PLEA BARGAINING AND ITS HISTORY

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For most of the history of the common law, Anglo-American courts did not encourage guilty pleas but actively discouraged them. Plea bargaining emerged as a significant practice only after the American Civil War, and it generally met with strong disapproval on the part of appellate courts. This practice nevertheless became a dominant method of resolving criminal cases at the end of the nineteenth century and beginning of the twentieth, and it attracted significant attention and criticism as a result of crime commission studies in the 1920s. In recent years, American criminal courts have become even more dependent on the guilty plea, but the good press that plea bargaining currently enjoys in legal and social science circles is a very recent development. This article explores changes in guilty plea practices and in attitudes toward the guilty plea from the Middle Ages to the present.

I. THE IDEOLOGICAL COMFORTS OF HISTORY

In seeking the historic origins of plea negotiation, one may be influenced by his opinion of the value of this practice. A defender of plea negotiation is likely to be comforted by the thought that this bargaining has "always" been with us—a conclusion that suggests both the inevitability of our nonadjudicative methods of processing criminal cases and the unreality of those who would alter these methods dramatically. Similarly, an opponent of "bargain justice" may seek comfort in the concept of a bygone golden age in which plea negotiation was unknown—an age from which we departed inadvertently and largely as a result of laziness, bureaucratization, overcriminalization, and economic pressure (see Feeley, 1975:23).

History does, of course, bear on current plea bargaining issues. Social scientists who explain the practice in terms of general principles of bureaucratic interaction sometimes offer historical support for their conclusions (Heumann, 1978:28-32, 157), and their theories of courtroom dynamics are often potentially subject to historical refutation. Similarly, the view that plea bargaining is an "economic necessity" would gain plausibility if this shortcut to conviction had been employed for as long as there had been trials—and, even more clearly, the claim of economic necessity would become strained if the Anglo-

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American legal system had survived without plea bargaining during most of its existence.

Perhaps more important than the logical bearing of history on any current issue is the mystical and emotional significance of the past. Ideological disputants seem to rival each other in claiming that their positions are traditional. In considering what kind of criminal justice system we ought to have, it may matter little whether plea bargaining is a recent phenomenon. Nevertheless, this historical question frequently generates an emotional response.

So strong are the emotional predilections of some defenders of plea bargaining that they have made historical statements without the slightest evidentiary support. A vigorous endorsement of plea bargaining issued by a California grand jury began: "With respect to plea bargaining, this has been a part of the judicial system ever since man was made to account for crimes against society" (*Vallejo News Chronicle*, February 6, 1974:8). The en banc United States Court of Appeals for the Fifth Circuit proclaimed in an opinion by Judge Charles Clark: "Plea bargains have accompanied the whole history of this nation's criminal jurisprudence" (*Bryan* v. *United States*, 492 F.2d 775, 780, 5th Cir., 1974). And Justice William Erickson of the Colorado Supreme Court wrote (1973:839): "Charge and sentence concessions to secure pleas of guilty are, and always have been, part and parcel of our criminal justice system."

As an opponent of plea bargaining, I have been offended by these rhetorical historical pronouncements and perhaps even more offended by the seemingly knowledgeable, but equally unsupported, assertions of scholars that plea bargaining "apparently originated in 17th Century England as a means of mitigating unduly harsh punishment" (Bond, 1975: § 1.07; see Dash, 1951:396; McLaughlin, 1969:256-57).[1] The defenders of plea bargaining have seemed to rely on a sense of what "must have been" in making their historical judgments, but today's method

[1] A generally unenlightening historical treatment of plea bargaining is contained in *Buffalo Law Review* (1974). This student comment maintained that plea bargaining has "ancient antecedents," but it seemed to treat almost everything as an antecedent of plea bargaining (for example, an offender's payment of a fixed fine to his victim in Anglo-Saxon England and the later practice of allowing qualified offenders to assert benefit of clergy). Only by including practices that involved neither a plea nor a bargain was the comment able to support its thesis.

of resolving criminal cases is not, from my perspective, a matter of doing what comes naturally.[2] I therefore cannot claim to have approached the history of plea bargaining in an entirely neutral manner, and I am, more than a good historian should be, subject to the ideological temptations that I have described. This paper, however, reflects a sense that a priori historical views should be tested whenever possible, and I have been alert to my biases.

At the outset, a preliminary matter of definition ought to be resolved. As I see it, plea bargaining consists of the exchange of official concessions for the act of self-conviction. The concessions given a defendant may relate to sentence, the offense charged, or a variety of other circumstances; they may be explicit or implicit; and they may proceed from any of a number of officials. The benefit offered by the defendant, however, is always the same—entry of a plea of guilty. This definition excludes unilateral exercises of prosecutorial or judicial discretion such as an unqualified dismissal or reduction of charges. It also excludes the exchange of official concessions for actions other than entry of a guilty plea, such as offering restitution to the victim of a crime, giving information or testimony concerning other alleged offenders, or resigning from public office following allegations of misconduct.

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[2] I do not deny, however, that the criminal justice system poses inherent temptations for prosecutors and defendants to engage in plea bargaining. Similarly, teachers and students face inherent temptations to engage in "grade bargaining," the exchange of a favorable grade for a student's waiver of the right to a reading of his final examination (see Kipnis, 1976). In the same way that a prosecutor can relieve caseload pressure through plea bargaining, an instructor can alleviate "bluebook backlog" through grade bargaining, and just as it is in a defendant's interest to secure a favorable sentence, it is in a student's interest to secure a favorable grade. Despite the impulse to engage in grade bargaining that both teachers and students may experience, we surely would not regard this process as natural or inevitable. On the contrary, if it arose, we would view it as a corruption of the grading process.

The grade-bargaining analogy is obviously imperfect but may nevertheless be instructive. If grade bargaining began, it would undoubtedly be hidden from public view initially. The first visible signs of the practice would probably emerge in its vigorous condemnation by school officials and the public. If the practice nevertheless persisted and flourished, some observers might begin to offer rationalizations for it: for example, it conserves scarce resources, ensures a prompt and certain conclusion of the grading process, gives students a sense of participation in this process, and alleviates the harshness and arbitrariness that have sometimes characterized grading in the past. Moreover, once grade bargaining became familiar, people might insist that it was inevitable, that it had always occurred in one form or another, and that assertions of its absence at particular times or places should be viewed with extreme skepticism. This paper contends that the history of plea bargaining has exhibited similar stages of development.

II. THE EARLY HISTORY OF THE GUILTY PLEA

A. The Judicial Discouragement of Confessions

From the earliest days of the common law, it has been possible for an accused criminal to convict himself by acknowledging his crime (The Constitutions of Clarendon, chap. 3, 1164; The Assize of Clarendon, chap. 13, 1166). "Confession" was in fact a possible means of conviction even prior to the Norman conquest (Adams *et al.*, 1876:285-88). Nevertheless, confessions of guilt apparently were extremely uncommon during the medieval period. In hundreds of reported cases, medieval defendants denied "word for word, the felony, the king's peace, and all of it," but historians have found only a handful of recorded instances of confession (Hunnisett, 1961:69).

When common law treatises first adverted to the guilty plea, they indicated that the courts were extremely hesitant to receive it. By 1680, Sir Matthew Hale had written: "[W]here the defendant upon hearing of his indictment . . . confesses it, this is a conviction; but it is usual for the court . . . to advise the party to plead and put himself upon his trial, and not presently to record his confession, but to admit him to plead" (1736:225). Earlier, Ferdinando Pulton had written that the plea of not guilty was "the most common and usual plea" and that "it receiveth great favour in the law" (1609:184).

Statements like Hale's persisted in criminal law treatises until the end of the nineteenth century. For example, Blackstone's *Commentaries on the Laws of England* (1765-69, vol. 4:329) observed that the courts were "very backward in receiving and recording [a guilty plea] . . . and generally advise the prisoner to retract it." Most of the English and American writers who noted this judicial phenomenon did so approvingly (e.g., Chitty, 1816:429), but the established procedure in guilty plea cases did have a notable critic. In his *Rationale of Judicial Evidence*, Jeremy Bentham declared:

> In practice, it is grown into a sort of fashion, when a prisoner has [entered a plea of guilty], for the judge to endeavour to persuade him to withdraw it, and substitute the opposite plea, the plea of not guilty, in its place. The wicked man, repenting of his wickedness, offers what atonement is in his power: the judge, the chosen minister or righteousness, bids him repent of his repentance, and in place of the truth substitute a barefaced lie. [1827, vol. 2:316]

Bentham, however, did not propose a more liberal acceptance of guilty pleas. Instead, he urged abolition of the guilty plea and the substitution of a more careful and rigorous examination of the defendant, an examination designed "to guard him

against undue conviction, brought on upon him by his own imbecility and imprudence" (1827, vol. 3:127).

Official reports of guilty plea cases remained infrequent until the last quarter of the nineteenth century, but John H. Langbein's study of the Old Bailey during the late seventeenth and early eighteenth centuries (1978a) offers a glimpse of the English criminal justice system in operation. Working from journalistic accounts designed for a popular rather than a professional audience, Langbein discovered that jury trials were extremely rapid in an era when neither party was represented by counsel, an informally selected jury might hear several cases before retiring, and the law of evidence was almost entirely undeveloped. Trials were in fact so swift that between twelve and twenty cases could be heard in a single day. The administrative pressure for plea bargaining was accordingly small, and Langbein found no indication of this practice. He did find a number of cases in which the court urged defendants to stand trial after they had attempted initially to plead guilty.

The case of Stephen Wright in 1743 seems especially revealing. Wright announced that he would plead guilty to robbery in order to spare the court trouble, and he expressed hope that the court and jury would recommend executive commutation of the death sentence mandated for this crime. The court responded, in effect, that the defendant had it backwards, for the court could not take notice of any favorable circumstances in his case unless he agreed to stand trial. Wright then yielded to the court's advice (Langbein, 1978a:278).

The earliest reported American decision on the guilty plea (*Commonwealth* v. *Battis*, 1 Mass. 95, 1804) reveals that the practice in America was no different. A 20-year-old black man was accused of "raping a 13-year-old white girl, breaking her head with a stone, and throwing her body into the water, thereby causing her death." When the defendant pleaded guilty to indictments for rape and murder,

> the court informed him of the consequences of his plea, and that he was under no legal or moral obligation to plead guilty—but that he had a right to deny the several charges and put the government to the proof of them. He would not retract his pleas—whereupon the court told him that they would allow him a reasonable time to consider of what had been said to him—and remanded him to prison. They directed the clerk not to record his pleas, at present. [*Ibid.*]

When the defendant was returned to the courtroom, he again pleaded guilty.

> Upon which the court examined, under oath, the sheriff, the gaoler, and the justice [who had conducted the preliminary examination of the defendant] as to the *sanity* of the prisoner; and whether there had not been tampering with him, either by promises, persuasions, or hopes of

> pardon, if he would plead guilty. On a very full enquiry, nothing of that kind appearing, the prisoner was again remanded, and the clerk directed to record the plea on both indictments.

