohio C.C.R. 331 (1892). Indeed, even if the suggestion of leniency came from a private individual, it would invalidate a confession if it were made in the presence of a person in authority who failed to disavow it. For example, in *Regina v. Laugher*, 2 Carrington & Kirwan's 225 (1846), a police constable came to the defendant's house to arrest her for stealing five sovereigns. The defendant's husband told her that if she knew anything about the crime she should "tell the truth." Because the husband extended this "inducement" in the presence of the constable, the defendant's confession was held inadmissible. *Accord*, *State v. Sherman*, 35 Mont. 512, 90 P. 981 (1907) (inducement by defendant's father in presence of police officer). The older cases seem to adopt the sensible theory that collaboration between a person in authority and a defendant's trusted advisor may make a promise of leniency more beguiling rather than less.

By relying on the distinction between counseled and uncounseled confessions, the Supreme Court largely abandoned a long-standing common-law doctrine.

A comparison of *Bram* and *Brady* indicates how insubstantial the Court's ground of distinction was on the facts of those cases. In *Bram*, the supposed promise of leniency arose when an interrogating officer informed the defendant that another suspect had implicated him. The officer said, "'If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders.'" For the Supreme Court, even this mild statement was enough to render the defendant's confession involuntary. In *Brady*, the promise was somewhat more forceful: a federal statute assured the defendant that a guilty plea would save him from the death penalty. Nevertheless, because the defendant in *Brady* had the assistance of counsel, the Supreme Court concluded that "Brady's plea, unlike Bram's confession, was voluntary." The Court surely strained at gnats while swallowing camels.

C. The Significance of Effective Legal Assistance in Resolving Questions of Voluntariness: A Note on the Record in *Brady*

Given an appropriate definition of the relevant terms, I have agreed that it may be reasonable to equate a competently counseled guilty plea with a knowing guilty plea. If a defendant has been fully advised by his attorney, his guilty plea will inevitably reflect a knowing abandonment of his rights. In *Brady*, however, the Supreme Court seemed to conclude that a competently counseled guilty plea would ordinarily be, not only a knowing plea, but a voluntary plea as well. I believe that this second equation was unsound, and, indeed, that the presence of counsel has little relevance to the question of voluntariness. A guilty plea entered at gunpoint is no less involuntary because an attorney is present to explain how the gun works.

176. 168 U.S. at 539. See also id. at 564-65, where the Court discussed the significance of this "promise."
177. 397 U.S. at 755.
178. See text accompanying note 82 *supra*.
179. Cf. Sanders v. State, 85 Ind. 318 (1882), in which a defendant pleaded guilty on the advice of a competent attorney who feared with good reason that a mob would lynch him if he stood trial. Of course the court held the plea involuntary despite the fact that the defendant's lawyer had offered very intelligent advice.

More recent decisions also illustrate that courts do not ordinarily attach significant weight to the presence of counsel in resolving questions of voluntariness. The plaintiff in a recent federal civil rights action, Boyd v. Adams, 513 F.2d 83 (7th Cir. 1975), had been arrested for disorderly conduct and resisting arrest, and in exchange for a dismissal of these charges, she had signed a form releasing the arresting officers from potential civil liability. Although the plaintiff had been represented by apparently competent counsel in the negotiations that led to
Under today's guilty-plea system, the basic function of the defense attorney is indeed to explain "how the gun works"—something that was illustrated by the record in *Brady*. The defendant in this case was charged with kidnapping, but under the Federal Kidnapping Act he could not have been executed merely for being a kidnapper. The defendant could have been executed only for being a kidnapper who exercised his right to trial before a jury.

For several months of pretrial detention, the defendant seemed reluctant to recognize this fact. He insisted that he was innocent and that he wanted a jury trial. After a conscientious investigation of the facts and the law, however, the defendant's attorney concluded that he had "never had [a case] where the defendants had tied themselves up in a sack like they had in this one." The attorney informed the defendant that "just couldn't go to a jury . . . because it would be almost sure conviction and possibly a death penalty." The attorney told the defendant that "he would be convicted beyond a shadow of a doubt." The defense attorney had two allies in his effort to persuade the defendant to plead guilty. The trial judge announced from the bench that he thought the defendant "might get the death penalty." Moreover, when the defense attorney told the judge in chambers that he thought that a guilty plea would probably be entered at a later date, the judge replied, "Well, I think you are very wise, because I was certainly going to submit the death penalty to the jury." The attorney dutifully reported this comment to the defendant.

The defendant's mother may also have been influential in altering the defendant's choice of plea. She attempted to visit the defendant in jail but found that "it wasn't visiting hours." She testified:

I went through the alley of the city jail where he was being held and I kept yelling, "Brady. Brady." Then—then there was somebody, some fellow up there that yelled, "Is there a

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the release, the court held that a release prompted by the plaintiff's fear of imprisonment was necessarily involuntary. It seems odd that a decision to waive a civil trial and forego a possible monetary award should be judged by a more stringent standard of voluntariness than a decision to waive a criminal trial and accept a jail term.

