PLEA BARGAINS, CONCESSIONS AND THE COURTS: ANALYSIS OF A QUASI-EXPERIMENT*

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INTRODUCTION

National debate over the predominance of plea bargaining[1] in the administration of criminal justice in America has become increasingly strident over the past several years. Positions range from the almost unqualified endorsement of plea bargaining practices by no less an authority than the Chief Justice of the United States,[2] through the American Bar Association's (1963) typically moderate proposal for improving procedural safeguards,[3] to the recommendation of total abolition of the practice by the National Advisory Commission on Criminal Justice Standards and Goals (1973). Because of a dearth of hard data concerning the effects of plea bargaining on the criminal justice system, debate over the proposals has tended to produce more heat than light. In the trenchant understatement of one surveyer of the subject, "[s]uch recommendations suffer from insufficient empirical grounding and could benefit from further research on plea bargaining" (Mulkey, 1974: 54).

This study assesses the impact of a selective elimination of one form of plea bargaining on the court system of a large suburban county in the Midwest. Like much previous criminal justice research, it is a case study of one jurisdiction and suffers from all the inherent limitations of that technique. The research

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1. Plea bargaining in the context of this paper refers to the practice by which prosecution or judge offers either charge or sentence concessions to a criminal defendant in exchange for his plea of guilty.
2. According to Mr. Chief Justice Burger, plea bargaining is "an essential element in the administration of justice" (*Santobello v. New York*, 404 U.S. 257, 260 [1971]).
3. For a similar recommendation, see President's Commission on Law Enforcement and the Administration of Justice (1967).

situation is novel, however, and permits application of rudimentary statistical methods to supplement data garnered from observation and interviews with participants. These factors allow insight into—and a rough empirical test of—some of the conventional wisdom[4] surrounding plea bargaining, concession giving, and their effects on the criminal justice process.

A quasi-experimental research situation was provided unintentionally by a newly elected county prosecuting attorney. After a "law and order" anti-drug election campaign, he instituted a strict policy forbidding charge reduction plea bargaining in drug sale cases: once a warrant for the felony of delivery of a controlled substance was issued, the assistant prosecutor in charge of the case could under no circumstances lower the charge. Because of uniform application of the policy and because bargaining over charge had been the predominant form of plea negotiation in such cases previously, the county presents an opportunity to assess how a fundamental change in ground rules affects the interrelationships of the various court participants. And because the rule change constituted at least a step toward the "no bargain" policy advocated by some reformers, it provides an indication of the impact that policy might have on court systems in general.

Research Setting

The research for this paper was conducted in Hampton County,[5] a suburban county located adjacent to a major midwest industrial city. Hampton County is large (900 square miles, with a population of over one million), wealthy (median family income in 1970 was over $18,000), and predominantly white (just under three percent of the population was non-Caucasian in 1970). Amidst this general opulence sits Hampton City, a striking anomaly. With a population of nearly 90,000, Hampton City is heavily industrialized, has a racial/ethnic makeup that is one-third Negro or Mexican-American, and a median family income that is about half that of the county as a whole. The decaying central core of Hampton City breeds a considerable proportion of the county's crime problems and contributes to the popular concern about crime evident throughout the county. The property tax base for the county as a whole, however, is ample, and Hampton County's criminal justice system is comparatively well-funded. Throughout the system salaries are high and offices

4. See note 25.
5. In the pages that follow proper nouns referring to the research site or participants in the court system are fictitious.

well-staffed by employees exhibiting a high degree of professional *esprit de corps*. Unlike Blumberg's (1967) Metropolitan Court and similar to Skolnick's (1966) La Loma County and Carter's (1974) Vario County, Hampton County

> [does] not display the worst pathologies of criminal justice in major urban centers. Rather, it suggests what we can reasonably expect from these systems if we eliminate the worst of the pathologies. (Carter, 1974: 7)

The criminal court system of Hampton County is two-tiered: district and municipal courts throughout the county handle most misdemeanors; those offenses carrying a penalty of more than one year incarceration fall within the jurisdiction of the eleven-judge Circuit Court located in Hampton City. Prior to the new prosecutor's plea bargaining initiative, the vast majority of criminal cases were disposed of without trial after negotiation between assistant prosecutor and defense attorney. The prosecutor's warrant division issued all arrest warrants, but a large majority of police requests for a warrrant were approved by the prosecutor more or less routinely.[6] The system produced a tendency toward overcharging. The level of charge was the predominant currency in defense attorney-prosecutor bargaining, however, and thus was almost always negotiable. In many general classes of case (or "normal crimes"; see Sudnow, 1965), the bargain struck was often the "standard deal," recognized by all parties to be the modal disposition in such circumstances. This standardization of negotiated settlements was particularly evident in drug sale cases where a charge of delivery of a controlled substance could nearly always be reduced to attempted sale or possession in exchange for a guilty plea.

Bargaining in felony cases occurred at the arraignment or evidentiary hearing in district court or at circuit court prior to, or on, the trial date. Judges were seldom involved in the process except to ratify the final agreement worked out between defense attorney and assistant prosecutor. Indeed, interviews revealed considerable system-wide agreement that judicial participation in pre-plea negotiations was improper.

Experimental Intervention: The Prosecutor and His Policy

Upon assuming office in January 1973, newly elected Prosecuting Attorney Robert Walker made a substantial modification in these system ground rules. Originally a "no deals with dope

6. The chief of the prosecutor's warrant division estimated in an interview that roughly 90 percent of police requests for warrants were granted.

pushers" campaign pledge, the operational change was effected in the first policy directive Walker issued to his staff:

> No plea bargaining is permitted in any case where the defendant is charged with the sale and/or delivery of a controlled substance (including marijuana).[7]

The choice of aggressive enforcement of drug offenses was not arbitrary—the area was the subject of intense popular concern. The no-charge-reduction policy was an important part of a general "front office" effort to reduce the discretion exercised by assistant prosecutors, to "program" their decisions in accordance with uniform office policy.[8] While charge reduction plea bargaining continued in non-drug cases during Walker's first year in office, the second and third years of his term saw armed robbery and carrying a concealed weapon added to the list of no-reduction "policy offenses."