The report concluded that the defendant "has since been executed" (*ibid.*:96)[3]

Even at the end of the nineteenth century, courts sometimes followed a procedure reminiscent of the one that Hale had described more than two hundred years earlier. In the first United States Supreme Court opinion to uphold a guilty-plea conviction (*Hallinger* v. *Davis*, 146 U.S. 314, 324, 1892), the Court observed: "The [trial] court refrained from at once accepting [the defendant's] plea of guilty, assigned him counsel, and twice adjourned, for a period of several days, in order that he might be fully advised of the truth, force and effect of his plea of guilty."

A few compilations of early nineteenth-century judicial records confirm the apparent absence of a regular practice of encouraging guilty pleas. Theodore N. Ferdinand examined the work of the Boston Police Court in 1824 and reported that only 11 percent of the 2,208 defendants who came before the court entered pleas of guilty (1973: table 2). Raymond Moley (1928:108) computed the percentage of felony convictions "by jury" and "by confession" in New York State for 88 years beginning in 1839. At the outset of this period, only 25 percent of all felony convictions throughout the state were by guilty plea, and in the urban counties of New York and Kings the figure was even smaller, 15 percent.[4]

There were several reasons for the reluctance of the courts to receive pleas of guilty during the formative period of the common law and for centuries thereafter. First, these pleas were apparently distrusted. William Auckland observed:

> [W]e have known instances of murder avowed, which never were committed; of things confessed to have been stolen, which never had quitted the possession of the owner. . . . It is both ungenerous therefore, and unjust, to suffer the distractions of fear, or the misdirected hopes of mercy to preclude that negative evidence of disproof, which may possibly, on recollection, be in the power of the party; we should never

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[3] In the only other American decision prior to the Civil War to discuss the guilty plea extensively (*United States* v. *Dixon*, 1 D.C. (1 Cranch) 414, 1807), the persuasion of the court was successful, and the defendant withdrew his plea.

[4] Of course one cannot know whether an expectation of leniency motivated the guilty pleas that criminal defendants did enter, but I am inclined to doubt it. These statistics reflect a period before the development of professional police forces, a time when substantial numbers of criminal defendants were probably apprehended during the commission of their crimes or following hot pursuit so that their guilt was beyond question. The guilty plea rates revealed by Moley and Ferdinand seem smaller than one might expect even in the absence of plea bargaining.

> admit, when it may be avoided, even the possibility of driving the innocent to destruction. [1771:167]

Probably more important than the judicial distrust of guilty pleas was the fact that English felony defendants were not represented by counsel. It was a basic duty of trial judges to see that these defendants "should suffer nothing for [their] want of knowledge in the matter of law" (*Rex* v. *Twyn*, 6 How. St. Tr. 513, 516, 1663). The common advice to stand trial may have been presented, not in what we would regard today as a judicial capacity, but in the judge's role as counselor.

Still another reason for the courts' discouragement of guilty pleas was that death was the prescribed penalty for every felony. When a guilty plea is an act of suicide, it is understandable that it should evoke squeamish feelings.[5] One should not suppose, however, that the English penalty structure was simply too rigid to permit any development of plea negotiation. When capital punishment reached its high-water mark in England in 1819, death was the authorized punishment for 220 offenses (Michael and Wechsler, 1940:236). Of the 1254 defendants convicted of capital crimes during the preceding year, however, only 97 were executed (Cottu, 1822:69n.). An extensive system of executive reprieves had developed alongside England's system of capital punishment (Bressler, 1965). A recommendation by the trial judge ensured a royal pardon, and other techniques were also available for nullifying the death penalty. In practice, therefore, judges did exercise substantial sentencing discretion through their recommendations of executive clemency, but this exercise of discretion apparently did not lead to the exchange of leniency for pleas of guilty.

B. The Requirement of Voluntariness

Common law courts apparently took a negative view of guilty pleas of any description, not of plea bargaining specifically. They therefore discouraged even guilty pleas that would plainly qualify as voluntary. Nevertheless, the formal requirement that a guilty plea be voluntary is at least as old as the first English treatise devoted exclusively to criminal law, Staundforde's *Pleas of the Crown* (1560:142-43), which declared that a guilty plea arising from "fear, menace, or duress" should not be recorded. A half century later, Ferdinando Pulton

[5] Blackstone attributed the judicial reluctance to receive guilty pleas to a "tenderness to the life of the suspect" (1765-69, vol. 4:329); during the nineteenth century, commentators who described the judicial dislike of guilty pleas sometimes added the words "especially in capital cases" (e.g., Stephen, 1874:394).

(1609:176) wrote that the plea must "proceed freely, and of [the defendant's] own good will."

Perhaps because guilty pleas were infrequent and even voluntary guilty pleas were discouraged, the courts articulated the meaning of the voluntariness requirement exclusively in cases involving out-of-court confessions. The principles developed in these cases, however, suggest a basic incompatibility between plea bargaining and traditional common-law assumptions. The most famous of the confession cases was probably *Rex* v. *Warickshall* (1 Leach 298, 1783), which held inadmissible any confession obtained "by promise of favor." The court declared: "[A] confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape . . . that no credit ought to be given to it" (*ibid.*:299).

The basic rule was, and still is, that a promise of leniency by a person in authority invalidates an out-of-court confession (McCormick, 1954: § 111). Were this rule applied to pleas of guilty, every bargained plea would of course be invalid. Although some modern courts and scholars have attempted to escape this conclusion by suggesting distinctions between guilty pleas and out-of-court confessions (see Alschuler, 1975a:52-55 and n.172), such a distinction probably would not have occurred to courts or legal scholars of the past. Indeed, although the legal phenomenon that we call a guilty plea has existed for more than eight centuries, the term "guilty plea" came into common use only about a century ago. During the previous 700 years, what we call a guilty plea was simply called a "confession."

Common law treatises revealed that a "judicial confession" was not a pleading at all. Hale, for example, declared (1736:225): "When the prisoner is arraigned, and demanded what he saith to the indictment, either he confesses the indictment; or pleads to it." Early treatises contained elaborate catalogues of the pleas that a defendant might offer in a criminal case, but these catalogues did not mention confessions or pleas of guilty. The sections of the treaties on evidence, however, set forth the law of the guilty plea. The work of John Frederick Archbold (1824:73) is typical. Confessions, he said, are of four kinds: extrajudicial confessions, confessions during preliminary interrogations by magistrates, confessions that we would now call pleas of *nolo contendere*, and confessions that we would now call pleas of guilty. "All of these several species of confessions, to be of effect, must be voluntary," he concluded. The early decisions on the voluntariness of confessions, coupled

with the fact that pleas of guilty were not regarded as different from other confessions, strongly suggest that the courts would have condemned the practice of plea bargaining had they had occasion to do so.

C. Approvement and Other Oddities

Even a sketchy history of the guilty plea requires mention of some early practices that resembled plea bargaining but that did not involve the exchange of leniency for self-conviction. In an early form of diversion from the criminal process, a felon who fled to a church without being captured was entitled to sanctuary there. If he then confessed his crime, he was permitted to "abjure the realm"—that is, suffer exile and a forfeiture of goods rather than conviction and judicially imposed punishment (Hunnisett, 1961:37-54). In addition, criminal cases were commonly compromised through the payment of money for the victim's refusal to prosecute. "Compounding," as this practice was called, was a criminal offense from the earliest days of the common law and remained a problem for centuries (Radzinowicz, 1956:313-18).[6]

Particularly instructive in an assessment of attitudes toward plea bargaining was the common law's earliest form of bargaining for information, the practice of approvement. An accused felon might confess his guilt and offer to "appeal"—or bring a private prosecution—against other participants in the crime with which he was charged (Hale, 1736:226-35). A judge would then balance the benefits of the proposed prosecution against the danger of pardoning the accused, for if the defendant were successful in his appeal, he would be entitled automatically to a pardon. Whether to accept the defendant's offer to become an approver was "a matter of grace and discretion" (*ibid.*:226).

Even this limited and regularized form of bargaining was sometimes criticized. Sir Matthew Hale argued that "more mischief hath come to good men by these . . . approvements . . . than benefit to the public by the discovery and convicting of real offenders" (*ibid.*). By at least the mid-seventeenth century, approvement had fallen into disuse. Nevertheless, judges regarded this practice as "very material" (*Rex* v. *Rudd*, 1 Cowper 331, 335, 1775) in shaping a closely related form of bargaining for information that persisted into the late nineteenth

[6] Although compounding, like plea bargaining, was a type of informal compromise, the concessions that a defendant received did not come from public officials and were not offered in exchange for his act of self-conviction.

century. Informants were no longer required to bring private prosecutions or to secure the judicial condemnation of their confederates, but whenever a felon was permitted to *testify* against his accomplices, he gained "an equitable title" to a pardon (*ibid.*:334). The courts therefore refused to allow an offender to testify against less culpable accomplices, and until the mid-nineteenth century they also forbade bargaining for testimony by the prosecutor. They said that the power to grant leniency in exchange for information was "by its nature a judicial power" (*People* v. *Whipple*, 9 Cow. 707, 711, N.Y. Ct. of Oyer & Terminer, 1827).

In 1878, however, the United States Supreme Court noted that a number of American jurisdictions had permitted the public prosecutor to displace the trial judge in deciding whether to allow an accomplice to testify and thereby gain a pardon. The Court apparently favored this development, for it noted that, unlike a trial judge, a prosecutor could assess the need for an accomplice's testimony in light of the other evidence available to the state (Whiskey Cases, 99 U.S. 549, 603, 1878).

In endorsing prosecutorial bargaining for testimony, the Court plainly did not endorse plea bargaining. The case in which the Supreme Court considered the issue was, in fact, a case of plea negotiation—the first such case to come before the Court. A federal prosecutor had struck a complex bargain in a number of internal revenue cases. The defendants had agreed to plead guilty to one count of a criminal indictment, to testify fully concerning a corrupt agreement involving internal revenue officials, and to withdraw their defensive pleas in a civil condemnation case. In exchange, the prosecutor had agreed to forego prosecution of the other counts of the indictment and to forego action on some other civil claims as well. The defendants alleged that they had fully performed their part of the bargain and that the prosecutor, in violation of the agreement, had pressed the civil claims that he had agreed to abandon. The Supreme Court held that the prosecutor had exceeded his authority in entering the agreement and that the bargain was therefore unenforceable. Because the defendants had been permitted to testify, they had an equitable claim to a pardon—a claim which the Supreme Court expressed confidence that the Chief Executive would honor (*ibid.*:606). Nevertheless, the prosecutor's agreement had purported to guarantee nonprosecution of the government's civil claims, and it was therefore improper.