181. Id. at 74-75.
182. Id. at 70.
183. Id.
184. Id. at 72.
185. Id. The Supreme Court did not mention these facts. Instead it said in a footnote, "In *Brady*’s case there is no claim . . . that the trial judge threatened Brady with a harsher sentence if convicted after trial in order to induce him to plead guilty," 397 U.S. at 751 n.8.
Brady here?" So then Brady came to the window. It was upstairs. I don't know how many floors. Brady came to the window and he said, "Mom what are you doing? You are going to get yourself in trouble," and I just said, "For God's sake, plead guilty. They are going to give you the death sentence."

When it became apparent that a co-defendant would probably testify against him, the defendant agreed to plead guilty. The defense attorney reported that he "felt very gratified when [the defendant] decided to change his plea in that we saved him from a death penalty in my opinion."

The defense attorney was, I think, entitled to feel gratified; he


187. The three Justices who concurred in the result in Brady attached great significance to the fact that the defendant's change of plea was induced by his co-defendant's action. At the conclusion of a post-conviction hearing, a trial court found that the defendant's guilty plea "was made . . . by reason of other matters and not by reason of [the death penalty provisions of the Federal Kidnapping Act]." 397 U.S. at 815. Mr. Justice Brennan's opinion for the concurring Justices declared that this finding was "not clearly erroneous" and added, "Although Brady was aware that he faced a possible death sentence, there is no evidence that this factor alone played a significant role in his decision to enter a guilty plea." Id. at 815.

An unconstitutional death penalty alone, however, could never induce a plea of guilty. If the government had no evidence against the defendant and he knew it, the threat of death would not be credible. It is only when the defendant fears that he may be convicted at trial that the threat of execution may have a coercive effect. In that sense, some piece of damaging evidence can always be seen as the motivating force behind the defendant's decision to plead guilty. It is invariably open to a court solemnly to "find" that the defendant's plea was induced by the strength of the case against him.

Of course a defendant might plead guilty simply because his case is hopeless, quite apart from any thought that this action will reduce his punishment. When the defendant has been repeatedly and forcefully assured that a guilty plea will save him from the death penalty, however, it would require awesome mind-reading powers for a judge to conclude that the defendant's decision would have been the same had the assurances not been offered.

A defendant ordinarily considers both the strength of the case against him and the concessions that he has been offered in deciding whether to plead guilty. If he concludes either that the government has no case or that no concessions will follow a plea, he will probably take whatever chance of acquittal a trial may offer. In most cases, therefore, both some sort of case and some sort of concession are essential to induce a plea of guilty, and if either factor is absent, the plea will not be entered. The record in Brady may establish that the prospect of the co-defendant's testimony "caused" the defendant's plea, but that fact in no way diminishes the importance of the "concurrent cause"—the threat of execution.

The concurring Justices in Brady later maintained in dissent that an out-of-court confession should be received in evidence only when it was shown "beyond a reasonable doubt" that the defendant had "chose[n] to speak in the unfettered exercise of his own will." Lego v. Twomey, 404 U.S. 477, 491 (1972) (Brennan, J., dissenting). Surely it was not shown beyond a reasonable doubt in Brady that the defendant's plea was the product of an "unfettered exercise of his own will."

had done a capable job and may indeed have saved the defendant from a death sentence. The defendant's principal complaint did not, however, concern his attorney's performance; it was directed to the fact that exercise of the right to trial might have incurred an awesome penalty. This underlying reality was beyond the defense attorney's control but not beyond the control of the Supreme Court.

Contrary to the Supreme Court's suggestion, the presence of the defense attorney in *Brady* did not "dissipate" the "possibly coercive impact" of this reality. Indeed, the record in *Brady* suggests that the principal function of a competent attorney in the guilty-plea system is exactly the opposite of the function suggested by the Supreme Court. Rather than dispel the coercive impact of a promise of leniency, the attorney must make the defendant realize with full clarity the coercive power of the alternatives that he faces. In that way, the attorney may persuade the defendant to choose the course that, within the confines of a cynical system, is likely to injure him least.189

In *Brady*, the Supreme Court assumed that the defendant's guilty plea had been induced by the government's threat of a death sentence, and words must mean very little to a Court that could describe such a guilty plea as voluntary. As James F. Parker has written, "A more coercive threat than the death penalty does not readily come to mind."190

D. The Court's Basic Touchstone of Involuntariness: A Threat of Unlawful Action

The Supreme Court did indicate in *Brady* that guilty pleas entered with the assistance of counsel might be set aside in a few extreme situations. The Court adopted a general definition of voluntariness that the United States Court of Appeals for the Fifth Circuit had devised in 1957:

[A] plea of guilty entered by one fully aware of the direct

Though a lawyer can explain to the defendant the consequences of his choice in each instance, he cannot remove the coercion inherent in the choice... Honest appraisal of the plea bargaining process in the future will demand that the Court not rely on the presence of counsel as a crucial factor in the determination of the voluntariness of a plea of guilty.