Walker's policy directives were clearly related to the political mileage obtainable by being "tough" on drug and gun offenses, an objective which could not be operationalized without firm controls on bargaining decisions of his assistants. The memorandum setting forth the new plea bargaining policy in drug sale cases made this point explicitly:

> Even though the process of plea bargaining has some of the advantages its proponents claim, the reckless use of that process has lead [*sic*] to the complete condemning of the criminal jussystem and a loss of confidence by the police, the community, and especially the victim in the ability of the court system to maintain an orderly society. *The unfettered use of plea bargaining by assistant prosecutors who use individual subjective judgments and are controlled by the exigencies of their particular docket contribute to the loss of confidence in the system.* (Emphasis added.)

All evidence suggests that the prohibition on reducing charges in these "policy offense" cases was enforced on assistant prosecutors with considerable vigor.[9]

The data base for the empirical portion of this research consists of every drug sale case warranted in 1972—the last year

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7. The relevant crimes are specified in the state controlled substances act. Delivery (sale) of a controlled substance is a felony with a maximum sentence ranging from four years prison for sale of marijuana to twenty years for sale of heroin. The statute also prohibits possession of a controlled substance (a two- to four-year maximum sentence felony for "hard drugs," a one-year misdemeanor for "soft") and use of a controlled substance (a 90-day to one-year misdemeanor, depending on the drug). These lesser included offenses were the typical ones bargained to when charge reduction plea bargaining occurred prior to Walker's policy change.
8. For extended analysis of a similar attempt by a prosecuting attorney to control his deputies, see Carter (1974), esp. ch. 5.
9. One assistant prosecutor reportedly lost his position after violating the no-reduction policy. There has been some slippage, however; see Table 2.

in which charge reduction was permitted in such cases—and in 1973—the first year of the new policy forbidding charge reduction. Dispositional information on these cases was then obtained from records of the prosecutor and the courts. It was not possible to obtain full and accurate dispositional information on every case for reasons which are familiar frustrations to anyone who has done research on court records;[10] several passes through various files of the prosecutor, circuit and district courts, however, produced reasonably complete and (I believe) accurate information on disposition of 1972 and 1973 drug sale warrants.[11]

Dispositional information on drug sale cases was supplemented by a series of open-ended interviews[12] conducted in the spring and summer of 1975 (the no-charge-reduction policy of the prosecuting attorney was still in effect at this time). Eight attorneys who the dispositional data indicated had handled a considerable number of drug sale cases in both 1972 and 1973 were interviewed along with the prosecutor, his chief assistant, the head of the warrants division and six assistant prosecutors of the trial division. Also interviewed were six of the eleven circuit judges and the circuit court administrator. An attempt was made to interview as many participants as possible who had been active both before and after the policy shift.

SYSTEM IMPACT OF THE NO-REDUCTION POLICY

Previous research into the operation of criminal justice systems provides a framework for assessing the impact of Hampton County's limited cessation of plea bargaining. For at least the past decade, the dominant model applied by social

10. Among the most serious problems: (1) some warrants were issued against "John Doe" or indicated only a nickname of the person being charged, making a trace of such cases difficult in a recording system generally organized by defendant name; (2) some persons charged were never arrested; (3) court records—particularly at the district court level—were sometimes hopelessly incomplete and unclear; (4) some cases initiated in 1973 were still not closed when the data were collected in spring 1975.

11. The data base is set forth below:

Year	Drug Sale Warrants Issued	Cases for Which Dispositional Data Was Obtained
1972	321	237 (74%)
1973	224	151 (67%)
	545	388 (71%)

12. Interviewing techniques were guided by Lewis Anthony Dexter (1970), especially his ch. 3, "Working Paper on Interviewing for a Law and Psychiatry Project." Quotations from interviews which follow, while probably not verbatim, represent a conscious attempt to duplicate words used by the subjects. No tape recorder was used, however, and quotations were transcribed from notes.

scientists to criminal courts depicts the criminal justice system in a bureaucratic/administrative framework rather than the more more traditional adversarial context (representative examples include Blumberg, 1966, 1967; Cole, 1970; Feeley, 1973; Oaks and Lehman, 1968; Skolnick, 1967; Sudnow, 1965; *Cf.* Packer, 1968). Operation of the system is still understood partially in terms of its formally defined substantive and procedural goals. But many of the routinized patterns of cooperation and exchange between supposed adversaries uncovered in these studies have suggested that the adversarial "due process" model of court operation may belie reality. Rather than a closely regulated battle at trial between adversaries before a neutral judge/referee, the predominant pattern of case disposition in many jurisdictions is a negotiated guilty plea that follows terms of an agreeement involving (to varying degrees) defendant, defense attorney, prosecutor and judge. Systems may vary as to the roles played by various participants in the negotiation process and in the "currency" (reduced charges, sentences, sentence recommendations, etc.) in which the bargaining is conducted.[13] The goal of the negotiation process is generally the same: avoidance of the uncertainty and potential risks to all participants inherent in a trial (Blumberg, 1967: ch. 1; Casper, 1972: 67, 74-75; Carter, 1974: 86-88).

The Hampton County criminal courts described in the preceding section fit closely this bureaucratic framework: the vast majority of convictions came about through pleas of guilty to reduced charges; trials, in the words of one judge, reflected "a breakdown in the negotiations." The bureaucratic norms of cooperation, "reasonableness," avoidance of interpersonal conflict were frequently lauded in interviews of judges, prosecutors and defense attorneys. Elimination of the primary device for working out agreements short of trial—charge reduction plea bargaining—could therefore be expected to cause system-wide changes in the disposition of drug sale cases. The two most significant systemic changes following the policy—alteration in guilty plea rates and modification of bargaining practices—are discussed in turn below.

Plea and Trial Rates

If charge reduction plea bargaining produced many of the guilty pleas prior to Walker's term of office, we would expect its elimination in drug sale cases to cause a decrease in the pro-

13. For a typology of system types, see Mather (1974: 189-190).

portion of defendants pleading guilty in those cases (at least if other aspects of the system remained the same: a topic to be discussed in the next section). Table 1 indicates the disposition of those 1972 and 1973 drug sale warrants that were not dismissed by the judge or nolle prossed by the prosecutor. For purposes of comparison, each year of warrants is subdivided into those cases disposed of the same year the warrant was issued and those disposed of in a later year. The first column includes cases handled entirely by Walker's predecessor; the second, cases warranted under him but disposed of during Walker's tenure; cases in the third and fourth columns were both warranted and disposed of under Walker. The columns from right to left represent a rough time dimension.