As this Supreme Court decision reveals, the common law did permit a sacrifice of the public interest in punishing a single offender in order to gain his assistance in convicting other criminals, and it devised an open and regularized form of bargaining to accomplish this result. Nevertheless, the courts apparently did not countenance bargaining for pleas of guilty at all.[7]

III. THE EMERGENCE OF PLEA BARGAINING

A. Plea Bargaining Before the Civil War

During most of the history of our legal system, guilty pleas were more discouraged than welcomed, but four specific indications of plea bargaining prior to the American Civil War have come to my attention. First, John H. Langbein's study of the preliminary examination in renaissance England (1974:70) noted a statute enacted in 1485 that authorized the commencement of prosecutions for unlawful hunting before Justices of the Peace. As Langbein interpreted this statute, it authorized a Justice to convict the defendant of a summary offense when he confessed his crime and to hold him for prosecution as a felon if he denied his guilt. The statute thus rewarded defendants who brought about their own convictions, but Langbein's study of the early preliminary examination did not reveal any other evidence of this practice.

A second indication of plea bargaining prior to the Civil War emerges from J. S. Cockburn's recent examination of approximately 5,000 indictments at the Home Circuit assizes between 1558 and 1625 (1978:73). For the first thirty years of this period, confessions of guilt were virtually unknown. Then,

[7] Of course a case in which a defendant has offered to testify against his confederates is an unusually strong case for permitting some form of plea bargaining. An offender ordinarily cannot reveal the role of his accomplices in a crime without at the same time revealing his own, and when this offender is willing to accept a reduced punishment in exchange for testifying, to insist that he be pardoned entirely may seem to involve a needless sacrifice of public interests. Nevertheless, when a defendant was induced to testify against his accomplices, Anglo-American courts refused to convict him on the basis of his bargained confession. The courts instead insisted that this defendant be given what modern lawyers would call transactional immunity. In short, in the sort of case in which plea bargaining seemed most likely to occur, it did not—a fact that may suggest that it was not frequent in other cases either. For this reason, it is unnecessary to rest the conclusion that plea bargaining is a relatively recent creation entirely upon the lack of affirmative evidence of plea bargaining and upon the fact that the courts invited and encouraged defendants who offered to plead guilty to reconsider this action. When one offender offered to help convict others, the usual result was either refusal of the offer or a grant of immunity from punishment, not the entry of a bargained plea.

quite suddenly, for a two- or three-year period, "five or six prisoners [at every assizes]—sometimes as many as half the calendar—confessed to their indictments and were sentenced without further process." In some cases, the indictments to which the defendants confessed had been altered: burglary charges had been reduced to larceny charges, thus entitling the accused to claim benefit of clergy, and larceny charges had been reduced from felonies to misdemeanors by substituting lesser values for the stolen property. These charge reductions seemed plainly to bespeak plea bargaining, and they occurred at a time when judges traveling the counties of the Home Circuit faced "a rising crime rate, a ludicrously inadequate local law enforcement system, negligent and absentee justices of the peace, ignorant and absentee jurors, and [a] high acquittal rate" (Cockburn, 1975:230). Cockburn noted that plea negotiation was part of a much broader pattern of lawlessness that came to characterize the administration of justice outside of London at this time. Nevertheless, during the final thirty-five years of the period that Cockburn studied, the altered indictments disappeared,[8] and defendants entered confessions in only 15 to 20 percent of the cases heard at the assizes (Cockburn, 1978:73-74).

In a study of criminal justice in colonial Massachusetts, David H. Flaherty (1973:30 n.6) noted a third instance of plea bargaining, a case in 1749 in which three defendants pleaded guilty to theft from a brigantine after the Attorney General announced that he would not prosecute them for the burglary charged in the indictment. Flaherty's examination of the records of the Court of Assize and General Jail Delivery prior to this time had uncovered no evidence of plea bargaining, and he reported: "Guilty pleas were uncommon for the crimes tried at the Assizes; even if a defendant had signed a confession upon a preliminary examination, he normally rescinded it and sought trial by jury."[9]

A French jurist, Charles Cottu, observed the English courts during the early nineteenth century, and his report for the French government (1822:95) provides the fourth indication of plea bargaining. Cottu reported that when a defendant was charged with forging bank notes, two indictments were prepared, one for forgery and the other for possessing forged notes with the intention of uttering them. The punishment for the first offense was death; for the second, it was transportation to

[8] Letter from J.S. Cockburn, September 6, 1978.

[9] Letter from David H. Flaherty, September 5, 1974.

the colonies for a term of years. When a defendant charged with forgery was brought into the courtroom, an attorney representing the defrauded bank would approach the defendant's attorney and ask whether the defendant would be willing to plead guilty to the second indictment. If the answer were affirmative, the defendant would be convicted of the lesser offense "upon his own confession," and because the bank's solicitor would then fail to offer any proof of the forgery, the jury would find the defendant not guilty of the capital offense. Cottu commented: "Let it not be thought that such an incredible transaction takes place in darkness and secrecy: no, the whole is done in open court, in the presence of the public, of the judge, and the jury." In other cases, however, Cottu noted that a defendant who sought to plead guilty was strongly discouraged: "[T]he judge, . . . the clerk, the gaoler, almost all counsel, even prosecutor's, persuade [the defendant] to take the chance of an acquittal" (*ibid.*:73).

These instances of pre-Civil War plea bargaining seem to stand alone, but Raymond Moley's compilation of guilty plea rates in New York State (1928:108) suggests that attitudes toward the guilty plea were changing throughout the last two-thirds of the nineteenth century. Although only 15 percent of all felony convictions in Manhattan and Brooklyn were by guilty plea in 1839, the figure increased steadily at decade intervals to 45, 70, 75, and 80 percent. This last figure remained steady until 1919, when it grew to more than 85 percent. By 1926, 90 percent of all felony convictions in Manhattan and Brooklyn were by plea of guilty, and the figures for New York State as a whole revealed a comparable increase.[10]

B. The Early Judicial Response to Plea Bargaining

It was only after the Civil War that cases of plea bargaining

[10] Although it barely seems possible, the guilty plea rate continued to grow in the period following Moley's study. Today approximately 97 percent of all felony convictions in New York City are by plea of guilty (Vera Institute of Justice, 1977: figure 3).

Roger Lane's study of all homicide prosecutions in Philadelphia between 1839 and 1901 uncovered no evidence of plea bargaining prior to the late 1880s. It was only then that "defendants began for the first time in any number to plead guilty to a lesser degree of homicide after being indicted for 'murder.' " In earlier years, "the defendant typically pleaded not guilty, suggesting he had acted in self-defense, and was let off in more than half of all cases. If convictions were obtained at all, they were usually for manslaughter whatever the evident facts" (letter from Roger Lane, October 25, 1978). Lane's study may indicate that the criminal justice system has been characterized by broad discretion far longer than by plea bargaining. "Flexibility" and "plea bargaining" should not be confounded with one another in analyzing either contemporary or historical data (but see Feeley, *supra*:200-201).

began to appear in American appellate court reports. In the first such case (*Swang* v. *State*, 42 Tenn. (2 Caldwell) 212, 1865), the defendant pleaded guilty to two counts of gambling. In accordance with an agreement that he had entered with the prosecutor, eight other charges of gambling were dismissed. The defendant was fined twenty-five dollars on one count and ten dollars on the other. The Tennessee Supreme Court said that this

> statement of fact [was] unprecedented in the judicial history of the state. . . . [The defendant was,] among other things highly improper, told by the Attorney General, that if he did not submit, he would have to go to jail, and that he could certainly prove his guilt. The plea of guilty was entered . . . while the prisoner was protesting against his guilt, but as the best, under the circumstances, he could do. [*Ibid.*:214-15]

The court ordered a new trial on a plea of not guilty and 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" (*ibid.*:213-14).

As guilty plea cases came before the courts with increasing frequency in the late nineteenth and early twentieth centuries, the usual judicial response was expressed in statements like these:[11]

> The least surprise or influence causing [the defendant] to plead guilty when he had any defense at all should be sufficient cause to permit a change of the plea from guilty to not guilty. [*State* v. *Williams*, 45 La. Ann. 1356, 1357, 14 So. 244, 245, 1893]

> The law favors a trial on the merits. [*Griffin* v. *State*, 12 Ga. App. 615, 622, 77 S.E. 1132, 1136, 1913]

> No sort of pressure can be permitted to bring the party to forego any right or advantage however slight. The law will not suffer the least weight to be put in the scale against him. [*O'Hara* v. *People*, 41 Mich. 623, 624, 3 N.W. 161, 162, 1879]

> [W]hen there is reason to believe that the plea has been entered through inadvertence . . . and mainly from the hope that the punishment to which the accused would otherwise be exposed may thereby

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[11] Because some readers have criticized this paper for relying on appellate court opinions as evidence of trial court practices, a brief reply seems in order. This paper does not in fact rely on appellate opinions for evidence of trial and court practices. Indeed, I have noted explicitly that the gap between judicial rhetoric and the practices of many urban trial courts at the turn of the century was extreme (see *infra*:227-29). The reaction of appellate courts to plea bargaining, however, is important for its own sake. Although one object of this paper is to sketch the development of current practices, another is to trace the history of the ideology surrounding the guilty plea. This ideological history requires no extrinsic justification, but it may yield a lesson. It reveals that the justifications for plea bargaining so often asserted today—for example, that it ameliorates harsh penalties prescribed by legislatures, affords both parties the option of compromising disputed factual and legal issues, and rewards defendants who exhibit remorse—apparently did not occur to those who examined the practice in the nineteenth century. These justifications are in essence *post hoc* rationalizations for a practice that developed more by accident than by choice. Far from embracing plea negotiation when it arose, commentators and appellate courts accepted it only after almost a century of severe criticism.

> be mitigated, the Court should be indulgent in permitting the plea to be withdrawn. [*People* v. *McCrory*, 41 Cal. 458, 463, 1871]

> As the plea of guilty is often made because the defendant supposes that he will thereby receive some favor of the court in the sentence, it is the English practice not to receive such plea unless it is persisted in by the defendant after being informed that such plea will make no alteration in the punishment. . . . [J]udicial discretion . . . should always be exercised in favor of innocence and liberty. All courts should so administer the law . . . as to secure a hearing upon the merits if possible. [*Deloach* v. *State*, 77 Miss. 691, 692, 27 So. 618, 619, 1900]

> The plea should be entirely voluntary by one competent to know the consequences and should not be induced by fear, misapprehension, persuasion, promises, inadvertence, or ignorance. [*Pope* v. *State*, 56 Fla. 81, 84, 47 So. 487, 489, 1908]

In more detailed statements, the courts offered a catalogue of theoretical and practical objections to plea bargaining. In 1877, the Wisconsin Supreme Court considered an agreement in which a defendant had secured a lenient sentence by pleading guilty and offering his testimony against other offenders. It called this agreement "hardly, if at all, distinguishable in principle from a direct sale of justice," and it also noted that "such a bargain . . . could not be kept . . . in any court not willing largely to abdicate its proper functions in favor of its officers" (*Wight* v. *Rindskpof*, 43 Wis. 344, 354-55, 1877). Perhaps the most serious problem that the Wisconsin court saw in plea bargaining, however, was its secrecy:

> The profession of law is not one of indirection, circumvention, or intrigue. . . . Professional function is exercised in the sight of the world. . . . Private preparation goes to this, only as sharpening the sword goes to battle. Professional weapons are wielded only in open contest. No weapon is professional which strikes in the dark. . . . Justice will always bear litigation; litigation is . . . the safest test of justice. [*Ibid.*:356-57]

The following year, the Michigan Supreme Court expressed concern about the motives of prosecutors in bargaining, and it plainly did not view the conservation of public resources through plea bargaining as a virtue. "[T]here was danger," the court said, "that prosecuting attorneys, either to save themselves trouble, to save money to the county, or to serve some other improper purpose, would procure prisoners to plead guilty by assurances they have no power to make of influence in lowering the sentence. . ." (*Edwards* v. *People*, 39 Mich. 760, 762, 1878).