190. Parker, *Plea Bargaining*, 1 Am. J. Crim. L. 187, 200 (1972). The Supreme Court itself has recognized this point in a context somewhat different from plea bargaining. In Schick v. Reed, 419 U.S. 256 (1974), the Court considered the historic English practice of commuting a convicted felon's death sentence on the condition that he be transported to a colony. Chief Justice Burger wrote for the Court, "The idea later developed that the subject's consent to transportation was necessary, but in most cases he was simply 'agreeing' that his life should be spared. Thus, the requirement of consent was a legal fiction at best..." Id. at 261.
consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes). 191

This standard, based on such largely undefined terms as "threats," "improper harassment," and "promises that are by their nature improper," could be read as entirely question-begging. If that reading is rejected, the standard suggests that only a broken promise, a factual misrepresentation, a threat to do something illegal if the defendant refuses to plead guilty, or a promise to discontinue an illegal action if he does plead guilty can make a resulting guilty plea involuntary. This standard may therefore seem to distinguish the case of a guilty plea entered at gunpoint from cases like Brady. 192 A defendant with a gun at his head is threatened with illegal action, but the defendant in Brady could, under a properly drawn statute, have been legally executed for his crime. In Brady, moreover, the Supreme Court maintained that a promise of leniency is not "an illegal act as such," 193 and it asserted that there had been no "misrepresentation or other impermissible conduct by state agents." 194 A number of lower courts have invoked the Fifth Circuit standard that the Supreme Court adopted in Brady to deny relief to defendants who could not show that they had been "subjected to threats or promises of unlawful action." 195

1. The Court's Unlawful Act Standard and Its Implicit Return to the View that Governmental Benefits Can Automatically Be Conditioned Upon Waivers of Constitutional Rights: The Defendant Merely Has an Option or a Privilege to Avoid Consequences that the State Could Lawfully Inflict.

The Court's "unlawful act" standard defines a possible test of voluntariness, but there is no magic in the definition. Any appeal that

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192. For a suggestion that the guilty plea in Brady should have been held involuntary even under the Court's standard, see text accompanying note 232 infra.

193. 397 U.S. at 754.

194. Id. at 757.

it has seems to derive from a crude sort of a fortiori reasoning: Because the state has a legal power to do something (for example, to grant leniency or withhold it), the state may condition the exercise of this power as it chooses (for example, by granting leniency only if a defendant agrees to waive his constitutional right to trial). The defendant is merely given an option, and because this option is less onerous than the fate that he could legally have suffered without it, he has no basis for complaint. The defendant can have a valid grievance only if the state has confronted him with an alternative that is itself beyond the state's power.\textsuperscript{196}

For a substantial period in the history of American jurisprudence, this type of reasoning was commonplace. Judges of the late nineteenth and early twentieth centuries, captivated by physical concepts, reasoned that a greater governmental power included all lesser powers. Justice Oliver Wendell Holmes wrote, for example, “Even in the law the whole generally includes its parts. If the State may prohibit, it may prohibit with the privilege of avoiding the prohibition in a certain way.”\textsuperscript{197} Justice Holmes therefore concluded that because a state had no constitutional duty to provide parks for its citizens, a citizen could have no constitutional right to speak in a park.\textsuperscript{198} Similarly, because a person had no constitutional right to be a policeman, it followed that a policeman could be discharged for expressing his political views.\textsuperscript{199}

Today this tough-minded approach has generally yielded to the language of unconstitutional conditions. Indeed, the view that the government may not automatically condition the grant of a benefit upon the waiver of a constitutional right was also dominant in the period before the end of the nineteenth century. Although the Su-

\textsuperscript{196} For an illustration of where this logic can lead, see “Sentence: Ten Years of Church,” Austin American, June 4, 1972:

Orlando, Fla. (AP)—A young woman who pleaded guilty to murder has been sentenced to go to church each Sunday for the next ten years by a judge who admits he skips religious services now and again himself. Eartha Lee Griffith, 28, appeared before Circuit Court Judge Claude Edwards last week and was told she could decide how to spend the next ten years of her life. “I told her she could go to jail for the next ten years or spend every Sunday through 1982 in a pew,” said Edwards. “For the first time since I have known her, she smiled. She chose church.”

\textsuperscript{197} Western Union Tel. Co. v. Kansas, 216 U.S. 1, 53 (1910) (Holmes, J., dissenting).