TABLE 1

Trial and Plea Rates in 1972 and 1973 Drug Sale Cases

Disposition	1972 Warrants		1973 Warrants	
	1972 Disposition	1973 or Later Disposition	1973 Disposition	1974 or Later Disposition
Guilty Plea to Reduced Charge	88 (81%)	5 (10%)	5 (10%)	0
Guilty Plea to Original Charge*	19 (17%)	29 (62%)	39 (75%)	37 (90%)
Total Guilty Pleas	107 (98%)	34 (72%)	44 (85%)	37 (90%)
Trials	2 (2%)	13 (28%)	8 (15%)	4 (10%)
Total Dispositions**	109 (100%)	47 (100%)	52 (100%)	41 (100%)

* Includes those defendants convicted as youthful trainees. See Table 2.

**Excludes dismissals and nolle prosses. See Table 2.

The table illustrates a striking change in the mode of disposition of drugs sale cases between 1972 and 1973. Reduced charge guilty pleas—the predominant mode of disposition in 1972—were almost totally eliminated.[14] The trial rate soared and the total proportion of cases decided through pleas of guilty fell considerably. Those cases held over from the previous prosecutor (column 2) tended to be the first handled under the new no-reduction policy. For this group the data indicate a 27 percent decrease in the proportion of cases disposed of through guilty pleas. Those cases handled later in Walker's term illustrate a similar, though less marked, tendency toward more trials, fewer pleas. Relative changes should not obscure absolute values, however: even at their most intransigent, nearly three out of every four post-policy drug sale defendants pleaded guilty "on

14. The prosecutor accounts for the ten plea reductions as errors by assistant prosecutors caused either by unfamiliarity with the policy during its early months, or by novices' inexperience.

the nose" to a felony carrying up to a twenty-year maximum sentence. This extraordinary level of defendant cooperation would be difficult to explain in the absence of some form of negotiation through which assurances could be made that cooperative defendant behavior would be rewarded. Heumann (1975: 526-527) hypothesizes the likely system response to the kind of "no bargaining" policy initiated by Walker:

> I suppose it would be possible to proscribe actual plea bargaining negotiations as some have suggested, and announce with a great flourish "the abolition of plea bargaining." But the guilty plea is legally protected, and concessions to the defendant who pleads guilty may readily be justified in terms other than saving the state time and money. Factually guilty defendants without much hope at trial would probably be disposed to plead guilty and avail themselves of the reward reputedly accorded the contrite and cooperative defendant. And defense attorneys would seek assurance from prosecutors that the expected implicit reward would be forthcoming. As these discussions multiply, I would hypothesize, a more explicit plea bargaining system would emerge again, albeit in *sub rosa* fashion.

This adaptation was precisely the response in Hampton County to Walker's policy directive; in short order bargaining developed over concessions not affected by the prosecutor's policy. The kinds of bargains struck and the arena in which they took place changed. Bargain justice continued.

The Shift to "Judicial Dominant" Sentence Bargaining

Prior to Walker's no-reduction policy, the prosecutor's control over the charge made him the dominant official figure in plea negotiations; he served as the system's "chief bargaining agent." But research has now thoroughly documented (Newman, 1956; Casper, 1972) what practitioners in the criminal justice system have known intuitively all along: the basic concern of the vast proportion of criminal defendants is *sentence.* Reduction of charge is an effective inducement of a guilty plea because it affects expected sentence or at least determines the maximum sentence a judge can impose.[15] When Robert Walker put his no-reduction policy into effect, defense counsel could no longer obtain indirect sentence concessions through reduction of charge. They began to seek direct sentence assurances. As one prosecutor put it:

> Plea bargaining still continues but the emphasis has shifted from the name of the charge to the sentence. That's really

15. In Hampton County, the statutory maximum also determines the highest minimum sentence a judge can impose. A recent court ruling held that when a judge imposes a variable-length sentence (e.g. two to five years in prison) the *minimum* figure cannot exceed two-thirds the statutory maximum. It is the minimum that generally determines actual prison time.

> where it was all along since the concern of the defendant and his attorney has always been with the amount of time to be served.

This shift of emphasis, however, placed the prosecutor in a more precarious bargaining position: while charge reduction could be effected by him almost unilaterally, sentence decisions are ultimately made by the judge.

In Hampton County, the role of the assistant prosecutor in a sentence bargaining system was vitally dependent on the eccentricities of the judge with whom he worked. One prosecutor was permanently assigned to the courtroom of each judge; the judge and "his" prosecutor in Hampton County often developed close working relations based upon mutual respect and trust. As one defense attorney put it:

> The judge and the prosecutor assigned to his court get to be very close. The prosecutors are usually bright young guys and the judges almost come to regard them as their sons.

In at least one instance, an assistant prosecutor enjoyed such a close working arrangement with "his" judge that the assistant prosecutor's bargaining position vis-à-vis defense counsel was (unlike most of his colleagues) hardly changed by the new policy. The judge encouraged sentence recommendations from the prosecutor and almost invariably followed them. In addition, the judge generally allowed a defendant to withdraw the plea if the subsequent probation report indicated the original sentence assurance to be inappropriate. Under these circumstances the assistant prosecutor was in almost as strong a position to offer assurances in exchange for pleas as he was under a charge reduction system. The prosecutor had only to maintain the judge's confidence and work within the confines of what he knew to be the sentencing philosophy of the judge. The assistant prosecutor described the process:

> I don't want to try these cases; I have more important cases on the docket than a small-time marijuana dealer. So what happens is I get to know my judge, I get to know his outside sentence limits. If the defendant isn't a real badass with a record, and if the drug isn't heroin then I'm pretty sure the guy will get probation. So I tell the attorney, "Listen, if we try this case and your guy is convicted then I'll recommend jail. If you plead him, I'll recommend probation." This is put on the record as part of the plea agreement. It won't infringe on the judge's prerogatives since I know his sentencing practices.

Note that in this mode of negotiation the prosecutor was still doing the bargaining. The judge himself made no pre-plea assurances concerning sentence. He had only to be reasonably predictable, and amenable to folowing his prosecutor's sentence recommendations. There was one other implicit requirement:

his general sentencing practices, if not lenient, had to allow the prosecutor to make an offer that seemed a genuine concession. An assurance of the statutory maximum in exchange for a non-reduced plea would obviously offer little inducement.

