John Baldwin and Michael McConville, ***Negotiated Justice: Pressures to Plead Guilty.*** London: Martin Robertson, 1977. 128 + xvi pp. £5.85.

SILVIA S. G. CASALE

From an American viewpoint it is difficult to understand fully the strong adverse reaction in England[1] to *Negotiated Justice*. To appreciate the reasons for this reaction, we must be aware of certain factors peculiar to the English criminal justice system: the unusually strong tradition of high ethical standards, on which the English Bar prides itself; the relative lack of demand for independent outside scrutiny of the inner workings of that system; the general disapproval with which the English Bar has regarded certain forms of American plea bargaining;[2] and the wide acceptance of the view that plea bargaining, if not absent from English criminal justice, is less prevalent than in the U.S. and eschews those extreme forms generally condemned by the English Bar.[3]

Negotiated Justice has directly or indirectly called all of these factors into question. The authors disclaim any intention of impugning the behavior of individual members of the Bar (p. 101), apart from certain exceptional cases (p. 54). They argue instead that it is certain deficiencies in the English criminal justice system itself which give rise to undue pressures on defendants to plead guilty (pp. 45, 103).

When *Negotiated Justice* appeared in 1977, it represented one of the very few empirical studies of the English criminal courts.[4] As such, it directed public attention to details of the

---

[1] The extent of the reaction is detailed in the Preface (pp. vii-viii) and may be measured by the fact that the Vice-Chancellor of the University of Birmingham decided to institute an independent academic assessment of the study (p. xv).

[2] In particular, the direct and open involvement of the judiciary in offer and counteroffer has aroused criticism from English commentators (see Davis, 1971:225; Jackson, 1972:211).

[3] In part, this view may be the result of semantic confusion. The term "plea bargaining" appears to be more suited to the American forms of the phenomenon, with their emphasis on active and direct participation by the prosecution and/or the judge in a process in which the element of barter is predominant. English practice tends toward less overt trading of concessions. The fact that "bargaining" does not accurately describe the English forms of this phenomenon may give rise to the notion that "plea bargaining" is less prevalent in England. However, it is unwise to allow terminological controversies to cloud the issue; what must be ascertained is to what extent and in what form compromise concerning the guilty plea occurs routinely in each system, (see Casale, 1978:6-8).

[4] Other empirical studies of plea bargaining in the English criminal justice system were confined to certain narrowly defined samples; for instance, McCabe and Purves (1972) focused upon defendants pleading guilty immediately before or at the beginning of their trials in the Crown Court.

criminal justice process that had hitherto escaped close analysis by those outside the legal profession. In so doing, the study raised questions concerning the validity of distinctions previously drawn between English and American plea bargaining—distinctions that formed the basis for the English Bar's disapproval of American practices. In the authors' strong criticism of the systemic weaknesses that promote plea bargaining there was an implicit challenge to the Bar for failing in their duty as the moral watchdogs of the English criminal justice system.

Leaving aside for the moment the question of the validity of this criticism, we must acknowledge that the book represents an important innovation in English legal sociology. For some time American researchers have been combining sociological theory and legal realism in studying the administration of criminal justice.[5] They have recognized that in criminal justice systems, as in other social systems, behavioral conventions and expectations evolve and acquire a quasi-institutional status, so that they import their own imperatives; nor are these imperatives less powerful than those derived from the formal institutional features of the system.

Baldwin and McConville focus upon two systemic weaknesses in the English criminal justice process: the latitude accorded to the police in their handling of suspects/defendants at the arrest and interrogation stages of the criminal justice process (pp. 103-5); and the prevailing convention of the sentence discount for a guilty plea (pp. 106 ff.). Neither feature derives its authority from legislation. The latitude accorded the police is rooted in long practice and general consensus among participants in the system. There is no adequate mechanism to ensure that existing guidelines for arrest and interrogation are followed; moreover, these guidelines derive from the Judges' Rules (1964), an expression of judicial opinion that lacks the force of law. The sentence discount is an equally well established principle, referred to and approved in certain leading cases concerning plea bargaining (*R.* v. *Turner*, 54 Crim. App. R. 352, 1970; *R.* v. *Cain*, [1976] *Crim. L. Rev.* 464).[6] The authors argue that these two factors, though lacking formal institutional status, exert a powerful influence upon the plea decision and

[5] For a discussion of this difference in the historical development of legal scholarship and education in England and the United States, see Twining (1967:407, 412).