\textsuperscript{198} Commonwealth v. Davis, 162 Mass. 510, 39 N.E. 113 (1895) (Holmes, J.), aff’d, 167 U.S. 43 (1897).

\textsuperscript{199} McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892) (Holmes, J.). Of course the blanket denial of privilege does not influence conduct or lead to a waiver of constitutional rights, while the conditional grant of a privilege is likely to have this effect. See O’Neil, Unconstitutional Conditions: Welfare Benefits With Strings Attached, 54 Calif. L. Rev. 443 (1966).
preme Court had at least hinted at the right-privilege distinction as early as 1869, its first articulation of the doctrine as a basis for decision apparently came in 1894. In Ashley v. Ryan, the first Mr. Justice White wrote for a unanimous Court:

As it was within the discretion of the State to withhold or grant the privilege of exercising corporate existence, it was, as a necessary resultant, also within its power to impose whatever conditions it might deem fit as prerequisite to corporate life. The act of filing, constituting, as it did, a claim of a right to the franchise granted by the state law, carried with it a voluntary assumption of any burden with which the privilege was accompanied . . . .

The approach of the Ashley Court was markedly different from the approach of the Supreme Court in 1855 when it decided Lafayette Ins. Co. v. French. The opinion of Mr. Justice Curtis in that case recognized that a state could prevent foreign corporations from doing intrastate business within its territory, but the opinion observed that conditions on doing business must be "reasonable" and not "repugnant to the constitution or laws of the United States."

The broad statements of Mr. Justice Field in Paul and his later statements in Pembina and Horn Silver could be read as expressing unqualified acceptance of the notion that a state may condition the grant of a privilege as it chooses. Nevertheless, Mr. Justice Field's concurrence in Insurance Co. v. Morse, 87 U.S. (20 Wall.) 445 (1874), indicates that this interpretation would be erroneous. The Morse case, which will be discussed in the text accompanying notes 205-08 infra, held a state's condition on the grant of corporate privileges unconstitutional. After careful analysis, the Court concluded that the Paul opinion was consistent with its theory of unconstitutional conditions. Indeed, all of the Field opinions took pains to demonstrate the constitutionality of the conditions that states had attached to their grants of privilege, and statements that corporate privileges "may be granted upon such terms and conditions as States may think proper to impose." Paul v. Virginia, supra at 181. Paul should be read in this context.


The Court's decision in Lafayette upheld a requirement that foreign corporations consent to suit on contracts "made and to be performed within" the state, and the limited character of the waiver that the state demanded and its close relationship to the purposes of a grant of business privileges plainly influenced the Court's result. In a later period, however, these limitations became unimportant. See Pennsylvania Fire Ins. Co. v. Gold Issue Mining Co., 243 U.S. 93, 96 (1917) (Holmes, J.) (state may require corporation to consent to suit on out-of-state contracts—"the party executing the document takes the risk of the interpretation that may be put upon it by the courts.")
In 1874, moreover, the Court decided *Insurance Co. v. Morse*, and brought the issue clearly into focus. A Wisconsin statute required insurance companies, as a condition of doing business in the state, to waive their right to remove civil lawsuits from the state to the federal courts. The two dissenting Justices who would have upheld the statute declared: "A State has the right to exclude foreign insurance companies from the transaction of business within its jurisdiction . . . . The right to impose conditions upon admission follows, as a necessary consequence, from the right to exclude altogether." The majority, however, relied on *Lafayette Ins. Co. v. French* and held the statute invalid. It observed, "None of the [prior] cases so much as intimate that conditions may be imposed which are repugnant to the Constitution and laws of the United States . . . ." Moreover, Mr. Justice Hunt's opinion for the majority contained language that may suggest how the Court would have viewed the propriety of guilty-plea bargaining had the issue come before it during this period:

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

The earliest appellate decision on plea bargaining that I have discovered relied on a theory of unconstitutional conditions to invalidate the defendant's plea. In Tennessee in 1865, a defendant pleaded guilty to two counts of gambling. He was fined twenty-five dollars on one count and ten dollars on the other. In accordance with an agreement that the defendant had entered with the prosecutor, eight other charges of gambling were dismissed. The Tennessee Supreme Court remarked that this "statement of fact [was] unprecedented in the judicial history of the state," and it ordered a new trial on a plea of not guilty. The court said, "By the constitution of the state, the accused, in all cases, has a right to a 'speedy public trial . . . ,' and this right cannot be defeated by any deceit or device whatever."
Even in the period from 1894 to 1926, many of the Supreme Court’s decisions were inconsistent with the notion that a state could condition the grant of a privilege as it chose. In 1926, moreover, Mr. Justice Sutherland’s opinion in *Frost & Frost Trucking Co. v. Railroad Comm’n* marked a turning point. The Justice observed, “If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.” In more recent years, as the scope of government employment, government contracts, government subsidies, and other governmental benefits has expanded, the Supreme Court has applied the concept of unconstitutional conditions in a variety of contexts.

