UNDERSTANDING THE SHORT HISTORY OF PLEA BARGAINING

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As late as the eighteenth century, ordinary jury trial at common law was a judge-dominated, lawyer-free procedure conducted so rapidly that plea bargaining was unnecessary. Thereafter, the rise of adversary procedure and the law of evidence injected vast complexity into jury trial and made it unworkable as a routine dispositive procedure. A variety of factors, some quite fortuitous, inclined nineteenth-century common law procedure to channel the mounting caseload into nontrial plea bargaining procedure rather than to refine its trial procedure as contemporary Continental legal systems were doing.

Alschuler (*supra*) has undertaken to document that plea bargaining was unknown during most of the history of the common law. Only in the nineteenth century does he find significant evidence of the practice in either England or America. These findings beckon to the legal historian for explanation. In modern times, plea bargaining has become the primary procedure through which we dispose of the vast proportion of cases of serious crime. How then could common law procedure function for so many centuries without[1] a practice that is today so prevalent and seemingly so indispensable?

I. WHAT IS PLEA BARGAINING?

In aid of historical inquiry it will be convenient to emphasize some essential features of the modern plea bargaining system.

(1) Plea bargaining is a *nontrial* mode of procedure.

(2) This nontrial procedure subverts the design of our Constitution, which provides that "[i]n *all* criminal prosecutions, the accused shall enjoy the right to . . . *trial* . . . by an impartial jury . . ." (U.S. Const. amend. VI, emphasis supplied).[2]

(3) In order to displace the constitutional design and substitute our nontrial procedure for the trial procedure envisaged by the framers, we make it *costly* for a criminal accused to

Suggestions and references supplied by Albert Alschuler (Colorado), Thomas Green (Michigan), Norval Morris (Chicago), William Nelson (Yale), and Franklin Zimring (Chicago) are gratefully acknowledged.

[1] But see the discussion in note 11, *infra*.

[2] In *Duncan* v. *Louisiana* the Supreme Court held "that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee" (391 U.S. 145, 149, 1968).

claim his constitutional right. When an accused is convicted following jury trial, we customarily punish him twice: once for the crime, and then more severely for "enjoy[ing] the right to . . . trial . . . by an impartial jury . . . ." We rely upon the deterrent effect of that practice to dissuade other defendants from claiming their right to jury trial.

(4) This nontrial procedure has serious *drawbacks*. In particular, the accused cannot present defenses and have his guilt proved to a jury beyond a reasonable doubt—his greatest safeguard against mistaken conviction.

(5) Nevertheless, on account of its *efficiency*, plea bargaining has won the endorsement of the Supreme Court as "an essential component of the administration of justice" (*Santobello* v. *New York*, 404 U.S. 257, 260, 1971). Chief Justice Burger explained there that plea bargaining "is to be encouraged" because "[i]f every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities."

II. NONADVERSARIAL JURY TRIAL

The main historical explanation for the want of plea bargaining in former centuries is, I believe, simple and incontrovertible. When we turn back to the period before the middle of the eighteenth century, we find that common law trial procedure exhibited a degree of efficiency that we now expect only of our nontrial procedure. *Jury trial was a summary proceeding*. Over the intervening two centuries the rise of the adversary system and the related development of the law of evidence has caused common law jury trial to undergo a profound transformation, robbing it of the wondrous efficiency that had characterized it for so many centuries.

The initial point to grasp, and then to explain, is how rapidly jury trials were conducted. The surviving sources show that well into the eighteenth century when the Old Bailey sat, it tried between twelve and twenty felony cases per day (Langbein, 1978:277), and provincial assizes operated with similar dispatch (Beattie, 1977:165). Indeed, it was not until 1794 that a trial "ever lasted for more than one day, and [in that case] the court seriously considered whether it had any power to adjourn . . . ."[3]

[3] Mackinnon (1933:307) referring to *R.* v. *Thomas Hardy* (24 St. Tr. 19, 1794). Mackinnon is speaking only of common law trials; some Parliamentary

How could the Old Bailey of the 1730s process a dozen and more cases to full jury trial in one day, whereas in modern times the average jury trial requires several days of court time?[4]

(1) The most important factor that expedited jury trial was the want of counsel. Neither prosecution nor defense was represented in ordinary criminal trials. The accused was forbidden counsel; the prosecution might be conducted by a lawyer, but in practice virtually never was. The victim or other complaining witness, sometimes aided by the lay constable and the lay justice of the peace, performed the role we now assign to the public prosecutor, gathering evidence and presenting it at trial.[5] As a result, jury trial was not yet protracted by the motions, maneuvers, and speeches of counsel that afflict the modern trial.

(2) There was, for example, no voir dire of prospective jurors conducted by counsel. In practice the accused took the jury as he found it and virtually never employed his challenge rights. Indeed, at the Old Bailey only two twelve-man jury panels were used to discharge the entire caseload of as many as a hundred felony trials in a few days. Each jury usually heard several unrelated cases before deliberating on any. Often the juries rendered verdicts in these cases of life and death "at the bar," that is, so rapidly that they did not even retire from the courtroom to deliberate (Langbein, 1978:280, 284; cf. Beattie, 1977:174).