The Louisiana Supreme Court was troubled by what plea bargaining might mean to innocent defendants:

> In the instant case the accused accepted the certainty of conviction of what he took to be a minor offense not importing infamy. Not only was there room for error, but the thing was what an innocent man might do who found that appearances were against him, and that he might be convicted notwithstanding his innocence. [*State* v. *Coston*, 113 La. 718, 720, 37 So. 619, 620, 1904]

The Georgia Court of Appeals invoked the analogy to out-of-court confessions:

> A plea of guilty is but a confession of guilt in open court, and a waiver of trial. Like a confession out of court, it ought to be scanned with care and received with caution. . . . The law . . . does not encourage confessions of guilt, either in or out of court. Affirmative action on the part of the prisoner is required before he will be held to have waived the right of trial, created for his benefit. . . . The affirmative plea of guilty is received because the prisoner is willing, voluntarily, without inducement of any sort, to confess his guilt and expiate his offense. . . . It has been said that withdrawal of the plea should be allowed whenever interposed on account of "the flattery of hope or the torture of fear." [*Griffin* v. *State*, 12 Ga. App. 615, 622-23, 1913][12]

The judicial decisions that did uphold guilty pleas during this period included an 1883 federal case in which the defendants' pleas had been induced by prosecutorial bargaining (*United States* v. *Bayaud*, 23 Fed. 721, S.D.N.Y., 1883). In the main, however, the courts affirmed guilty plea convictions only in cases in which there had been no bargains (or at least no explicit bargains) and in which the defendants' alleged expectations of leniency seemed to lack a plausible basis.[13]

The United States Supreme Court did not directly address the propriety of plea bargaining during this era, but there are indications of the position that the Court probably would have taken. For example, this paper has noted the *Whiskey Cases* (99 U.S. 594, 1878), in which the Court insisted that defendants who had been permitted to testify against their accomplices

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[12] Other cases that indicate the courts' wary attitude toward guilty pleas are *State* v. *Stephens* (71 Mo. 535, 1880) (unkept bargain); *State* v. *Kring* (8 Mo. App. 597, 1880) (mem.) ("[T]he act of fixing the punishment, being purely judicial, cannot be made the subject of an agreement between the circuit attorney and the accused"); *Sanders* v. *State* (10 Tex. App. 336, 1881); *Saunders* v. *State* (85 Ind. 318, 1882) (plea induced by fear of mob violence); *People* v. *Brown* (54 Mich. 15, 19 N.W. 571, 1884); *Harris* v. *State* (17 Tex. App. 559, 1885); *Myers* v. *State* (115 Ind. 554, 18 N.E. 53, 1888) (unkept bargain); *People* v. *Walker* (250 Ill. 427, 95 N.E. 475, 1911) (retained attorney induced belief defendant would not be sent to penitentiary); *State* v. *Nicholas* (46 Mont. 470, 128 Pac. 543, 1912) (retained attorney told defendant he would get a light sentence if he pleaded guilty and 40 years if he did not); *Wolfe* v. *State* (102 Ark. 295, 144 S.W. 208, 1912) (guilty plea coupled with agreement for deferred sentencing is invalid); *State* v. *Keep* (85 Ore. 267, 166 Pac. 936, 1917) (dictum) (because district attorney has no authority to control actions of subsequent grand jury, he cannot dismiss charges in exchange for plea of guilty).

[13] *State* v. *Reininghaus* (43 Iowa 149, 1876) (in response to defense attorney's inquiry, district attorney said that, although he of course had no control of that matter, he thought that the court would impose a small fine of 25 or 50 dollars); *Mastronada* v. *State* (60 Miss. 86, 1882) (expectation of leniency because defendant had received a light sentence on a previous occasion when he was a first offender); *People* v. *Lennox* (67 Cal. 113, 7 Pac. 260, 1885) (defendant's father, his lawyer, and a deputy sheriff suggested defendant might avoid capital punishment by pleading guilty); *Mounts* v. *Commonwealth* (89 Ky. 274, 1889) (expectation apparently based on nothing); *Monehan* v. *State* (135 Ind. 216, 1893) (suggestion by person not connected with the court that defendant would probably receive the same treatment as three associates who had already pleaded guilty); *State* v. *Yates* (52 Kan. 566, 1894) (usual fine in past cases $100 but no promises made); *People* v. *Miller* (114 Cal. 10, 45 Pac. 986, 1896) (expectation apparently based on nothing).

were entitled to pardons, and that a plea agreement which had led instead to a reduction in punishment and an abandonment of the government's civil claims was invalid.

The Court's reluctance to permit bargained waivers of procedural rights was more strikingly illustrated by *Insurance Co.* v. *Morse* (87 U.S. (20 Wall.) 445, 1874). In this case, the Court invalidated a Wisconsin statute which required insurance companies, as a condition of doing business in the state, to waive their right to remove civil lawsuits from state to federal court. The Court thus manifested its hostility to a less sweeping procedural waiver than a waiver of the right to trial through plea bargaining, and it said:

> 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. [*Ibid.*:451]

In 1892 in *Hallinger* v. *Davis* (146 U.S. 314, 1892), the Supreme Court upheld a guilty plea conviction in a case in which there had been no bargain and the trial court had been extraordinarily solicitous in affording the defendant an opportunity to reconsider his plea. A New Jersey statute provided that, following a guilty plea to murder, the trial court should conduct a hearing to determine whether the murder was of the first or second degree. The defendant contended that any waiver of the right to jury trial on this issue, even through a knowing and voluntary guilty plea, violated the due process clause of the Fourteenth Amendment. Although the defendant's argument was rejected, the fact that it was seriously made and considered may indicate how far the Supreme Court was, in a relatively formalistic era, from countenancing any form of plea bargaining.

C. The Growth of Plea Bargaining

The gap between judicial denunciations of plea bargaining and the behavior of many urban courts at the turn of the century and thereafter was apparently large. In these courts, notorious political corruption apparently contributed to a growing practice of plea bargaining. Richard Canfield, later an operator of elegant gambling casinos in several cities, testified that as early as 1885 his friend, the Mayor of Providence, Rhode Island, had acted as an intermediary in arranging a plea agreement with the State Attorney General (Gardner, 1930:77). By 1914, there were accounts of a New York defense attorney whose financial arrangements with a magistrate enabled him to "stand out on the street in front of the Night Court and dicker away

sentences in this form: $300 for ten days, $200 for twenty days, $150 for thirty days."[14] The Dean of the University of Illinois Law School, Albert J. Harno, later noted:

> When the plea of guilty is found in records it is almost certain to have in the background, particularly in Cook County, a session of bargaining with the State's Attorney. . . . These approaches, particularly in Cook County, are frequently made through another person called a "fixer." This sort of person is an abomination and it is a serious indictment against our system of criminal administration that such a leech not only can exist but thrive. The "fixer" is just what the word indicates. [1928:103]

Although most of the reported decisions on plea bargaining involved bargains struck by prosecutors, police officers may also have played a significant role in the development of this practice. Arthur Train, an assistant district attorney in Manhattan, wrote:

> Court officers often win fame in accordance with their ability as "plea getters." They are anxious that the particular Part [courtroom] to which they are assigned shall make as good a showing as possible in the number of cases disposed of. Accordingly each morning some of them visit the pens on the floor below the courtroom and negotiate with the prisoners for pleas. . . . The writer has known of the entire population of a prison pen pleading guilty one after another under the persuasion of an eloquent bluecoat. [1924:223-24]

An early twentieth-century edition of Wharton's *Criminal Evidence* (1912:1326 n.22) ascribed a corrupt motive to bargaining police officers and asserted that they commonly made false promises to jailed defendants in order "to earn the transportation and mileage incident to conveying [them] to prison." The work concluded: "[I]t has become a 'business' to misuse the power given [to policemen who have charge of detention], and this, too, when both court and prosecution are entirely innocent of the wrong so shamelessly inflicted" (*ibid.*).

In the late 1960s, when I interviewed participants in the criminal justice system about the plea bargaining process, a number of older attorneys reported that corruption had been the norm at the outset of their legal careers. One recalled a former prizefighter who became an attorney and worked out of a bondsman's office. This attorney commonly offered half his fee to a police inspector to arrange a plea agreement, and if the inspector turned him down, the attorney returned the money to his client. "In that respect, this attorney was more honest than most of the guys in the criminal courts 35 years ago," my source commented (Alschuler, 1975b:1185).

In its infancy the practice of plea negotiation undoubtedly produced many satisfied customers just as it does today, and

[14] Story No. 870-A, Magnes Archives, Jerusalem, Oct. 8, 1914. I am indebted to Mark H. Haller for this and the preceding reference.

serious judicial review of the process was rare. This fact, coupled with the corrupt atmosphere of urban criminal justice in the late nineteenth and early twentieth centuries, may help to explain the growth of plea negotiation despite its condemnation by appellate courts.[15]

IV. THE DISCOVERY OF PLEA BARGAINING BY THE CRIME COMMISSIONS OF THE 1920s

During the 1920s a number of states and cities conducted surveys of criminal justice. These surveys, which offered a far more complete picture of the workings of American criminal courts than has generally been available in later years, revealed a lopsided dependency on the plea of guilty. In Chicago, 85 percent of all felony convictions were by guilty plea; in Detroit, 78; in Denver, 76; in Minneapolis, 90; in Los Angeles, 81; in Pittsburgh, 74; and in St. Louis, 84 (Moley, 1928:105).

The dominance of the guilty plea apparently came as a surprise. The first of the criminal justice surveys, the Cleveland survey, noted that 77 percent of all convictions in that jurisdiction were by guilty plea, but its discussion of prosecution focused only briefly on this phenomenon and concentrated primarily on abuses in the granting of dismissals (Fosdick, 1922). Until the Missouri survey in 1926, investigators largely ignored plea negotiation, apparently because its importance was unsuspected (Moley, 1928:110). Nevertheless, the Missouri, Illinois, and New York surveys soon brought the practice into focus and, in the words of Raymond Moley, "the public learned how much the spirit of an auction had come to dominate the process of justice" (*ibid.*:114).