Of course the problem remains difficult. Although a governmental agency may not invariably condition the grant of a benefit upon a waiver of constitutional rights, sometimes it may do so. It is necessary to balance the sacrifice of constitutional values against the ability of the waiver to further the legitimate purposes of the grant. Nevertheless, purely “gratuitous” conditions—conditions that do not significantly further the purpose of a governmental grant—are almost invariably invalidated. If, for example, the federal government were to award a contract to build aircraft to a particular manufacturer, it could probably require, as a condition of the grant, that the manufac-

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210. See, e.g., New York Life Ins. Co. v. Head, 234 U.S. 149 (1914); Pullman Co. v. Kansas, 216 U.S. 56, 62 (1910); Western Union Tel. Co. v. Kansas, 216 U.S. 1 (1910). In *Baltic Mining Co. v. Massachusetts*, 231 U.S. 68, 83 (1913), the Court said, “A state may not say to a foreign corporation, you may do business within our borders if you permit your property to be taken without due process of law.”

211. 271 U.S. 583 (1926).

212. Id. at 594.


Not only must the conditions annexed to the enjoyment of a publicly-conferred benefit reasonably tend to further the purposes sought by conferment of that benefit but also the utility of imposing the conditions must manifestly outweigh any resulting impairment of constitutional rights.

*Cf.* *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1969) (“The problem . . . is to arrive at a balance between the interest of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public service it provides through its employees.”). For a more exhaustive description of considerations that may become relevant in cases in which unconstitutional conditions are alleged, see O’Neil, *supra* note 199.
The manufacturer waive a fourth-amendment privilege and that he permit federal inspectors to enter his plant without search warrants to insure that the terms of the contract were observed.\textsuperscript{215} The government probably could not, however, require that the manufacturer permit governmental inspection of his private residence, that he agree never to criticize American foreign policy, or that he waive his right to jury trial in future criminal prosecutions. The Supreme Court has said, “If the only objective of a state practice is to discourage the assertion of constitutional rights it is ‘patently unconstitutional.’”\textsuperscript{216} Thus, when a waiver of constitutional rights furthers the legitimate purpose of a governmental grant, the case is often difficult, but when the grant of a governmental benefit is diverted from its legitimate purpose and is used simply to discourage the exercise of a constitutional right, the case is easy.

In my view, plea negotiation presents a relatively easy case of gratuitous conditioning.\textsuperscript{217} Prosecutors were given their power to recommend leniency, and trial judges their power to grant it, so that they could tailor criminal punishment to the crime and the offender. Both prosecutors and judges, however, have bent this power to other ends—notably, easing the administrative burden of heavy caseloads and insuring conviction when the outcome at trial might be doubtful.

Of course it might be maintained that chilling the assertion of a constitutional right is not the “only objective” of plea negotiation; the ultimate objective is usually to keep the criminal caseload within manageable proportions. In the same way, it might be maintained that the object of inducing an aircraft manufacturer to permit inspection of his residence would be to facilitate crime detection, that the object of inducing him never to criticize American foreign policy would be to promote national unity, and that the object of inducing him to waive his right to jury trial would be to simplify the administration of justice. In each of these situations, the assertion of a “legitimate purpose” for the government’s condition would be unrelated to the purpose of the government’s grant; a defender of the condition would find himself arguing only that the exercise of a constitutional


right should be discouraged because exercise of the right would be undesirable. Similarly, when the defenders of plea negotiation articulate "legitimate purposes" for the practice, they seem to balance the defendant's interest in having a trial against the government's interest in not affording him a trial. The Constitution, however, precludes this sort of balancing. The sixth amendment, by providing a right to jury trial, settles the question whether the cost of affording jury trials exceeds the gain.\textsuperscript{218}


The view that a guilty plea is involuntary only when it is induced by a threat of illegal action does have an antecedent in private contract law. In determining when contractual promises should be denied enforcement on grounds of duress, common-law courts frequently said that "where [a] party threatens nothing which he has not a legal right to perform, there is no duress."\textsuperscript{219} The rigors of this doctrine were mitigated, however, by other doctrines that often afforded relief when enforcement of a promise seemed harsh. Under equitable doctrines of undue influence, for example, the type of pressure used was immaterial.\textsuperscript{220} Even in cases of common-law duress, the requirement of a threat of unlawful action was frequently honored in the breach,\textsuperscript{221}