Most judges apparently did not wish to fulfill these conditions. In their courtrooms the role of the assistant prosecutor in securing guilty pleas was lessened considerably. Experience exclusively with cases handled by these prosecutors may be what led one defense attorney to conclude, "In drug sale cases, the prosecutor has stepped out of the process altogether." In some courtrooms this vacancy in the position of "chief bargainer" in policy crimes was filled by the judge. In others, the position apparently remained vacant.

As Table 1 indicates, a major impact of Walker's no-charge-reduction policy was reluctance of drug sale defendants to plead guilty. While the increase in trials demanded was not as debilitating as some judges had feared when the policy was first initiated, the added trial load clearly caused considerable concern on a bench generally described as "statistics conscious." Few judges were prepared to move the drug sale cases on their dockets by forfeiting a measure of control over sentencing through routine acceptance of the prosecutor's sentence recommendations. Thus a number of judges reluctantly (or so they indicated in interviews) began to encourage pleas through personal participation in sentence bargaining procedures in those cases in which the prosecutor's policy did not permit his assistants to reduce the charge. These procedures were reserved almost exclusively for policy offenses. In one attorney's experience: "It's almost as if the judge says, 'What's the charge here? Oh—delivery. So there's nothing the prosecutor will do. Then let's see what we can work out.' "

The major difficulty facing a judge in pre-plea sentence negotiations was lack of information relevant to the sentencing decision. Prior to final sentencing the circuit court probation department routinely prepared for the judge an extensive pre-sentence report containing information on the defendant (family, employment record, current job, criminal record) and on the crime. Appended was the sentence recommendation of both the parole officer who prepared the report and of a sentencing review panel of senior parole officers. All judges interviewed indicated the considerable importance of this report in their sentencing decisions, although they varied in the weight given to probation's specific recommendations. At the time sentence

bargaining typically took place—the pre-trial conference between assistant prosecutor, defense attorney and judge, or with the same participants in the judge's chambers on the date set for trial—most of this information was unavailable. The assistant prosecutor usually had a rough idea of the offense committed, the strength of his case, and the prior criminal record of the defendant. All other personal information on the defendant, including any mitigating circumstances surrounding the crime, were supplied by defense counsel. Much depended on whether or not a judge believed the attorney to be "responsible" or otherwise trustworthy[16] (and, of course, whether the attorney had taken the time to find out such information about his client).

Once beyond this preliminary hurdle, bargaining did not proceed in the bartering format common in attorney-prosecutor plea negotiations.[17] Rather, the process appeared more as the statement of a hypothetical situation to the judge to which he responded with a hypothetical sentence. Any explicit granting of a concession by the judge in exchange for a plea was intentionally avoided. One attorney described a typical session:

> With most judges you can tell them about your guy at the pre-trial conference or with the prosecutor in chambers on the date of the trial. I tell him what the probation report will say about him, about his family, his job, the crime, and then ask him, "if the facts about my client are as I'm telling them, what would you be disposed to do? Would you be disposed to give him probation?" If the judge says he probably would, then I ask him if I can withdraw the plea if he changes his mind.

Interviews indicated that roughly half the bench would make some form of pre-plea sentence commitment in policy cases—a sizeable shift given former practices and strong system norms against judicial participation in plea bargaining. To a considerable extent, judges found themselves pressured by their dockets and by attorneys practicing before them to fill the void left by abdication of the prosecutor from his position of ascendency in the bargaining process.

It should not be concluded from the foregoing that sentence bargaining served as the only dispositional technique developed in response to the no-charge-reduction policy. Nor should prosecutorial impotence in disposing of policy cases be assured. While sentence bargaining with the judge did constitute the basic response for a majority of the judge-prosecutor "teams," behavior of all participants in the Hampton County court system was

16. On the importance of trust in defense-prosecution-judge relations, see Carter (1974: 85-87).
17. See Alschuler (1968); Newman (1956).

modified in some degree by Walker's drug sale policy. The following section outlines some of the more significant of these adaptations.

PARTICIPANT ACCOMMODATIONS

Prosecutor

Blumberg (1967: 58) terms the discretion of the prosecutor to lower a charge in exchange for a guilty plea "the most important weapon in the prosecutor's arsenal, for it furnishes his basis for power in negotiation with significant 'others' in the court." Assistant prosecutors in Hampton County conceded lessened ability to control the disposition of drug sale cases after Walker's prohibition of charge reduction. This diminution of authority, however, was not unequivocally resented. One prosecutor who worked for both Walker and his predecessor described the situation this way:

> Under Walker's policy the burden has shifted from the prosecutor to the judge. Under the old system the pressure was on us. We had to define justice in the individual case. We got all the pleas from lawyers to "Help this kid, he's a first offender and from a good family." Under the new system the pressure is on the judge. He decides the equities.

Mild resentment was expressed by several assistant prosecutors over losing flexibility in troublesome cases, especially when they felt saddled with a nonreducible felony warrant in a case where either considerations of equity or the weakness of the case demanded a lesser charge. But a general reaction—summed up by the same "old hand" in the trial division—was one almost of relief:

> There's no question we have less discretion in delivery and CCW cases. But I'm not sure we should have that much discretion. Everybody likes playing God but maybe those decisions involving balancing of equities should rest with elected officials and judges. Under the old system we were functioning more like judges than prosecutors. We got involved in moving dockets, sentences, deciding the equities of individual cases. I guess there is a real question in my mind as to whether that is the prosecutor's function.

A uniform reaction of those assistant prosecutors interviewed was that "the policy makes my job a lot easier."

While an assistant prosecutor could no longer lower the charge, he did retain several other tools for inducing pleas in drug sale cases. The prosecutor still decided whether to charge a recidivist under the habitual offenders statute, whether to drop other cases or counts pending against a defendant, whether to recommend a harsh sentence to the probation department for

inclusion in the pre-sentence report. One defense attorney indicated that the *smallest* concession he was offered from an assistant prosecutor in a drug sale case was a promise to stay out of the sentencing process altogether in a case where the defendant ("a real bad dude") would almost surely have been a a candidate for a "throw the book at him" prosecutorial recommendation.