[6] It is interesting to note that there has been no progression toward further institutionalization of these features through legislation, the more usual response in the American criminal justice system with its penchant for detailed and comprehensive codification of legal practice and procedure.

effectively deny defendants freedom of choice in certain of the cases analyzed.

To counteract these systemic deficiencies, Baldwin and McConville argue for more adequate checks on police behavior at arrest and interrogation (pp. 104-6) and for abolition of the sentence discount (pp. 107-9). They reason that it may be quite logical for defense counsel to advise the defendant strongly to plead guilty, given a system that offers a considerable bonus for such a plea and attaches serious risks to asserting the right to put the prosecution to its proof (p. 45), particularly when this involves challenging police testimony concerning admissions obtained from the defendant during arrest and interrogation. The advice to plead guilty may be manifestly in the defendant's best interests as far as the calculation of probable outcomes and possible costs is concerned. The perversion of the system is its tendency to promote this sort of cost/benefit analysis at the expense of the more fundamental considerations of guilt and innocence. The strength of the authors' analysis lies in this exposition, its weakness in the limited ability to generalize beyond the small number of cases they examined.

It is unfortunate that inadequate attention to methodological considerations in *Negotiated Justice* opens the way for citicism concerning the general applicability of the arguments and diverts attention from the important questions the book raises. The authors' analysis lacks a careful and complete explanation of the research methods used in their study. We learn only that, in the course of examining contested trials in Birmingham Crown Court, the authors noted that "150 defendants fell into the late change of plea sample" (p. 3) and conducted interviews with 121 of these defendants. We do not know the relationship between these 121 defendants and those who plead guilty at other stages of the proceedings, the population of defendants in Birmingham Crown Court generally, and the larger defendant populations in the English Crown Courts and the English criminal justice system as a whole. Whether the selection of cases was random and what proportion of the population was represented by the sample remain unanswered.

Without this information it is clearly impossible to determine whether any valid inferences may be drawn from the sample and which inferences may be drawn about which population. It may well be that the research design limits what can be learned from this study to the 121 cases analyzed.

Even without more definite knowledge of the research methods adopted, we see immediately that there is a

probability of bias in the sample for a number of reasons. First, the sample is restricted to those defendants changing plea immediately before or at the beginning of their trials. Although we are told that this group constitutes 10 percent of the defendants pleading guilty in Birmingham Crown Court (p. 3), it is reasonable to hypothesize that this fraction is not representative of the guilty plea population,[7] since the last minute quality of the plea change probably skews the sample.

Then, too, we need to consider to what extent Birmingham Crown Court is typical of the English criminal justice system; this issue is sparingly addressed by comparing the Birmingham guilty plea rate with the national average (p. 3). This is obviously too crude a measure to reveal how the sample relates to the national guilty plea population.

Third, insufficient attention is paid to the effect of restricting the sample to Crown Court cases. Since the vast majority of criminal cases in England is handled in the magistrates' courts, it would seem important to address the question of whether the latter share the deficiencies found in the former.

The other main ground for criticism of *Negotiated Justice* is its limited perspective. The research is based on interviews with defendants alone.[8] Baldwin and McConville spend considerable effort explaining the reasons for this strategy (pp. 9-12) and justifying their inevitably one-sided approach.

In support of this focus it should be noted that the courts themselves have declared that it is the defendant's viewpoint which must be considered in determining whether the circumstances surrounding the guilty plea amount to undue pressure. Thus the fact that the defendant had construed his counsel's advice as emanating from the judge himself led a court to conclude that the guilty plea decision had not been made freely.[9] Clearly, analysis of the defendant's perspective is a necessary and important part of plea bargaining research (p. 11); to the extent that the existing literature has tended to view the plea bargain process from the barrister's standpoint, the new perspective presented by *Negotiated Justice* is badly needed. But certainly a better strategy would be to portray the same cases

[7] The authors merely address the narrower question of whether the 121 defendants with whom interviews were completed are representative of the 150 defendants in the original sample and demonstrate that it is, as far as certain important variables are concerned.