(3) The most efficient testimonial resource available to a criminal court is almost always the criminal defendant. He has, after all, been close enough to the events to get himself prosecuted. In modern Anglo-American procedure we have constructed the privilege against self-incrimination in a way that often encourages the accused to rely entirely upon the intermediation of counsel and say nothing in his own defense. But in the period before the accused had counsel, there could be no

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and other irregular proceedings before 1794 lasted more than a day, such as the "trial" of Charles I (4 St. Tr. 990, 1649).

[4] In the District of Columbia, the length of the average felony trial increased from 1.9 days in 1950 to 2.8 days in 1965 (President's Commission on Crime in the District of Columbia, 1966:263). A few years later, the figure was "well over three days" (Hearings on District of Columbia Appropriations, 90th Cong., 1st sess., 1967) (statement of United States Attorney David G. Bress; figures include both bench and jury trials). In Los Angeles, the length of the average felony jury trial is said to have increased from 3.5 days in 1964 to 7.2 days in 1968 (San Francisco Committee on Crime, 1970:1). (I am grateful to Professor Albert W. Alschuler for supplying these references.)

[5] This is discussed further in the text, *infra*:266-67; cf. Langbein (1978:280-82, 311-13; 1973:315-24).

practical distinction between his roles as defender and as witness. The accused spoke continuously at the trial, replying to prosecution witnesses and giving his own version of the events (Langbein, 1978:282-84).

(4) The presentation of evidence and the cross-examination of witnesses and accused took place in a fashion that was businesslike but lacked the time-consuming stiffness of a modern adversary trial, which has strict rules of sequence and phase preclusion. The trial judge superintended this "altercation" (Smith, 1583:80) of witnesses and accused, occasionally examining or cross-examining, and he exercised a broad power of comment upon the evidence (Langbein, 1978:284, 285-87).

(5) The common law of evidence, which has injected such vast complexity into modern criminal trials, was virtually nonexistent as late as the opening decades of the eighteenth century (Langbein, 1978:300-6; cf. Wigmore, 1908:696). The trial judge had an alternative system of jury control that was both swifter and surer than the subsequent resort to rules of admissibility and exclusion. He had unrestricted powers of comment on the merits of criminal cases; he could reject a verdict that displeased him and require the jury to deliberate further; indeed, until 1670 he could fine a jury that persisted in acquitting against his wishes (Langbein, 1978:284-300).

(6) In an age before professional police and prosecutors, the problems of controlling such officers and protecting the accused from abuse of their powers lay wholly in the future. The remarkable American exercise of attempting to substitute exclusionary rules of evidence for a direct system of discipline was not yet operating to protract the criminal process.

(7) Finally, there was as yet virtually no appeal in criminal cases.[6] Accordingly, the familiar modern machinations of counsel directed to provoking and preserving error for appeal were unknown.

It should surprise no one that in a system of trial as rough and rapid as this there was no particular pressure to develop nontrial procedure, or otherwise to encourage the accused to waive his right to jury trial. Indeed, the sources reveal an opposite pressure, which we find confirmed by Sir Matthew Hale, a trial judge of long experience, in his *Pleas of the Crown*, written in 1670. He reports that "it is usual" for the judge to discourage an accused from pleading guilty, and "to advise the party to

[6] This explains, in part, the prominence of the pardon as an alternative scheme of review, see Hay (1975:40-49); Radzinowicz (1948:107-37).

plead [not guilty] and put himself upon his trial . . ." (1736:225).

We should also not be surprised that this summary form of jury trial perished over the last two centuries. The level of safeguard against mistaken conviction was in several respects below what civilized peoples now require. The hard question, which remains unresearched, is why the pressure for greater safeguard led in the Anglo-American procedure to the common law of evidence and dominance of the trial by lawyers, reforms that ultimately destroyed the system in the sense that they rendered trials unworkable as an ordinary or routine dispositive procedure for cases of serious crime. Similar pressures for safeguard were being felt in the Continental legal systems in the same period, but they led to reforms in nonadversarial procedure that preserved the institution of trial.

III. WHY PLEA BARGAINING?

We think that we understand why there was no plea bargaining while jury trial retained its character as a summary proceeding. And we have no difficulty seeing that once jury trial had been overlaid with the complexity that characterizes it today, it could no longer be used as the exclusive dispositive proceeding for cases of serious crime.[7] But these insights leave us still a good distance from explaining why the particular adaptation that resulted was plea bargaining. Too little is known about the detail of the transformation of eighteenth-century summary jury trial into twentieth-century adversary jury trial to permit us to speak with precision about how the response of plea bargaining took shape. We may, however, indicate some features of the earlier system of jury trial that predisposed Anglo-American procedure to plea bargaining.