\begin{itemize}
\item \textsuperscript{218} If the people who created the right to jury trial were not fools, it is safe to assume that they were aware of the fact that jury trials cost money. One who argues that plea bargaining is necessary to conserve resources merely seeks to reassess the framers' determination that the price of jury trials is worth paying. Similarly, the authors of the sixth amendment were doubtless aware that jury trials sometimes result in the imposition of "harsh" penalties and that they sometimes result in acquittal of the guilty when the government's case is weak. The waiver extracted by plea bargaining would seem rationally related to the legitimate purposes of a grant of leniency only if bargained guilty pleas could truly be said to reflect "remorse." As Professor Arthur Rosett has observed, however, "In many courts, the guilty-plea process looks more like the purchase of a rug in a Lebanese bazaar than like the confrontation between a man and his soul." Rosett, The Negotiated Plea, ANNALS, Nov. 1967, at 75.
\item \textsuperscript{219} Hackley v. Headley, 45 Mich. 569, 576, 8 N.W. 511, 513 (1881).
\item \textsuperscript{220} See Dawson, Duress Through Civil Litigation, Part I, 45 Mich. L. Rev. 571, 585 (1947).
\item \textsuperscript{221} See, e.g., Schoellhammer v. Rometsch, 26 Ore. 394, 403, 38 P. 344, 347 (1894) (duress defined as "intimidation" and as "anything tending to restrain [the promisor's] free and voluntary act").
\end{itemize}

Cases involving threats to institute incompetency proceedings seem particularly instructive. Typically, a relative concluded that the promisor was squandering his estate and suggested that, unless the promisor appointed a conservator "voluntarily," it would be necessary to file judicial proceedings against him. Although, in these circumstances, it would not have been unlawful for the relative simply to bring his lawsuit, courts invariably held that the relative's threat constituted duress and rendered the resulting promise invalid. See Harris v. Flack, 289 Ill. 222, 124 N.E. 377 (1919); Gill's Trustee v. Gill, 124 S.W. 875 (Ky. App. 1910); Foote v. De Poy, 126 Iowa 366, 373, 102 N.W. 112, 115 (1905) (duress equated with "moral compul-
and during the twentieth century, there was a significant movement away from this requirement. The historic concept of duress still exerts an influence, however, and Professor John P. Dawson has written:

It is [the] concentration on distinctions between legal and illegal means which has chiefly arrested the modern development of the law of duress. No single formula has achieved so wide a circulation in the duress cases as the statement that "It is not duress to threaten to do what there is a legal right to do." Certainly no other formula is anything like so misleading. Its vice lies in the half-truth it contains. For an enormous range of conduct is included in the class of acts that there is a "right" to do (and therefore, under this formula to threaten).

One early departure from the common-law formula came from a surprising source—Justice Oliver Wendell Holmes. In *Silsbee v.* 

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222. Even the relatively formalistic RESTATEMENT OF CONTRACTS rejected the traditional formulation:

> Acts or threats cannot constitute duress unless they are wrongful . . . But acts may be wrongful within the meaning of this rule though they are not criminal or tortious or in violation of a contractual duty.


223. Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253, 287 (1947). Professor Dawson noted that the class of threats that would invalidate a promise has steadily expanded over the course of history. In Bracton's time, only a threat of death or bodily torture was sufficient. *Id.* at 254. During the eighteenth century, the concept of duress was extended to include the wrongful seizure and detention of property ("duress of goods"). *Id.* at 255. During the nineteenth century, courts began to condemn any "wrongful" interference with freedom of choice, *id.* at 256, and they gave increased attention to the threat of criminal prosecution as a means of obtaining civil satisfaction. *Id.* at 261. Today's doctrine of "unconscionability," formulated after Professor Dawson wrote his article, has continued this expansive trend, but in judging the threats that may be used to induce guilty pleas, courts have moved in the opposite direction. For a brief description of the judicial treatment of guilty-pleas in Anglo-American history, see Alschuler, *The Prosecutor's Role In Plea Bargaining*, 36 U. CHI. L. REV. 50, 50-51 (1968). In Application of Buccheri, 6 Ariz. App. 196, 203, 431 P.2d 91, 98 (1967), the court observed, "It is very apparent from reading the decisions in this troublesome area of 'voluntariness' that pleas of guilty are usually sustained when there have been coercive influences far greater than those which would be permitted if an ordinary contractual were at stake." See also Tigar, *Forward, Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 19-20 (1970).
Weber,224 a businessman accused an employee of stealing money from him and obtained the employee's confession. The employee was unable to make restitution, however, and the businessman therefore approached the employee's mother. She was willing to pay a portion of the amount that her son had stolen, but she claimed that she could not pay the entire amount. The businessman said that in that event he would speak to the employee's father. The employee's mother protested that her husband was mentally ill and that knowledge of his son's wrongdoing might seriously affect his condition; she begged the businessman not to discuss the matter with him. When the businessman persisted in his threat, the employee's mother executed an assignment to him of her share of her father's estate.