The surveys commonly revealed a substantial increase in the percentage of guilty pleas in the period just prior to their publication, and they also indicated that plea bargaining became routine in different jurisdictions at different times. In urban jurisdictions in Virginia, half of all convictions were by guilty plea in 1917, but three-quarters were by plea in 1927 (Fuller, 1931:81). Between 1916 and 1921 the number of guilty

[15] Mark H. Haller's commentary on this paper (*infra*) and on that of Lawrence M. Friedman (*infra*) emphasizes that the criminal courts comprised a distinct subculture at the turn of the century and after. They were not effectively scrutinized by appellate courts, bar associations, or legal scholars. The criminal bar was composed of lawyers who had attended less prestigious law schools, who usually did not join the bar associations, and who typically were members of ethnic minorities. Judicial norms and methods, moreover, were political rather than legal. Thus the "discovery" of plea bargaining by the elite bar, by academics, and by the public in the 1920s could and did produce a genuine sense of shock.

pleas in urban misdemeanor courts in Georgia increased approximately three times as rapidly as the total number of cases (Georgia Department of Public Welfare, 1924:190). In New Haven in 1888, fully 75 percent of all felony convictions were by plea of guilty. A steady increase brought the figure to over 90 percent by 1921 (Moley, 1928:107).

In the federal courts, the statistics date from 1908, when only about 50 percent of all convictions were by plea of guilty (American Law Institute, 1934:56, 58). This percentage remained fairly constant until 1916, when it increased to 72 percent. Because the number of cases in the federal courts actually declined during 1916, the increase cannot be attributed to caseload pressures. The American Law Institute commented: "It would appear that the habits of the prosecution suddenly changed in that year. . . . A method of handling cases which may be referred to as the guilty plea technique came into extensive use" (*ibid.*:12). Soon, a flood of cases under the federal prohibition laws seemed to preclude any retreat. By 1925, the percentage of convictions by guilty plea had reached almost 90 (*ibid.*:56), approximately the same level as that of recent years.

The surveys of the 1920s indicated that increased plea bargaining might have led some defendants to plead guilty although they could not have been convicted at trial. As the percentage of convictions by guilty plea grew in the period just preceding the 1920s, both the percentage of convictions at trial and the percentage of acquittals showed a sharp decline.[16] If one assumes that the character of the cases coming before the courts did not change significantly during this period and that prosecutors did not significantly alter their screening practices,[17] it seems probable that, although most of the increased numbers of guilty plea defendants would have been convicted

[16] "The increase in the proportion of pleas of guilty between 1917 and 1927 apparently came about 70 percent from the convicted column and 30 percent from the not guilty column" (Fuller, 1931:78). In urban misdemeanor courts in Georgia, although the total number of cases increased 48 percent between 1916 and 1921, the absolute number of acquittals declined by 13 percent. The explanation for this decline in acquittals (as well as in the proportion of defendants convicted at trial) apparently lay in a 117 percent increase in the number of guilty pleas (Georgia Department of Public Welfare, 1924:190). Increased plea bargaining was also accompanied by a substantial increase in the overall conviction rate in the federal courts (Finkelstein, 1975:301-2; American Law Institute, 1934:58).

[17] In fact, the character of the cases coming before the courts probably did change, but not in a manner favoring the prosecution. The increased prosecution of liquor cases and other cases of "victimless" crime might have been expected to produce a lower conviction rate, not the higher conviction rate that in fact materialized. It usually seems more difficult to establish guilt in a case of

had they stood trial, a substantial minority would have been acquitted.

A reward to defendants who waive their rights to trial lies at the heart of any system of plea negotiation, and many of the surveys focused specifically on the nature of this reward. In Chicago in 1926, 78 percent of all guilty pleas in felony cases were to offenses less serious than those originally charged. Indeed, most of the guilty pleas in cases in which felonies had been charged were not to felonies at all but to misdemeanors (Illinois Association for Criminal Justice, 1929:47). In New York City in 1926, 85 percent of all guilty pleas were to offenses less serious than those initially charged (Moley, 1928:111).

The rewards associated with pleas of guilty were manifested not only in the lesser offenses of which defendants who pleaded guilty were convicted but also in the lighter sentences they received. The *Missouri Crime Survey* declared: "[A] plea of guilty upon arraignment reduces the chances of a penitentiary sentence in the cities by about one half" (Missouri Association for Criminal Justice, 1926:149). The *Illinois Crime Survey* reported: "[T]he chances of getting probation are roughly two and one-half times as great if one pleads guilty to begin with as they are if one pleads not guilty and sticks to it" (Illinois Association for Criminal Justice, 1929:84). The New York survey found that suspended sentences were more than twice as frequent when guilty pleas had been entered as when defendants had been convicted at trial (New York State Crime Commission, 1927:135).

A few of the surveys noted that the increased volume of

"victimless" crime than in one in which a specific victim appears as the complainant (see Packer, 1968:150-52). Moreover, it was notoriously difficult to secure convictions in liquor cases, for juries were often unsympathetic to the purposes of the law.

Another explanation for the increased conviction rate might look to the rising volume of judicial business. Caseload pressure may have caused prosecutors to be more selective in the cases that they filed; an increase in the overall conviction rate would then be a natural consequence quite apart from any intensification in plea negotiation or any likelihood that this practice would cause defendants who could not have been convicted at trial to plead guilty. This "increased screening" hypothesis is plausible, and by failing to consider it, Finkelstein (1975) seriously overdramatizes his conclusions. Nevertheless, it also seems possible that a growing caseload would tend to lower the conviction rate by reducing the time that prosecutors could devote to each case. Any conclusion is therefore speculative, but plea negotiation may very well have enabled prosecutors significantly to improve their "batting averages" in the period just before the 1920s. The data collected by the crime commissions of the 1920s (as well as more recent research by Finkelstein) should at least give pause to commentators who assert that plea bargaining is likely to produce approximately the same results as trial (e.g., Enker, 1967:113).

guilty pleas in the early 1920s had been accompanied by an enhancement of the concessions offered to defendants for pleading guilty. Even in 1917, a defendant in Virginia who pleaded guilty was 2.3 times more likely to receive a suspended sentence than a defendant convicted at trial. In 1927, however, this ratio increased to 6.3 (Fuller, 1931:17). In Georgia, 38 percent of all defendants convicted at trial were sentenced to prison. During a five-year period from 1916 to 1921 while this figure remained unchanged the proportion of defendants receiving a prison sentence following a plea of guilty declined from 24 percent to 13.5 percent (Georgia Department of Public Welfare, 1924:191).

Although plea bargaining had become a central feature of the administration of justice by the 1920s, it had few apologists and many critics. Most of the criticism came from the hawks of the criminal process rather than the doves. The President of the Chicago Crime Commission condemned plea negotiation as "paltering with crime" and demanded the immediate removal from office of three Criminal Court judges, solely on the ground that they had permitted the reduction of felony charges to misdemeanors in exchange for pleas of guilty. The judges ultimately kept their jobs, but only after an inquiry by a committee of Circuit and Superior Court judges had cast primary responsibility for the reduction of felony charges upon the State's Attorney (Haller, 1970:633-34).

The *Illinois Crime Survey* argued that plea negotiation "gives notice to the criminal population of Chicago that the criminal law and the instrumentalities for its enforcement do not really mean business. This, it would seem, is a pretty direct encouragement to crime" (Illinois Association for Criminal Justice, 1929:318). The Virginia survey added: "[Persons who boast of their real or fancied bargains] are the best and most persistent advertisers in the world for the bargain counter. Surely this does not make for deterrence" (Fuller, 1931:154). Dean Roscoe Pound (1930:184) observed: "[P]rosecutors publish statements showing 'convictions' running to thousands each year. But more than ninety percent of these 'convictions' are upon pleas of guilty, made on 'bargain days,' in the assured expectation of nominal punishment, as the cheapest way out, and amounting in effect to license to violate the law."

Observers who saw plea bargaining as a threat to the rights of criminal defendants occasionally added their voices. Dean Justin Miller wrote in the first issue of the *Southern California Law Review* (1927:22-23):

> There can be no doubt that [our undercover system of criminal law administration] is dangerous, both to the rights of individuals and to orderly, stable government. . . . [T]he poor, friendless, helpless man is most apt to become the one who helps swell the record of convictions. The necessity for making a good record . . . may well result in prosecutors overlooking the rights, privileges and immunities of the poor, ignorant fellow who . . . is induced to confess crime and plead guilty through hope of reward or fear of extreme punishment.

In its *Report on Crime and the Foreign Born*, the Wickersham Commission found that a frequent complaint of foreign-born prisoners was that their appointed attorneys had urged them to plead guilty after discovering that they lacked money to pay legal fees (National Commission on Law Observance and Enforcement, 1931a:180).

Some observers denounced the irrationality of the guilty-plea system without characterizing it as either too lenient or too harsh. The Wickersham Commission's *Report on Prosecution* labeled plea bargaining an "abuse" without further analysis (National Commission on Law Observance and Enforcement, 1931b:95-97). The *Chicago Tribune* (April 27, 1928:1) called it an "incompetent, inefficient, and lazy method of administering justice." The Virginia survey noted that the practice of bargaining had enhanced the power of prosecutors. It said: "[T]he usual case is now decided, not by the court, but by the commonwealth's attorney, [who is] often young, often rather inexperienced" (Fuller, 1931:155-56).

Other critics looked to the motives of prosecutors in bargaining, and they did not accept the view that a prosecutor's acquiesence in a bargain ordinarily ensures that it serves public interests. "Many prosecutors," the Missouri survey observed, "have an inordinate fear of trying a weak case. As a matter of fact, the case may be weak because the prosecutor himself is weak" (Missouri Association for Criminal Justice, 1926:150). Raymond Moley (1929:157, 187, 190) suggested other reasons why prosecutors entered plea agreements—reasons irrelevant to penology but highly relevant to local politics:

> [When the prosecuting attorney accepts a guilty plea to a lesser offense, he] is not compelled to carry through an onerous and protracted trial. He does not run the risk of losing the case in court. He runs no risk of having to oppose an appeal to a higher court in case he wins in the trial. . . . Most important of all to the prosecutor is the fact that in such record as most prosecutors make of their work, a plea of guilty of any sort is counted as a conviction. When he goes before the voters for reelection he can talk in big figures about the number of convictions secured. In reality these "convictions" include all sorts of compromises. . . . [I]t is easy for a prosecutor to avoid labor in this way merely for the purpose of expending his best energies upon sensational and politically advantageous exploits in court. . . . It is not surprising, then, that prosecutors have indulged in the politically profitable enterprise of making friends among the friends of accused

> persons while at the same time and by the same acts they were building a record of vigorous and successful prosecutions.

Prosecutors answered that they bargained for guilty pleas only in cases that would be difficult to try (Miller, 1927:6 n.24, 7 n.25; Baker, 1933). They insisted that "half a loaf is better than none." The *Illinois Crime Survey* responded: "[T]he interpretation of 'the best he can get' is left to [the prosecutor]. Such a course . . . may . . . be used to excuse weak and careless prosecution" (Illinois Association for Criminal Justice, 1929:262).