[8] Apparently the authors' attempts to conduct interviews with barristers involved in the cases met with no success (p. 8).

[9] "Once he felt that this was an intimation emanating from the judge, it is really idle in the opinion of this court to think that he really had a free choice in the matter," (*R.* v. *Turner*, 54 Crim. App. R. 352, 359, 1970).

from the viewpoint of each participant. Yet even in the absence of this multifaceted approach, Baldwin and McConville achieve an impressive realism in presenting the defendant's situation as he considers his plea choice. It is this realism that has been conspicuously undervalued when eminent members of the English Bar offer their opinions concerning what constitutes undue pressure to plead guilty. Baldwin and McConville show the plea decision for what it really is—not a high-minded moral choice, but an anxious assessment of the practical alternatives.

American courts have long since acknowledged the plea bargain as just such an exercise in practical calculation; this recognition has permitted them to set about ensuring that the calculation is based on relatively certain and clear alternatives. To avoid such open bargaining among the judge, the prosecuting and defending attorneys, and the defendant, English courts have laid down what Baldwin and McConville consider to be vague guidelines concerning police discretion and sentence discounting. By exploring in detail the defendant's view of the plea decision, the authors try to demonstrate (p. 67) that the exercise of discretion by police, prosecuting attorney, and judge, unfettered by formal safeguards routinely enforced, enhance the defendant's anxiety, uncertainty, and dependence upon the "inside" knowledge of his barrister.

Had it been possible to judge the degree to which each defendant exaggerated the account of his case by comparing it with his barrister's version, the arguments that the plea bargain reflects coercion fostered by weaknesses in the system would have been more cogent and more difficult to repudiate. As it is, the research can be attacked as a one-sided description of events from an obviously biased, and notoriously unreliable, source.

That the authors were aware of this weakness is clear from their attempt to perform an independent test of the evidence and assertions offered by defendants to show undue pressure to plead guilty. The appropriateness of the barristers' advice, as reported by the defendants, was evaluated by comparing it with assessments by two experts[10] of probable outcomes in these cases (pp. 12, 13). Despite the high agreement rate between the two experts concerning the appropriateness of the charges and the likelihood of conviction or acquittal (p. 73), this

[10] The authors consulted a retired Justices' Clerk and a retired Chief Constable concerning probability of conviction at trial for all the sample cases, based on the transmittal papers (p. 73).

external check does not suffice to validate or invalidate defendant claims of undue pressure. The outcome of jury trials is notably unpredictable and the probability of conviction cannot be reduced to measures of this sort. The authors' test is inadequate and gives, at best, an interesting sidelight on the degree of human error associated with all judgments of this nature.

Despite these shortcomings, *Negotiated Justice* has taken a significant first step towards a reevaluation of the conventional wisdom concerning plea bargaining in England. If, as has been maintained, the integrity of the English Bar guarantees defendant rights and interests in the plea bargain situation and protects the accused against the excesses that English commentators criticize in the American criminal justice system, then that very integrity should be able to withstand sound empirical research. Baldwin and McConville have opened Pandora's Box; what lies inside is still very much an unknown quantity, but clearly there is no turning back.

REFERENCES

CASALE, Silvia S. G. (1978) *Plea Compromise in New York and London.* Ph.D. Dissertation, Political Science Department, Yale University.

DAVIS, Anthony (1971) "Sentences for Sale: A New Look at Plea Bargaining in England and America," [1971] *Criminal Law Review* 225.

JACKSON, Richard M. (1972) *The Machinery of Justice in England* (6th ed.). Cambridge: Cambridge University Press.

McCABE, Sarah and Robert PURVES (1972) *By-Passing the Jury.* Oxford: Basil Blackwell.

TWINING, William (1967) "Pericles and the Plumber: Prolegomena to a Working Theory for Lawyer Education," 83 *Law Quarterly Review* 396.