TABLE 2

Disposition of 1972 and 1973 Drug Sale Cases

Disposition	1972 Warrant				1973 Warrant			
	1972 Disposition		1973 or Later Disposition		1973 Disposition		1974 or Later Disposition	
Plea of Guilty to Original Charge	15	(10%)	25	(31%)	24	(27%)	27	(43%)
Plea of Guilty to Reduced Charge	88	(56%)	5	(6%)	5	(6%)	0	
Convicted as Youthful Trainee	4	(3%)	4	(5%)	15	(17%)	10	(16%)
Convicted at Trial	2	(1%)	7	(9%)	8	(9%)	3	(5%)
Total Convictions	109	(69%)	41	(51%)	52	(59%)	40	(63%)
Dismissal (Judge)	26	(17%)	19	(24%)	30	(34%)	13	(21%)
Nolle Prosse (Prosecutor)	22	(14%)	14	(18%)	6	(7%)	9	(14%)
Acquittal (Trial)	0		6	(8%)	0		1	(2%)
Total Cases	157	(100%)	80	(101%)	88	(100%)	63	(100%)

Assistant prosecutors could also move cases simply by dropping charges, the formal device being a motion of *nolle prosequi*, commonly termed a nolle prosse. Table 2 indicates that except for those cases held over from Walker's predecessor, no increase occurred in nolle prosses after charge reduction ceased. The nolle prosse statistics, however, misstate the total extent of prosecutorial participation in terminating cases. As will be discussed in the following section, assistant prosecutors often tacitly agreed to dismissal of a case by not contesting (or offering only token protest to) a defense motion to suppress evidence or dismiss. Nolle prosses and dismissals taken together made up a consistent 41 percent of drug sale dispositions in 1973—an increase of one-third over analogous dispositions in 1972. Increased numbers of nolle prosses and dismissals were primarily responsible for the sizeable drop in Walker's drug sale conviction rate (see Table 2). This fall in the conviction rate is particularly significant in the face of changes effected by Walker in drug sale warranting procedures.

Many participants in the Hampton County criminal justice system believed that the prosecutor's warrant division engaged

in overcharging, that is, setting the original charge higher than likely to be sustained in a jury trial. Walker's no-charge-reduction policy, however, produced considerably greater care in charging defendants with sale of a controlled substance. Indeed, Walker tightened considerably the standards by which drug sale warrants were issued as an integral part of his policy. The new standards required a "controlled buy" of the drug by an undercover police officer. Under the previous prosecuting attorney, delivery warrants were often issued solely upon evidence obtained from informers (or, in the terminology of Walker's chief assistant, "finks"). These cases apparently fared poorly at trial, necessitating pre-trial settlements involving reduction of charge.

The new warrant procedures resulted in a 30 percent reduction in the number of drug sale warrants issued,[18] but not the rise in conviction rate that would be expected upon elimination of weaker (or overcharged) cases. Rather, the conviction rate *fell* by nearly one-sixth; from 69 percent of 1972 cases handled exclusively by Walker's predecessor, to 59 percent in cases warranted and disposed of under the new policy in 1973. The increased tendency to dismiss or nolle prosse cases indicated above thus becomes doubly significant: although 1973 cases were factually stronger than 1972 cases, they were more likely to be dismissed or nolle prossed. Some drug sale cases that would have been prime candidates for reduced charge convictions in 1972 apparently found their way out of the system altogether in 1973.

The tightened warrant restrictions may, however, have encouraged what Heumann (1975: 526) terms "implicit plea bargaining." Attorneys conceded that Walker usually had a very strong case when the charge was sale of a controlled substance, the only chance for acquittal being some form of police misconduct (such as illegally seized evidence or entrapment). In the absence of procedural irregularities, a drug sale defendant was in a particularly weak bargaining position. Given the common assumption in Hampton County that sentences were harsher after conviction at trial than after a plea, a clear incentive operated to encourage guilty pleas in such cases despite the absence of explicit charge reduction concessions.[19]

18. See n.10.

19. Post-policy drug sale cases in Hampton County resembled Mather's (1974: 198-209) "dead bang" category; her analysis of dispositions in Los Angeles is relevant here: in a "light" or less serious case where the prosecution's evidence is very strong, little explicit bargaining takes place "because specific outcomes are fairly predictable" (198). The greater the probability of prison time, the more the defense presses for explicit assurances in exchange for a plea.

Judge

Walker's restraints on prosecutor-based plea bargaining in drug sale cases put increased pressure on a docket-conscious court to move cases through their own devices. The major accommodation by the bench, described at some length above, involved at least half the judges in sentence bargaining with drug sale defendants. Judges also made more use of dismissals in troublesome cases. According to one judge:

> I'm finding myself increasingly disposed to grant defendants' motions to suppress evidence or dismiss a case because of insufficient evidence in delivery cases. If the case is one of the many we're seeking now that shouldn't be in circuit court in the first place, and if the prosecutor doesn't seem all that interested in contesting the motion, then I might grant it even though the legal grounds are a little shaky.

This increased utilization of dismissals was, as the quotation indicates, a practice at least tacitly accepted, if not sometimes encouraged, by the assistant prosecutor. As one prosecutor put it: "Walker's policy may forbid reducing charges but it doesn't say anything about dismissing or nolle prossing cases."

Increased judicial recourse to another docket-moving technique, the Youthful Trainees Act, is indicated in Table 2 by the fivefold increase in the proportion of YTA guilty pleas on 1973 drug sale warrants. The relevant statute allows a juvenile criminal defendant to emerge from even a felony conviction with a sentence of probation and no criminal record. Defendants assured of receiving such lenient treatment obviously have a strong incentive to plead guilty rather than risk its probable loss after trial. Designation of a defendant as a youthful trainee is up to the discretion of the trial judge. The authorizing legislation places age and other limitations on the decision, but at least one judge indicated that those limitations were sometimes circumvented, even to the extent of granting youthful trainee status in one case to a thirty-year-old man! In this judge's words, "Our use of YTA in policy cases has been loose as a goose."[20]

Predictably lenient treatment after a plea—"implicit plea bargaining"—may have been responsible for many of Walker's as-charged guilty pleas, at least in cases involving defendants who were likely candidates for parole. The statutory possibility of a considerable prison term upon conviction of sale of a controlled substance, however, very probably produced the defense pressure for more explicit assurances. See Heumann (1975: 526-527).