Just as critics in the 1920s took a different view of why prosecutors engaged in plea bargaining from that of some contemporary observers they also differed about the motivation of defendants. Modern courts and scholars sometimes argue that an acknowledgement of guilt provides a sign of repentance and that defendants who plead guilty should therefore receive lighter sentences than those who stand trial. The *Missouri Crime Survey* commented: "The popular impression is that when an offender enters a plea of guilty he throws himself upon 'the mercy of the court.' As a practical proposition he does nothing of the kind" (Missouri Association for Criminal Justice, 1926:149). The Illinois survey added: "This tendency to plead guilty is no abject gesture of confession and renunciation; it is a type of defense strategy" (Illinois Association for Criminal Justice, 1929:310). The New York survey, after noting the increase in the number of guilty pleas, observed: "This is not because those accused of crime are becoming to a greater degree repentant of their misdeeds. . . . It is a development of the tactics of the defense combined with the rise of certain conditions in the machinery of justice" (New York State Crime Commission, 1927:129).

The conditions to which the New York survey referred included growing caseloads caused in part by an expansion of the substantive criminal law. Dean Roscoe Pound (1930:23) observed that "of one hundred thousand persons arrested in Chicago in 1912, more than one half were held for violation of legal precepts which did not exist twenty-five years before."[18] In 1931, the Wickersham Commission noted the effect on the administration of justice of federal prohibition, the most important victimless crime in American history:

> [F]ederal prosecutions under the Prohibition Act terminated in 1930 had become nearly eight times as many as the total number of all

[18] Dean Justin Miller listed the following areas of human activity that had recently been affected by the substantive expansion of the criminal law: the manufacture and sale of liquor, the sale of securities, the issuance of checks, the driving of automobiles, the construction of buildings, and the maintenance of public health (Miller, 1927:17-18).

> pending federal prosecutions in 1914. In a number of urban districts the enforcement agencies maintain that the only practicable way of meeting this situation with the existing machinery of the federal courts . . . is for the United States Attorneys to make bargains with defendants or their counsel whereby defendants plead guilty to minor offenses and escape with light penalties.
>
> Lawyers everywhere deplore, as one of the most serious effects of prohibition, the change in the general attitude toward the federal courts. . . . [T]he huge volume of liquor prosecutions . . . has injured their dignity, impaired their efficiency, and endangered the wholesome respect for them which once obtained. [National Commission on Law Observance and Enforcement, 1931c:56]

V. THE RECENT HISTORY OF THE GUILTY PLEA

The high rates of guilty pleas in the 1920s left little room for dramatic increases. In recent years, however, prosecutors may have found it necessary to offer greater concessions simply to keep those rates constant. This hypothesis is supported by the statements of participants in the criminal justice system whom I have interviewed in various jurisdictions[19] and also by a study of the United States District Court for the District of Columbia between 1950 and 1965 conducted by the President's Commission on Crime in the District of Columbia (1966). During the period of this study, guilty pleas accounted for approximately 74 percent of all felony convictions; there was little fluctuation in this figure. In 1950, however, 58 percent of the District of Columbia's guilty pleas were to the charges originally filed, with no reduction in the number or seriousness of offenses. By 1965, only 27 percent of all guilty pleas were to the indictments originally drawn (*ibid.*: table 5, 243).[20] In view of the greater frequency with which charges were reduced, it is not surprising that sentences became lighter during this period (*ibid.*:245). At the same time, the crimes charged in the District Court became more serious (*ibid.*:248-49).

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[19] Older prosecutors and defense attorneys almost universally agreed that the concessions offered to encourage defendants to plead guilty had become greater over the course of their careers, and some defense attorneys noted that prosecutorial overcharging also had grown in intensity. Thus, as the rewards offered for a guilty plea became more generous, trial itself became a more threatening alternative. In Cleveland, for example, J. Frank Azzarello, who had practiced in the criminal courts for 42 years, observed: "It has been only within the past dozen years that prosecutors started overcharging, throwing a lot of dirt at the walls in the hope that some of it might stick," and John P. Butler added: "When I was a member of the Prosecuting Attorney's staff, from 1936 to 1942, our philosophy was to underindict and overprove. Today the philosophy is to overindict and underprove." Interviews with Mr. Azzarello and Mr. Butler, Nov. 14, 1967.

[20] In New York, similarly, during the seven-year period from 1960 through 1966, the number of felony charges reduced to misdemeanors increased markedly in relation to the number of actual felony convictions. The ratio was approximately 16 to 15 at the outset of the period and approximately 23 to 15 at the end (McLaughlin, 1969:258).

Although the length of the average criminal trial in the District of Columbia increased notably during the period of the Crime Commission's study (*ibid.*:263), the growth of plea negotiation probably cannot be explained by caseload pressures. Indeed, as greater concessions were offered to persuade defendants to plead guilty, the number of felony cases reaching the District Court declined (*ibid.*:248-55), and the staff of the United States Attorney increased substantially (*ibid.*:236). One possible explanation for the enhanced concessions to defendants who pleaded guilty is simply that the attitudes of bureaucracy, emphasizing the maximization of production and the minimization of work, became more pronounced as the prosecutor's staff grew.[21] As Judge Arthur L. Alarcon noted in discussing what he regarded as a growing reliance on plea bargaining in Los Angeles: "The increase in the number of deputy district attorneys has fully kept pace with the increase in cases. Prosecutors say that bargaining is a way to reduce the backlog, but in reality it is simply a way to reduce the work."[22]

In other jurisdictions, growing caseloads probably did contribute substantially to judicial dependence on the guilty plea. The "crime wave" of the 1960s, produced in part by the post-World War II baby boom and the increased proportion of young people in American society, was no figment of Richard Nixon's imagination (Wilson, 1975:3-20), and as the volume of traditional crime increased, the courts also confronted marijuana cases and other cases of victimless crime in greatly increased numbers.[23] These developments led to a major administrative crisis in the courts. Criminal caseloads commonly doubled from one decade to the next,[24] while judicial resources increased only slightly (e.g., *New York Times*, February 12, 1968:41).

In 1967, both the American Bar Association Project on Minimum Standards for Criminal Justice (1967) and the President's Commission on Law Enforcement and Administration of

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[21] For an alternative explanation emphasizing the increased bargaining power of defendants, see *infra*:239-40.

[22] Interview with Judge Alarcon, Feb. 15, 1968.

[23] In California in 1968, for example, approximately one-fourth of all felony charges were for violation of the marijuana laws, and the number of adult marijuana arrests had multiplied more than ten times since 1962 (Kaplan, 1970:29).

[24] In Houston the number of felony indictments increased from 2,582 in 1956 to 5,811 in 1967—and then to 13,996 in 1975. Unpublished statistics supplied by R. J. Roman, Clerk's Office, Harris County District Courts. In Cleveland, the number of indictments rose from 4,514 in 1952 to 9,470 in 1963. Unpublished statistics supplied by John L. Lavelle, Court Administrator for the Court of Common Pleas of Cuyahoga County.

Justice (1967:134-37) proclaimed that, properly administered, plea bargaining was a practice of considerable value. Nevertheless, a case that reached the United States Supreme Court in 1958 suggests that only a few years before the beginning of today's reign of "realism," the legality of plea bargaining had been very much in doubt (*Shelton* v. *United States*, 356 U.S. 26, 1958), reversing per curiam on confession of error 246 F.2d 571, 5th Cir. 1957 (en banc), setting aside judgment in 242 F.2d 101, 5th Cir.). In *Shelton*, a three-judge panel of the Court of Appeals had held plea bargaining unlawful,[25] and when this ruling was later set aside by the full court,[26] the defendant sought Supreme Court review. Officials of the Justice Department may have assessed the probable votes of individual Supreme Court Justices and feared that the Court would condemn all bargained guilty pleas as involuntary. Whatever the reason, the government proceeded to confess error on a narrow, highly questionable ground that prevented the Court from deciding the substantive issue.[27] It seems possible that, even at this late

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[25] Judge Richard T. Rives, writing for a two-to-one majority, proclaimed: "Justice and liberty are not the subjects of bargaining and barter" (242 F.2d at 113).

[26] The court noted that the defendant had challenged the propriety of his plea only when it was too late to resurrect the charges that the government had abandoned, and it set forth a test of voluntariness that turned primarily on whether the government's promises had been honored and on whether the defendant had been threatened with unlawful governmental action (246 F.2d at 571 n.2).

[27] Although the government's confession of error does not appear in most collections of Supreme Court briefs and records, I was able to locate a copy in the Supreme Court library. This document maintained that the trial court had failed to conduct an adequate inquiry when it accepted the defendant's plea of guilty and that "in these circumstances, taken as a whole, together with all the other facts in the case," reversal was appropriate.

This confession of error seemed peculiar. For one thing, it failed to mention the ruling of the Court of Appeals on the issue in question. This court had held that even if the trial court should have conducted a more thorough inquiry, its subsequent determination that the defendant's guilty plea was voluntary—a determination made after a full evidentiary hearing—had cured any error (246 F.2d at 572-73). Even the initial panel opinion had concluded that the failure to conduct an adequate inquiry into voluntariness would not entitle the defendant to post-conviction relief but only to a hearing at which the government would bear the burden of demonstrating that the guilty plea was voluntary (242 F.2d at 112).

Although the Solicitor General has sometimes been described as the "tenth Justice of the Supreme Court," this official's confession of error in a case before the Court is sometimes troublesome. When the government's position has been sustained by a United States Court of Appeals, respectable arguments in support of this position are rarely lacking, and it seems presumptuous for a single advocate, in effect, to "reverse" the decision of a federal Court of Appeals. Surely the Solicitor General should hesitate before confessing error in a case decided en banc by one of the nation's most respected appellate tribunals on a procedural issue on which this court was unanimous. In light of the extremely dubious merits of the confession of error in *Shelton*, it seems possible that this confession masked the strategic concerns of the Department of Justice.

It is noteworthy that almost a dozen years after the Justice Department confessed error in *Shelton*, the Supreme Court held that a federal trial court's failure to conduct an adequate inquiry when it accepted a guilty plea rendered

date, the history of plea bargaining might have taken a dramatically different turn.

In the decade following this inconclusive episode, the Supreme Court had other opportunities to consider the legality of plea negotiation[28] but did not use them. Instead, during the period of its "due process revolution," the Court seemed to treat the police as the principal villains of the criminal process. In a regime in which the pressures for self-incrimination ordinarily were far greater at the courthouse than at the stationhouse, the Court repeatedly ignored the leverage that prosecutors exerted upon criminal defendants at the courthouse.[29]

A major effect of the "due process revolution" was to augment the pressures for plea negotiation. For one thing, the Supreme Court's decisions contributed to the growing backlog

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the plea invalid (*McCarthy* v. *United States*, 394 U.S. 459, 1969). In *McCarthy*, however, the position of the Justice Department was the opposite of its position in *Shelton*. It contended that the trial court's failure should entitle the defendant only to an evidentiary hearing on the validity of his plea, not to a new trial (Brief for the United States at 17-23). In adopting this position, the Justice Department simply disregarded the ruling it had induced the Supreme Court to make in *Shelton*.