In an opinion for the Supreme Judicial Court of Massachusetts, Justice Holmes agreed that for the businessman to seek restitution from the employee's father would not have constituted an unlawful act. He nevertheless upheld a jury's determination that the assignment had been obtained by duress. Justice Holmes wrote, "When it comes to the . . . question of obtaining a contract by threats, it does not follow that, because you cannot be made to answer for the act, you may use the threat."225 The test of duress suggested by the Silsbee opinion was whether one party had "creat[ed] a motive from which the other party ought to be free."226 This standard, although plainly question-begging, marked a refreshing departure from common-law abstraction. The law of duress does provide a precedent for those who would make a threat of unlawful action the touchstone of involuntariness in guilty-plea cases, but the precedent does not seem auspicious.

3. Departures from the Unlawful Act Standard in Other Areas: Out-of-Court Confessions, the Law of Extortion, and Non-Guilty-Plea Waivers of Constitutional Rights

Common-law courts refused to extend the logic of the duress cases to other important areas. One departure from this logic has already been noted: the rule that a confession is involuntary "if made under any threat, promise, or encouragement of any hope or favor."227 This rule, like the doctrine of duress, was concerned with protecting the quality of individual choice, but the rule did not turn on whether a threat or promise was of lawful or unlawful action. In applying a more sensitive test of voluntariness to confessions than to contractual promises, common-law courts implicitly recognized a

224. 171 Mass. 378, 50 N.E. 555 (1898).
225. Id. at 381, 50 N.E. at 556.
226. Id.
227. See text accompanying notes 159-77 supra.
major difference between the two sets of issues. Threats and promises are, of course, the essence of bargaining in a competitive marketplace. It is not at all offensive for one businessman to tell another, "Get those soybeans here by Friday, or my firm will never do business with your firm again." In a legal system that values the privilege against self-incrimination, however, it is not apparent why a defendant's decision to confess or to plead guilty should not be as free as possible. If the "unlawful action" standard has proven unproductive as a means of evaluating the voluntariness of contractual agreements, it plainly holds even less promise as a test of the voluntariness of guilty pleas.

The common law also departed from the logic of the duress cases when, in the late eighteenth century, it made blackmail a crime. A person ordinarily has a legal right to reveal what he knows about another person's indiscretions or to remain silent, but he may not condition his silence upon the second person's payment of a fee. Although the action threatened by the blackmailer is itself within his legal power, it is unconscionable for him to induce another to surrender his right to his property in this way.

In plea negotiation, the subject of the bargain is not the defendant's property but something that is often more valuable, his right to trial. If the principle that has long governed the law of extortion is sound, the fact that a defendant may have been induced to waive his right by something other than a threat of illegal action need not be conclusive.

The Supreme Court has not applied an "unlawful act" standard in evaluating the voluntariness of non-guilty-plea waivers of constitutional rights, and indeed, if the statute at issue in Brady had been designed to exact a less complete waiver, the result of the case would probably have been different. The statute might, for example, have guaranteed a more lenient sentence to a defendant who agreed to stand trial without an attorney, or who waived his right to cross-examine the witnesses against him, or who agreed not to object to the use of illegally seized evidence, or who agreed not to challenge the

228. In Bram v. United States, 168 U.S. 532, 542-43 (1897), the Supreme Court not only reiterated the common-law principle that confessions must not be obtained by "direct or implied promises, however slight," but insisted that this principle was mandated by the fifth amendment privilege against self-incrimination. This constitutional aspect of the decision made Bram both an anathema to Dean Wigmore and a precedent of major importance for the Warren Court. Compare 3 J. Wigmore, THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 823 (3d ed. 1940), with Malloy v. Hogan, 378 U.S. 1, 7 (1964).

racial composition of the jury. If this statute had induced a waiver of any one of these constitutional rights, I have little doubt that the Supreme Court would have held the waiver invalid. It therefore seems incongruous for the Court to uphold a guilty plea that waives all of these rights and more, on the theory that the waiver was not induced by a threat of illegal action. The smaller the defendant's opportunity to defend himself, the less sophisticated the Supreme Court seems to be in evaluating the quality of his choice.

Three years after the guilty-plea trilogy, the Supreme Court considered the constitutionality of a term that the State of New York inserted into its public contracts. The contracts provided that if a contractor invoked his privilege against self-incrimination in official inquiries concerning his dealings with the state, his existing contracts would be cancelled and the contractor would be disabled from contracting with the state for a period of five years. The sanction threatened by this provision—a loss of public contracts—was plainly less severe than the sanction threatened in Brady—a loss of life—and the waiver encouraged by the contractual provision was plainly a less complete waiver of fifth amendment rights than the act of self-conviction in Brady.

Although a threat to withhold government contracts is certainly not a threat of unlawful action, the Supreme Court held the contract term invalid. Mr. Justice White, who in Brady had regarded the threat of capital punishment as merely another factor for the defendant and his attorney to take into account, wrote for the Court, "A waiver secured under threat of substantial economic sanction cannot be termed voluntary." When a court refuses to apply its usual standards of waiver to the most pervasive waiver that our system of criminal justice permits, its application of sensitive due-process standards in other contexts seems hypocritical.