20. Some judges adopted more idiosyncratic techniques to deal with the docket pressures brought about by the no-bargaining policy. One judge, for example, made increased use of a device for which he was already somewhat notorious: taking a plea of guilty under advisement for a year, thereby delaying imposition of sentence. If the defendant managed to stay out of trouble during that period, the judge

Defense Attorney

This suspension of charge reduction plea bargaining in drug sale cases found its most severe critics among defense attorneys. Several lawyers phrased their objections on grounds of equity, stressing the importance of plea bargaining as a tool for mitigating the rigors of criminal justice when the circumstances of an individual case demanded it.[21] Others expressed concern for assistant prosecutors who were, in their view, being demoted to non-thinking "automatons," deprived of their "professionalism."[22] An assistant prosecutor, when asked about this solicitude, put the point in somewhat different terms:

> Lawyers aren't concerned about our professionalism; they're concerned about what they can do for their clients. They come in here and say "What can you do for me? Give me something to take back to my client." With the no-reduction policy, they can't take back a lowered charge. I guess what we're really doing is making it difficult for attorneys to justify their fee to their clients.

Viewed in this light, both the expressed concern with equity for defendants and for professionalism of prosecutors become rather similar. An attorney who cannot negotiate a reduced charge for the client who seems a likely candidate for equitable consideration is obviously of less service to that client than if he could obtain such a concession. And if a "professional" assistant prosecutor is defined as one who can grant charge reductions at will, then prosecutorial professionalism is at least as much an asset to attorneys as to prosecutors.

When pressed, attorneys generally conceded that a fundamental source of their distaste for the no-reduction policy was indeed the difficulties it caused them in dealing with clients. In

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would dismiss the case altogether. Another judge—one with a general reputation in the county for being a "tough" sentencer—served notice on attorneys before him in implicit, and sometimes explicit, terms that defendants who were found guilty after a trial ("when their peers have spoken") would be in considerably greater jeopardy than those who pleaded guilty in the first place. All the techniques were designed to dispose of cases without trial under a system in which the primary trial-avoidance mechanism, charge reduction plea bargaining, was no longer in operation.

21. In one attorney's words: "Plea bargaining is an absolute necessity to achieve fair results in the criminal justice system. You can't solve the drug problem by taking away the prosecutor's discretion. Now they can't separate the big apples from the little kids. It's those nice kids from good families, kids who make one little mistake, who are getting the dirty end of Walker's policy."

22. In one attorney's words: "I resent the prosecutor's office having such a hard-and-fast policy. Assistant prosecutors are hired for their professional competence and then told how to handle cases. The policy takes away from their professionalism."

the words of one defense attorney, the policy posed problems of "client management."[23] Retained clients pay a price to a criminal lawyer for which they expect a service, a service which usually involves negotiating with the prosecutor for concessions. In Hampton County, the end result of the lawyer's efforts was usually a "deal": a reduced charge offered by the prosecutor in exchange for a plea of guilty. When that most important of concessions could no longer be obtained, the attorney was put in a difficult position. The state's evidence in drug sale cases after Walker's "controlled buy" restriction on warrants was generally quite strong, making defendant success at trial unlikely. No lawyer wants to take a sure loser to trial, especially given a fee structure which may cause the loss of revenue as well as face. When the only alternative to trial must be an "on the nose" plea for a twenty-year felony, lawyer-client relations can become strained:

> You come back from the prosecutor and tell your guy: "Plead guilty as charged and throw yourself on the mercy of the court. I know the judge and he'll probably be easy on you." He's going to say, "Why do I need you for that, man? I can do that by myself."

Hence, the pressure from attorneys, related by assistant prosecutors and judges alike, for *some* kind of "deal," for some explicit concession to justify to a client that services have, in fact, been rendered.

Lawyers interviewed uniformly indicated that if no concession was forthcoming from either prosecutor or judge, they would be forced to take the case to trial. Several spoke of a trial under such circumstances as a "professional responsibility," although others stressed long-term tactical reasons for holding out the ultimate threat: "If there's no deal, there'll be no plea; you have to make the judge and the prosecutor understand that you won't just lie down and let them walk on you." Whether or not this bravado accurately described actions of the bulk of attorneys practicing under the no-charge-reduction system is not possible to determine. Trials were hardly a frequent mode of disposition of drug sale cases in 1972 *or* 1973. Attorneys and prosecutors alike agreed that in the vast proportion of policy cases some plea agreement was worked out, although the "concession" might be merely the prosecutor's promise to stay out of the sentencing decision.[24]

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23. For discussion of a similar problem labeled by attorneys in an analogous manner ("client control"), see Skolnick (1967).
24. A major element in many of the pleas may have been the assump-

Most attorneys' major difficulty with the new system was not that concessions were unavailable. Rather, they complained that the kinds of assurances possible in sentence bargaining were usually vague, ephemeral, and dependent on unpredictable contengencies such as the probation report or the possible materialization of public pressure on the judge. In one attorney's words:

> The main thing a defendant wants to know from his attorney is what will happen to him after he pleads. If the charge is lowered, he can figure out the highest minimum sentence the judge can impose, deduct for good time and parole, and get a very accurate picture of what he's getting into. Without charge reduction you get into a hairy area. The attorney has to interpret to his client how often X assistant prosecutor's recommendations are followed by Y judge, or that Z judge almost always gives probation. But when you go back to your client he doesn't want generalities, he wants specifics. And often all you can tell him is "this is what the judge says he usually does in these kinds of cases." It is plea bargaining that is too general not to cause problems.

For retained counsel, these problems consisted primarily of convincing a defendant that even though he was being asked to plead guilty as charged, he had received something of value for the fee paid to his attorney and some concession from the authorities in exchange for his cooperative behavior.

In the case of court-appointed counsel (Hampton County has no public defender), the problems were somewhat different. Fee schedules for court appointments, variously described by attorneys interviewed as "pitiful" and "ridiculous," provided specified payment for handling a criminal case, augmented by a *per diem* for any trial days. Most attorneys agreed that economic incentives worked strongly toward disposing of a case as soon as possible through a plea, since little additional income could be obtained to offset the considerable investment of time and effort needed for a trial. Another factor worked against appointed counsel pressing for trials: the source of their appointment was individual circuit judges. Presumably a judge's concern for moving his docket could be translated into bypassing those attorneys on the appointments list known to be contentious and uncooperative. These two factors, in the words of one attorney who accepted few appointments, "inhibit . . . the vigor of the defense" in appointed cases.