[28] See, e.g., *Green* v. *State* (327 P.2d 704, Okl. Cr. 1958, *cert. denied*, 358 U.S. 905, 1958); *People* v. *Darrah* (33 Ill.2d 175, 210 N.W.2d 478, *cert. denied*, 383 U.S. 919, 1965); *Pinedo* v. *United States* (347 F.2d 142, 9th Cir. 1965, *cert. denied*, 382 U.S. 976, 1966); *Bailey* v. *MacDougall* (247 S.C. 1, 145 S.E.2d 425, 1965, *cert. denied*, 384 U.S. 962, 1966); *Cooper* v. *Holman* (356 F.2d 82, 5th Cir., *cert. denied*, 385 U.S. 855, 1966); *Carlino* v. *United States* (400 F.2d 56, 2d Cir. 1968, *cert. denied*, 394 U.S. 1013, 1969).

[29] In focusing on the police, the Supreme Court directed its efforts toward the criminal justice agency that enjoyed the greatest degree of political support and that was least subject to effective judicial control. Decisions like *Mapp* v. *Ohio* (367 U.S. 643, 1961) and *Miranda* v. *Arizona* (384 U.S. 436, 1966) involved the Court in intense political controversy, but their immediate impact on the everyday administration of criminal justice was probably small (see, e.g., Skolnick, 1966:223-43; *Yale Law Journal*, 1967). When the Court turned to the judicial process, it not only achieved more meaningful reforms but did so without generating very significant public controversy (see *Gideon* v. *Wainwright*, 372 U.S. 335, 1963; *Douglas* v. *California*, 372 U.S. 353, 1963; *Fay* v. *Noia*, 372 U.S. 391, 1963; In re *Gault*, 387 U.S. 1, 1967).

Plea negotiation might have been a more appropriate target for the due process revolution than those that the Supreme Court selected. In a decade of intense concern about crime, Americans were naturally suspicious of restrictions on crime-detection techniques, but they probably retained the faith that an accused criminal should be afforded his day in court. Moreover, Americans may well have suspected that plea negotiation cheated public interests as well as those of criminal defendants; in a public opinion poll in Michigan, 70 percent disapproved of plea bargaining, 21 percent approved, and 9 percent "didn't know" (see Fogel, 1975: app. 3 at 300).

Of course I do not suggest that the Supreme Court should select or decide its cases on the basis of public opinion polls. The Court should decide its cases "without fear or favor" (at least some of the time). In neglecting plea negotiation throughout the decade of the "due process revolution," however, the Court used its power to control its own jurisdiction not to direct its attention to significant issues but to evade them. This evasion, in my view, helped to ensure the ultimate failure of the due process revolution, for as the text following this note indicates, the accordian-like properties of the guilty-plea system often deprived the Court's reforms of their desired effect.

of criminal cases. Prosecutors' offices were required to devote a larger share of their resources to appellate litigation, and both prosecutors and trial judges spent a greater portion of their time on pretrial motions and post-conviction proceedings. In addition, the Court's decisions probably contributed to the increased length of the criminal trial. In the District of Columbia, the length of the average felony trial grew from 1.9 days in 1950 to 2.8 days in 1965 (President's Commission on Crime in the District of Columbia, 1966:263), and in Los Angeles the length of the average felony jury trial increased from 3.5 days in 1964 to 7.2 days in 1968 (San Francisco Committee on Crime, 1970:1).

The "due process revolution" also led directly to more intense plea negotiation. In the words of Oakland Public Defender John D. Nunes, "rights are tools to work with," and rather than insist on a hearing on a motion to suppress illegally obtained evidence, a defense attorney was likely to use a claim of illegality to exact prosecutorial concessions in plea bargaining.[30] New York defense attorney Stanley Arkin explained: "As the defendant gains more rights, his bargaining position grows stronger. That is a simple matter of economics."[31] Donald Conn, an Assistant Attorney General in Massachusetts, observed: "If guilty pleas are cheaper today, it is simply because Supreme Court decisions have given defense attorneys an excellent shot at beating us."[32]

As American criminal courts became more dependent on plea bargaining for a variety of reasons, a return to the historic principle that a guilty plea should be entered "freely and of the defendant's own good will," without "inducement of any kind," began to seem unrealistic; and the legal profession apparently decided that this principle was sour anyway. By 1970, the due process revolution had run its course and the Supreme Court, which bore a share of responsibility for the dominance of the guilty plea, was ready at last to confront this central feature of American criminal justice. In a series of decisions which seemed to imply that any other course would be unthinkable, the Court upheld the propriety of plea bargaining. It insisted that plea bargaining was "inherent in criminal law and its administration" *Brady* v. *United States*, 397 U.S. 742, 751, 1970) and that "disposition of charges after plea discussions is not

[30] Interview with Mr. Nunes, Feb. 13, 1968.

[31] Interview with Mr. Arkin, Jan. 11, 1968.

[32] Interview with Mr. Conn, Jan. 12, 1968.

only an essential part of the [criminal] process but a highly desirable part for many reasons" (*Santobello* v. *United States*, 404 U.S. 257, 261, 1971). Indeed, even those Justices who criticized the Court's approach took pains to distinguish the practices then before them from what they called "the venerable institution of plea bargaining."[33]

VI. SOME CONCLUDING OBSERVATIONS

Americans tend to view history as progress and often assume that throughout history the law has afforded increasing dignity to persons accused of crime. The lash, the rack, and the thumbscrew have given way to *Miranda* warnings, and lynchings and blood feuds have become rare. The history of plea negotiations, however, is a history of mounting pressure for self-incrimination, and in explaining this phenomenon, the growing complexity of the trial process over the past two and one-half centuries seems highly relevant. Lawrence M. Friedman (*infra*: 257 n.16) discovered that one American felony court could conduct a half-dozen jury trials in a single day in the 1890s. This was only half the number of cases that an Old Bailey jury had been able to resolve in a day in the early eighteenth century (Langbein, 1978a:277), but it contrasts dramatically with the 7.2 days that an average felony jury trial required in Los Angeles in 1968 (San Francisco Committee on Crime, 1970:1). One may fairly conclude that if there was a golden age of trials, it was not one in which trials were golden.[34] The rapid trials of the past plainly lacked safeguards that we consider essential today. It may be equally true, however, that our system of resolving criminal cases has now become absurd both in the complexity of its trial processes and in the summary manner in which it avoids trial in the great majority of cases. For all the praise lavished upon the American jury trial, this fact-finding mechanism has become so cumbersome and expensive that our society refuses to provide it. Rather than reconsider our overly elaborate trial procedures, however, we press most criminal defendants to forego even the more expeditious form of trial that defendants once were freely granted as a matter of right.

The paradox of our current criminal justice system has a notable parallel in history (Langbein, 1978b). During the late

[33] Brennan, J., dissenting in *Parker* v. *North Carolina* (397 U.S. 790, 1970) and concurring in the result in *Brady* v. *United States* (397 U.S. at 808).

[34] This statement is borrowed from a participant in the Special National Workshop on Plea Bargaining in French Lick, Indiana, in June, 1978, whose identity I unfortunately failed to note.

Middle Ages and Renaissance, as English courts were discouraging guilty pleas, confession assumed an overwhelming importance on the European continent. Both torture and false promises of pardon were commonly used to induce defendants to confess (Currie, 1968; see Langbein, 1977a). Indeed, what is probably history's most famous case of plea bargaining arose in 1431 in an ecclesiastical court in France. When Joan of Arc yielded to the promise of leniency that this court made, she demonstrated that even saints are sometimes unable to resist the pressures of plea negotiation. Joan, however, was able to withdraw her confession and go to her martyrdom (see Sackville-West, 1936).

Part of the explanation for the greater importance of confession on the Continent lay in the fact that standards of proof were much higher there than in England. Neither the testimony of a single witness nor any amount of circumstantial evidence could warrant conviction of a serious crime. Confession was therefore essential to conviction in a great many cases, and this fact led to the exertion of extraordinary pressures to secure it. Formal courtroom requirements apparently designed to protect defendants were transmuted into something like their antitheses through the adoption of expedient shortcuts.[35]

Today, in a sense, the situation is reversed. Methods of proof are far more formal, expensive, and time-consuming in Anglo-American justice than on the Continent, and the elaboration of safeguards surrounding the trial process has provided one source of pressure for plea bargaining. Our supposedly accusatory system has in fact become more dependent on proving guilt from the defendant's own mouth than any European "inquisitorial" system (see Langbein, 1977b). The lessons of both comparative and historical study are therefore essentially the same: the more formal and elaborate the trial process, the more likely it is that this process will be subverted through pressures for self-incrimination. The simpler and more straightforward

[35] See Langbein (1977a). Torture was occasionally employed in renaissance England, but never as part of a judicial proceeding (and never, contrary to common belief, in the Court of Star Chamber). Its most frequent use was in cases of religious and political crime, and its usual object was not to secure evidence against the person tortured (which often existed in abundance before the torture began) but rather to determine the scope of what might be an ongoing plot against the state (*ibid.*:88-90). Even on the relatively infrequent occasions when torture was employed in cases of ordinary crime, its object was commonly the discovery of accomplices rather than simply the coercion of a confession (see *ibid.*:192-205).

the trial process, the more likely it is that the process will be used.[36]

The growing complexity of the criminal trial was not the only factor that contributed to the development of contemporary plea bargaining. Urbanization, increased crime rates, expansion of the substantive criminal law, and the professionalization and increasing bureaucratization of the police, prosecution, and defense functions may also have played their parts. For a variety of reasons, we have come a long way from the time when guilty pleas were discouraged and litigation was thought "the safest test of justice." We have also come a long way from the first appellate decision on plea bargaining, in which the court refused to permit the right to trial to be defeated "by any deceit or device whatever." Indeed, the view advanced by the Supreme Court one hundred years ago that "a man may not barter away his life or his freedom, or his substantial rights" is disparaged by the Supreme Court today, and judges no longer proclaim: "No sort of pressure can be permitted to bring the party to forego any right or advantage however slight. The law will not suffer the least weight to be put in the scale against him."