4. The Court's Failure to Apply Its Articulated Standard

The distinction between "legal" and "illegal" threats seems an unsound basis for a test of voluntariness, and ultimately the Su-

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232. Perhaps I have already belabored the point, but there is another incongruity that exclusive reliance on the "legality" of a threat or promise is likely to produce. In Lassiter v. Turner, 423 F.2d 897 (4th Cir. 1970), the defendant agreed to plead guilty partly because a prosecutor had threatened to resurrect a previously abandoned five-year-old charge unless he
Supreme Court did not rely on this distinction. Rather than hold that something less than a threat of illegal action might sometimes invalidate a guilty plea, however, the Court upheld a series of guilty pleas that, in a sense, rested on threats of illegal action.

In *McMann v. Richardson*, the State of New York, by virtue of its pre-*Jackson v. Denno* procedures, informed the defendants that even if their confessions had been illegally obtained, the confessions would be used at trial in violation of the United States Constitution. Despite this threat of unlawful action, the Court upheld the defendants' pleas. Similarly, although the defendant in *Brady v. United States* might have been lawfully sentenced to death under a properly drawn statute, the defendant was not charged under a properly drawn statute. He was instead threatened with a death penalty that, under the retroactively applied decision in *United States v. Jackson*, could not have been legally imposed. If a threat of unlawful action is sufficient to render a guilty plea involuntary, the guilty plea in *Brady* should also have been set aside. By sustaining the guilty pleas in *Brady* and *McMann*, the Supreme Court abandoned the test of voluntariness that it had apparently adopted and left the law of voluntariness in a state of disarray.

CONCLUSION

In the guilty-plea trilogy, Justice White adhered to what one of my colleagues, Professor Lucas A. Powe, has called the “quacking ducks school of opinion-writing.” To the unsophisticated, the issue in a case like *Brady* seems simple and straightforward: a defendant was bludgeoned into a guilty plea by the prospect that he would be executed for standing trial. Justice White, however, sent force a fleet of quacking ducks until this issue disappeared beneath the surface:

*did so. The court of appeals concluded that the prosecutor could not, in fact have brought the defendant to trial on this charge; that action would have been inconsistent with the defendant’s right to a speedy trial. The court therefore decided that, although the prosecutor had acted in good faith, he had threatened the defendant with an illegal action. On that basis, the court ruled the defendant’s guilty plea involuntary.*

The *Lassiter* decision apparently places a higher premium on the full litigation of procedural issues than on the litigation of guilt or innocence. If a question of the defendant’s identity, a factual issue, had been compromised through plea bargaining, the court apparently would not have perceived a significant problem. *Id.* at 900. Nevertheless, when the ability of the prosecutor to resurrect a five-year-old charge, a legal issue, was compromised, the court permitted the defendant to litigate the very issue that he had compromised. When the court decided that the defendant had been threatened with illegal action, it set the guilty plea aside. In that way, the “illegal act” standard may seem to invert the priorities of the criminal-justice system. *See also People v. Blakley*, 34 N.Y.2d 311, 313 N.E.2d 763, 357 N.Y.S.2d 459 (1974).
Voluntariness can be determined only by examining all of the circumstances of the case; the state encourages guilty pleas in various ways throughout the criminal process; the defendant was represented by competent counsel throughout; he was not threatened with any illegal action.

Supreme Court opinions deserve to be taken at face value, and I have therefore devoted this article to exploring the guilty-plea trilogy in detail. My conclusion is that the opinions of the trilogy are essentially hypocritical. These opinions disregard both recent and long-standing precedent, pervert or ignore the records in the cases before the Court, and degrade the right to trial by treating the waiver of this right in a manner that cannot be reconciled with the Supreme Court's treatment of other waiver problems.

I should confess in closing to some small sympathy for the Supreme Court's dilemma. To insist upon constitutional values when these values point to a major restructuring of the criminal-justice system would require considerable courage, and it is only through decisions like Brady, McMann, and Parker that the guilty-plea system can be maintained. As our criminal courts have become more dependent on the expedient and the unconstitutional, the Supreme Court has felt an impulse to "lock the door and throw away the key"—an impulse to avoid rulings whose apparent virtue would be adherence to constitutional principle and whose apparent vice would be the creation of ramifications that could be foreseen only dimly. Nevertheless, one can hope that a bolder Supreme Court will someday tire of elaborate rationalization for a lawless regime of criminal justice and will rule that principles of constitutional fairness extend even to guilty-plea cases.

233. Cf. United States v. Bluso, 519 F.2d 473, 474 (4th Cir. 1975) ("A guilty plea is normally understood as a lid on a box, whatever is in it . . . ").