Most attorneys, judges and assistant prosecutors interviewed indicated that these factors were overcome by the "professionalism" of the Hampton County bar and by the desire of young appointed attorneys to make names for themselves. In fairness

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tion of all parties that post-plea sentences would be lighter than post-trial sentences. See n.18.

to this position, the Hampton County courts did not exemplify the oft-described urban "assembly line" judicial system in which courthouse hangers-on make large incomes by rapid-fire turnover of guilty pleas from indigent defendants. The data on drug sale cases collected in this research, however, do indicate that the added pressure for trials accompanying the no-charge-reduction policy was not uniform from appointed and retained counsel. Of the two trials of drug sale cases held in 1972, one was conducted by appointed and one by retained counsel. Of the twenty-two drug sale trials held in 1973, however, only three were conducted by court-appointed attorneys, even though roughly one-third of the 1973 defendants had assigned counsel. It is not possible to determine from this limited data whether the smaller proportion of trials demanded by appointed counsel lowered the credibility of their "trial threat," thus putting them in a weaker position to hold out for a favorable sentence.

Hampton County attorneys interviewed generally confirmed findings of previous research (esp. Casper, 1972: ch. 4): "state lawyers" (the pejorative Hampton City street term for appointed counsel) tend to be distrusted by their clients. Whether based on a perception that court-appointed attorneys are less than vigorous in their defense, or on the simple fact that the defense is paid out of the same purse as the prosecution, this distrust caused special problems in a sentence bargaining system in which concessions from a judge were often implicit rather than explicit, where a lawyer's subjective evaluation of a judge's sentencing practices, the weight likely to be accorded an assistant prosecutor's sentence recommendation, and the like, were often more crucial than any specific *quid pro quo* worked out between the parties. Imparting such non-specific assurances to a suspicious client was apparently difficult at best.

Sentence bargaining, as indicated previously, also required an atttorney to possess considerable background information on his client, information he was expected to provide the judge in absence of the pre-sentence report of the probation department. Securing such detailed personal information required both attorney effort and client trust. Yet in court-appointed cases the fee structure produced disincentives for added attorney effort and the "state lawyer" syndrome discouraged client cooperation. The difficulties caused assigned counsel by the elimination of charge reduction plea bargaining were somewhat more intense than those experienced by retained counsel; the basic problem was the same: "client management."

IMPLICATIONS: COURTS, CONCESSIONS AND ELIMINATING PLEA BARGAINING

The conventional wisdom surrounding plea bargaining—shared by academic observers[25] as well as most practitioners interviewed in this study—is grounded in the general proposition that the guilty pleas are secured primarily through granting concessions to defendants. In the words of one prominent Hampton City attorney, "Before I'll plead my client guilty, somebody has to give me something." The experience in Hampton County has tended to confirm the importance of concessions in securing pleas. Tables 1 and 2 illustrate the lower proportion of guilty pleas obtained in drug sale cases after the prosecution stopped making charge concessions. As we have seen, however, that drop was not as great as might be expected, in part because judges tended to take up the role of "concession giver" abandoned by the prosecuting attorney.

Because of the growth of alternative forms of negotiation, 1973 drug sale cases in Hampton County are not representative of a "no bargain/no concession" system. Among these alternate dispositional techniques, however, attorneys uniformly indicated that the concession most often sought, in the absence of a reduction of charge, was an assurance that their client would avoid incarceration by being placed on probation. And, as one assistant prosecutor put it, "Judges who aren't prepared to give probation will have docket problems." It is thus possible to obtain a limited approximation of a "no concession" system by examining the 1973 drug sale dispositions by judges reluctant to sentence these defendants to probation. While other negotiating processes may have been operative in these cases, the major techniques—charge reduction by the prosecutor and assurance of leniency by the judge—were not.

In order to determine the relationship between judges' concession-giving behavior and the disposition of drug sale cases of their dockets, the bench was divided into two categories, "lenient" and "stringent" sentencers, based on the proportion of convicted drug sale defendants granted probation in 1972 and 1973.[26] Sentencing practices of these two categories of judges

25. See, e.g., Newman (1966):77; Alschuler (1968):51; Yale Law Journal (1972):286.

26. Two indices were computed for each judge: the percent granted probation of those convicted defendants originally charged with sale of narcotics (heroin and other opiates), and the percent granted probation of those convicted defendants originally charged with sale of a *non*-narcotic drug (including marijuana). An average of these two figures, weighted by the overall proportion of narcotic to non-narcotic drug cases in the two-year period, was then computed. Those

were markedly different. Stringent judges were considerably less likely to give probation than lenient judges. Prison sentences of stringent judges also tended to be longer, as illustrated by their tendency to sentence to the state penitentiary (where sentences must exceed two years) rather than to the county jail (where sentences are always less than two years).

Table 3(A) and Table 3(B) indicate disposition of narcotic and non-narcotic delivery cases in the courtrooms of lenient and stringent judges under a charge-reduction and a no-charge-reduction system. A preliminary note concerning the tables: The mix of narcotic and non-narcotic cases handled by stringent judges was rather different from that of lenient judges. In particular, the disproportionately small number of narcotic cases docketed before stringent judges in the no-reduction system is difficult to reconcile with random assignment of cases. Cases were supposedly assigned permanently to one judge's docket by means of a blind draw, but these data suggest manipulation of the docketing system by attorneys handling "hard" drug cases so as to avoid stringent-sentencing judges. One attorney indicated his practice of "judge shopping" in policy cases; court officials have, however, denied the possibility of such practices. Whatever the cause, the different proportion of hard and soft drug cases handled by the two categories of judges produced several small cells and the possibility of a lack of randomness in case assignment: both tendencies lessen reliability. It is hoped that the unidirectional and rather strong trends depicted in both tables justify their inclusion here.