How very far we have traveled is illustrated by the Supreme Court's decision in *Bordenkircher* v. *Hayes* (434 U.S. 357, 1978). The prosecutor in this case offered to permit the defendant, a prior offender charged with uttering a forged check, to plead guilty in exchange for the recommendation of a five-year sentence. When the defendant rejected this offer, the prosecutor carried out a threat that he had made during the negotiations to return to the grand jury and obtain an indictment under the Kentucky Habitual Criminal Act. The defendant was then convicted at trial, and the court imposed the life sentence that the Habitual Criminal Act required. The Supreme Court upheld the constitutionality of the penalty that the defendant had incurred by exercising his right to trial, and indeed, even the four Justices who dissented indicated that they would have upheld this penalty if only the prosecutor had observed some additional niceties in the timing of his threat and offer. The Supreme Court thus gave its imprimatur to a bizarre system of justice in which the crime of uttering a forged $88 check is "worth" five years while the crime of standing trial is "worth" imprisonment for life. The road from common law principles to

[36] A similar lesson can be drawn from the experience of some modern American jurisdictions. The low guilty plea rates in Philadelphia and Pittsburgh are largely explained by the informal and expeditious bench-trial procedures employed in those cities (Alschuler, 1968:61).

the Supreme Court's decision in *Bordenkircher* v. *Hayes* has indeed been long, and although Sir Winston Churchill once observed that "the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country," Americans can hope there are other yardsticks.[37]

REFERENCES

ADAMS, Henry, Henry Cabot LODGE, E. YOUNG and James LAUGHLIN (1876) *Essays in Anglo Saxon Law.* Boston: Little, Brown.

ALASKA JUDICIAL COUNCIL (1977) *Interim Report on the Elimination of Plea Bargaining.* Anchorage: Alaska Judicial Council.

ALSCHULER, Albert W. (1968) "The Prosecutor's Role in Plea Bargaining," 36 *University of Chicago Law Review* 50.

——— (1975a) "The Supreme Court, the Defense Attorney, and the Guilty Plea," 47 *University of Colorado Law Review* 1.

——— (1975b) "The Defense Attorney's Role in Plea Bargaining," 84 *Yale Law Journal* 1179.

AMERICAN BAR ASSOCIATION. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE (1967) *Standards Relating to Pleas of Guilty.* New York: Institute for Judicial Administration.

AMERICAN LAW INSTITUTE (1934) *A Study of the Business of the Federal Courts*, Part I. Philadelphia: American Law Institute.

ARCHBOLD, John Frederick (1824) *Pleading and Evidence in Criminal Cases* (1st American Edition).

AUCKLAND, William (1771) *Principles of Penal Law* (2d ed.). London.

BAKER, Newman F. (1933) "The Prosecutor—Initiation of Prosecution," 23 *Journal of Criminal Law and Criminology* 770.

BENTHAM, Jeremy (1827) *Rationale of Judicial Evidence.* London: John Bowring.

BLACKSTONE, William (1765-69) *Commentaries on the Laws of England.*

BOND, James (1975) *Plea Bargaining and Guilty Pleas.* New York: Boardman.

BRESSLER, Fenton S. (1965) *Reprieve: A Study of a System.* London: Harrap.

BUFFALO LAW REVIEW (1974) "Comment, The Plea Bargain in Historical Perspective," 23 *Buffalo Law Review* 499.

CHITTY, Joseph (1816) *Criminal Law.* Philadelphia: Isaac Riley.

COCKBURN, James S. (1975) "Early-Modern Assize Records as Historical Evidence," 5 *Journal of the Society of Archivists* 215.

——— (1978) "Trial By the Book? Fact and Theory in the Criminal Process, 1558-1625," in J.H. Baker (ed.) *Legal Records and the Historian.* London: Royal Historical Society.

COTTU, Charles (1822) *On the Administration of Criminal Justice in England.* Boston: Little, Brown.

CURRIE, Elliott P. (1968) "Crimes without Criminals: Witchcraft and its Control in Renaissance Europe," 3 *Law & Society Review* 7.

DASH, Samuel (1951) "Cracks in the Foundation of Criminal Justice," 46 *Illinois Law Review* 385.

ENKER, Arnold (1967) "Perspectives on Plea Bargaining," in President's Commission on Law Enforcement and the Administration of Criminal Justice, *Task Force Report: The Courts.* Washington, D.C.: Government Printing Office.

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[37] The general attitudes of the legal profession toward plea bargaining are probably fairly illustrated by the majority and dissenting opinions in *Bordenkircher* v. *Hayes*: courts must move gingerly around the outer edges of this practice for fear of upsetting an indispensable institution. Nevertheless, this view is far from universal. The U.S. National Advisory Commission on Criminal Justice Standards and Goals (1973:46-49) called for the abolition of all forms of plea bargaining, and promising experiments in the abolition of plea bargaining are under way in the State of Alaska and other jurisdictions (see Rubinstein and White, *infra*; Alaska Judicial Council, 1977).

ERICKSON, William H. (1973) "The Finality of a Plea of Guilty," 48 *Notre Dame Lawyer* 835.
FEELEY, Malcolm (1975) "The Effect of Heavy Caseloads." Presented at the Annual Meeting of the American Political Science Association, San Francisco, California (September 5).
FERDINAND, Theodore N. (1973) "Criminality, the Courts, and the Constabulary in Boston: 1703-1967." Unpublished manuscript.
FINKELSTEIN, Michael O. (1975) "A Statistical Analysis of Guilty Plea Practices in the Federal Courts," 89 *Harvard Law Review* 293.
FLAHERTY, David H. (1973) "Criminal Justice in Provincial Massachusetts." Presented at the Conference on Atlantic Society, University of Edinburgh (June 29-July 1).
FOGEL, David (1975) *We Are the Living Proof: The Justice Model for Corrections.* Cincinnati: W.H. Anderson Co.
FOSDICK, Raymond (1922) "Police Administration" in Roscoe Pound and Felix Frankfurter (eds.) *Criminal Justice in Cleveland: Reports of the Administration of Criminal Justice in Cleveland, Ohio.* Cleveland: Cleveland Foundation.
FULLER, Hugh Nelson (1931) *Criminal Justice in Virginia.* Charlottesville: University of Virginia Institute for Research in the Social Sciences.
GARDNER, A. (1930) *Canfield: The True Story of the Greatest Gambler.* New York: Doubleday.
GEORGIA DEPARTMENT OF PUBLIC WELFARE (1924) "Crime and the Georgia Courts," 16 *Journal of the American Institute of Criminal Law and Criminology* 169.
HALE, Matthew (1736) 2 *The History of the Pleas of the Crown.* (S. Emlyn, ed.). London: Nutt; 1st American ed. (1847) Philadelphia: R.H. Small.
HALLER, Mark H. (1970) "Urban Crime and Criminal Justice: The Chicago Case," 57 *Journal of American History* 619.
HARNO, Albert J. (1928) "The Workings of the Parole Board and Its Relation to the Courts," 19 *Journal of the American Institute of Criminal Law and Criminology*, app. at 83.
HEUMANN, Milton (1978) *Plea Bargaining: The Experiences of Prosecutors, Judges, and Defense Attorneys.* Chicago: University of Chicago Press.
HUNNISETT, R. (1961) *The Medieval Coroner.* Cambridge: Cambridge University Press.
ILLINOIS ASSOCIATION FOR CRIMINAL JUSTICE (1929) *The Illinois Crime Survey.* Chicago: The Illinois Association for Criminal Justice.
KAPLAN, John (1970) *Marihuana: The New Prohibition.* New York: World Publishing Company.
KIPNIS, Kenneth (1976) "Criminal Justice and the Negotiated Plea," 86 *Ethics* 93.
LANGBEIN, John H. (1974) *Prosecuting Crime in the Renaissance: England, Germany, France.* Cambridge, Mass.: Harvard University Press.
——— (1977a) *Torture and The Law of Proof: Europe and England in the Ancien Regime.* Chicago: University of Chicago Press.
——— (1977b) *Comparative Criminal Procedure: Germany.* St. Paul: West Publishing Company.
——— (1978a) "The Criminal Trial before the Lawyers," 45 *University of Chicago Law Review* 263.
——— (1978b) "Torture and Plea Bargaining," 46 *University of Chicago Law Review* 3.
MC CORMICK, Charles (1954) *Evidence.* St. Paul: West Publishing Co.
MC LAUGHLIN, Edward J. (1969) "Selected Excerpts from the 1968 Report of the New York State Joint Legislative Committee on Crime, Its Causes, Control, and Effect on Society," 5 *Criminal Law Bulletin* 255.
MICHAEL, Jerome and Herbert WECHSLER (1940) *Criminal Law and Its Administration.* Chicago: Foundation Press.
MILLER, Justin (1927) "The Compromise of Criminal Cases," 1 *Southern California Law Review* 1.
MISSOURI ASSOCIATION FOR CRIMINAL JUSTICE, SURVEY COMMITTEE (1926) *The Missouri Crime Survey.* St. Louis: Missouri Association for Criminal Justice, and New York: Macmillan.
MOLEY, Raymond (1928) "The Vanishing Jury," 2 *Southern California Law Review* 97.
——— (1929) *Politics and Criminal Prosecution.* New York: Minton, Balch.

NEW YORK STATE CRIME COMMISSION (1927) *Report to the Commission of the Sub-Committee on Statistics.* New York City: New York State Crime Commission.
PACKER, Herbert (1968) *The Limits of the Criminal Sanction.* Stanford, Calif.: Stanford University Press.
POUND, Roscoe (1930) *Criminal Justice in America.* New York: Henry Holt.
PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA (1966) *Report.* Washington, D.C.: Government Printing Office.
PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE (1967) *The Challenge of Crime in a Free Society.* Washington, D.C.: Government Printing Office.
PULTON, Ferdinando (1609) *De Pace Regis et Regni.* London.
RADZINOWICZ, Leon (1956) 2 *A History of English Criminal Law.* London: Stevens.
SACKVILLE-WEST, Victoria M. (1936) *Saint Joan of Arc.* Toronto: Doubleday.
SAN FRANCISCO COMMITTEE ON CRIME (1970) *A Report on the Criminal Courts of San Francisco, Part I: The Superior Court Backlog—Consequences and Remedies.* San Francisco: San Francisco Committee on Crime.
SKOLNICK, Jerome H. (1966) *Justice without Trial.* New York: John Wiley.
STAUNDFORDE, W. (1560) *Les Plees Del Corone.* London.
STEPHEN, Henry (1874) *Commentaries on the Laws of England.* London.
TRAIN, Arthur (1924) *The Prisoner at the Bar* (3rd ed.) New York: Charles Scribner's Sons.
U.S. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS (1973) *Courts.* Washington, D.C.: Government Printing Office.
U.S. NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT (1931a) *Report on Crime and the Foreign Born.* Washington, D.C.: Government Printing Office.
——— (1931b) *Report on Prosecution.* Washington, D.C.: Government Printing Office.
——— (1931c) *Report on the Enforcement of the Prohibition Laws of the United States.* Washington, D.C.: Government Printing Office.
VERA INSTITUTE OF JUSTICE (1977) *Felony Arrests: Their Prosecution and Disposition in New York City's Courts.* New York City: Vera Institute of Justice.
WHARTON, Francis (1912) *Evidence in Criminal Issues* (10th ed.). Philadelphia: May & Brother.
WILSON, James Q. (1975) *Thinking about Crime.* New York: Basic Books.
YALE LAW JOURNAL (1967) "Note, Interrogation in New Haven, The Impact of *Miranda*," 76 *Yale Law Journal* 1519.