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judges with a weighted average proportion of incarceration above the median were classified "stringent" sentencers; those below, "lenient" sentencers. Five judges were assigned to each category (two judges who served only part of the two-year period were not assigned to either category). Sentencing of the two classes of judges in 1972 and 1973 drug sale cases is set out below:

Sentence	Original Charge			
	Sale of Non-Narcotic		Sale of Narcotic	
	Lenient	Stringent	Lenient	Stringent
Probation or Suspended Sentence	46 (74%)	22 (50%)	26 (60%)	6 (18%)
County Jail	12 (19%)	15 (34%)	4 (9%)	15 (45%)
State Prison	4 (6%)	7 (16%)	13 (30%)	12 (36%)
	62 (99%)	44 (100%)	43 (99%)	33 (99%)

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TABLE 3 (A)

Mode of Disposition of Sale of Non-Narcotic Drug Cases by Lenient and Stringent Judges Under Charge Reduction and No-Charge-Reduction Systems

Mode of Disposition	Lenient Judges		Stringent Judges	
	Charge Reduction Permitted*	Charge Reduction Not Permitted**	Charge Reduction Permitted*	Charge Reduction Not Permitted**
Dismissal, Nolle Prosse, Quashed Indictment	4 (20%)	9 (15%)	1 (9%)	20 (33%)
Trial	0	6 (10%)	0	12 (20%)
Guilty Plea	16 (80%)	44 (75%)	10 (91%)	28 (47%)
Total	20 (100%)	59 (100%)	11 (100%)	60 (100%)

TABLE 3 (B)

Mode of Disposition of Sale of Narcotic Drug Cases by Lenient and Stringent Judges Under Charge Reduction and No-Charge-Reduction Systems

Mode of Disposition	Lenient Judges		Stringent Judges	
	Charge Reduction Permitted*	Charge Reduction Not Permitted**	Charge Reduction Permitted*	Charge Reduction Not Permitted**
Dismissal, Nolle Prosse, Quashed Indictment	6 (22%)	4 (15%)	1 (4%)	2 (22%)
Trial	0	2 (7%)	1 (4%)	2 (22%)
Guilty Plea	21 (78%)	21 (78%)	25 (93%)	5 (56%)
Total	27 (100%)	27 (100%)	27 (101%)	9 (100%)

* Includes all cases in data base disposed of in 1972 (pre-Walker).

** Includes all cases in data base disposed of in 1973 or later (post-Walker).

The tables illustrate that when charge reduction was permitted, lenient and stringent judges were equally successful in avoiding trials. Under the no-reduction policy of the prosecutor, the trial rate soared for both categories, although the proportion of trials demanded before stringent judges was much higher than for those in the lenient category. And while lenient judges maintained virtually the same proportion of cases disposed of by plea between the two periods, the stringent judges' plea rate fell by one-third. When the prosecutor stopped charge concessions, increased pressure on judges to be liberal in granting probation is strongly suggested by the data, although the aforementioned discrepancies in the proportion of narcotic and non-narcotic cases in the various categories demand that the results be regarded as tentative. It would appear, in other words, that when charge reduction plea bargaining ceases, judges not disposed to place defendants on probation do indeed have "docket

problems," which are reflected in increased numbers of trials demanded and a smaller proportion of guilty pleas. Stringent judges (or the assistant prosecutors assigned to them) appear to have made considerable use of at least one previously discussed method of dealing with these pressures: note the substantial increases in dismissals and nolle prosses for stringent judges after Walker's policy was initiated.

These data suggest that when the assistant prosecutor cannot make concessions and the judge *will* not, then defendants will be less likely to plead guilty. Under Robert Walker's predecessor, when the prosecution was chief bargaining agent in drug sale cases, sentencing practices of individual judges apparently had little effect on the proportion of defendants pleading guilty in their courtrooms. But when the prosecution stopped making the most prevalent form of concession to drug sale defendants—a reduced charge—the pressure to grant consideration in exchange for pleas moved to the judge. Those judges prepared to make sentence concessions to defendants had little trouble securing pleas. Those judges who maintained stringent sentencing practices had little to offer a defendant in sentencing negotiations (and, from suggestions in interviews, "tough sentencers" tended to be the "no bargainers"). The courtrooms of these stringent sentencing judges are the closest approximation in this study to a pure "no bargain" system. And in these courtrooms pleas decreased, trials increased.

This tentative empirical support for the centrality of concession-giving to the securing of guilty pleas lends credence to the position that an elimination of *all* bargaining—over charge, sentence or any other form of pre-plea assurance—would be accompanied by a very considerable increase in the number of trials (and therefore judges, courtrooms, prosecutors) necessary to dispose of criminal cases. But the Hampton County experience with a limited reduction in plea bargaining through imposition of a formal policy directive suggests not only the costliness of abandoning plea bargaining, but also the impossibility of accomplishing that goal without fundamental alteration in the incentive structure undergirding court systems in the United States.

Most recent criminal justice research has stressed a conceptualization of courts as bureaucratic organizations dedicated to maintaining ongoing relationships and mutual accommodations among the various participants. Thus while docket pressures and scarcity of resources may contribute to the prevalence of justice through negotiation, alleviation of those pressures

by no means guarantees significantly lessened dependence on bargain justice.[27] Hampton County provides an example of one attempt to further a substantive goal of the court system—crime control—through manipulation of the formal rules by which the system operates. Despite a publicly announced policy forbidding "deals," the prosecuting attorney could not eliminate granting concessions to, or bargaining with, drug sale defendants. Plea negotiation continued because it was still very much in the interest of the parties involved to maintain the practice. Attorneys sought to secure some form of concession so as to avoid the dilemma of either incurring the expense of going to trial with a losing case or appearing to provide no service whatever to their clients. Judges wished to dispose of cases on their dockets expeditiously and without the risk of embarrassment from adverse publicity or reversal on appeal attending a trial. Assistant prosecutors, under pressure from judges to move dockets and from their superiors to maintain an election-worthy conviction record, could achieve both goals most surely through a higher proportion of pleas.

Hampton County's experience with a limited attempt to stop plea bargaining illustrates a conclusion of previous research on courts: plea bargaining is difficult to eliminate because it reduces the uncertainties and risks inherent in a trial for all court participants, including the defendant (Blumberg, 1967: ch. 1; Casper, 1972: 74-75; Carter, 1974: 153-154). Apparently alleviation of this uncertainty is no small gain for all concerned. Whatever the motivation of the parties, a negotiating system was maintained in Hampton County because, in the words of one circuit judge, "When faced with an unpleasant policy, resourceful attorneys, assistant prosecutors and judges will generally find acceptable ways to get around it." Given equally "resourceful" attorneys, prosecutors and judges elsewhere, it is unclear how any fundamental shift away from bargain justice could occur without an even more fundamental change in the incentive structures of the participants.

27. On the lack of relationship through time between case pressure and guilty plea rates, see Feeley (1975) and Heumann (1975).

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