[7] In isolating the transformation of jury trial as the root cause of plea bargaining, I do not mean to imply that this procedural development is the sole cause of a practice so complex. When the history of plea bargaining is ultimately written, there will certainly be other chapters. In particular, it will be necessary to investigate: the influence of the rise of professional policing and prosecution and the accompanying changes in the levels of crime reporting and detection; changes in the social composition of victim and offender groups; changes in the rates and types of crime; and the intellectual influence of the marketplace model in an age when laissez faire was not an epithet. But these other phenomena were largely experienced in Continental countries that did not turn to plea bargaining. Anyone looking beyond the uniquely Anglo-American procedural development that we have emphasized needs to explain why plea bargaining has characterized lands with such disparate social composition as the United States and England, but not Germany, France, or the other major European states.

A. Private Prosecution

The tradition of private prosecution has been a feature of English criminal procedure nearly as striking and tenacious as the jury trial. To this day the English are as reluctant to admit that the tradition of private prosecution has been eroded as they are to concede that they have largely displaced jury trial by plea bargaining (Baldwin and McConville, *infra*). In theory, private prosecution continues to be the norm. Official prosecution is formally limited to the handful of cases brought by the Director of Public Prosecutions. Otherwise, the police are said to prosecute. Further, "[w]hen 'the police' prosecute, the correct analysis is that some individual has instituted proceedings, and the fact that this individual is a police officer does not alter the nature of the prosecution" (Jackson, 1972:155).

Writing in 1860, when the transition to an adversary jury trial was well underway, Stephen emphasized the persistence of this peculiar tradition of private prosecution in a most useful passage:

> In this country, though probably this country only, the result of the experience of nearly eight centuries has been to establish the principles that a criminal trial differs from a civil action principally in the character of the damages ultimately awarded. In the one case a man is tried for the sake of exacting from him his life or his liberty, as in the other case he is sued for the sake of exacting from him satisfaction for the breach of an obligation, or for the infliction of an injury. . . . There is no public functionary whose duty it is to investigate the charges and to obtain and arrange the evidence required to support them. The prosecutor is generally a private person, and has never, as such, any official authority. He employs his own attorney just as he would in a civil action, and he is practically the *dominus litis*. [Stephen, 1860:697-98]

By analogizing the private prosecutor to the *dominus litis* of civil litigation, Stephen reminds us of the civil litigant's right to compromise his claim. Although the English did place some limits upon the power of the private prosecutor to compromise criminal litigation,[8] the prosecutorial function nevertheless grew up steeped in the conceptual forms of private discretion

[8] Compounding a felony for gain without leave of court was itself criminal, see Stephen (1883:501-2). The pretrial procedure instituted by the Marian committal statute (1555, 2 & 3 Phil. & M., c. 10) authorized the justice of the peace (hereafter JP) to bind over the private prosecutor and other accusing witnesses, that is, to require them to sign recognizances by whose terms they would, in the event of nonappearance at trial, forfeit the sums specified in the respective instruments. These powers led some JPs to take a more active role in investigating and prosecuting difficult or important cases, see Langbein (1973:317-24).

The surviving sources suggest that in London in the early eighteenth century certain of the JPs were already quasi-professionals at investigation and prosecution, and that they were already employing a technique of negotiated nonprosecution much older than plea bargaining. They could grant immunity from prosecution to a culprit who "made himself an evidence" against other criminals. See, for example, the trial testimony of a JP (Gwyn Vaughan) explaining how he chose among competing applications of a group of shoplifters

as opposed to official duty.[9] Even in America, where the public prosecutor has a longer history than in the mother jurisdiction (*Wisconsin Law Review*, 1952), the district attorney fell heir to the discretion of the citizen prosecutor whom he succeeded. When, therefore, the transformation of jury trial left the trial system clogged, the pressure of caseloads could find release in the exercise of prosecutorial discretion much more naturally than on the Continent, where the prosecutorial function has for so long been performed by officials and where there has been constant concern to regulate their discretion (Langbein, 1974:442-43, 448-50).

B. The Guilty Plea

Stephen's analogy to the civil *dominus litis* is also important in thinking about the position of the criminal defendant. For many centuries he, too, has had the civil litigant's right to concede liability without trial, through the use of the guilty plea. This device, now familiar to us as the doctrinal basis of our nontrial plea bargaining procedure, also turns out to be an Anglo-American peculiarity. In Continental legal systems someone who is accused of a serious crime may confess, but he will nevertheless go to trial. Confession shortens the trial by affecting the quality of the evidence, but confession does not eliminate trial.[10] For most purposes it hardly mattered that the

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wanting to become this so-called crown witness, in The Proceedings at the Sessions of the Peace, and Oyer and Terminer, for the City of London and County of Middlesex (Aug.-Sept. 1726) at 4.

Writers have been known to confuse this practice with plea bargaining, e.g., *Buffalo Law Review* (1974), properly criticized on this ground by Friedman (*supra*:247). The confusion is understandable. The crown witness typically did confess his own crime in the course of testifying against his accomplices, and in this sense it can be said that he exchanged his confession for the prosecutor's leniency.

There are, however, major distinctions. (1) The crown witness ordinarily escaped prosecution and sanction altogether, whereas the conventional plea bargain imposes conviction and (reduced) sentence on the culprit who confesses. (2) The object of the exchange was not, as in plea bargaining, self-incrimination, but rather the conviction of others whose actions were regarded as more heinous than those of the crown witness. (3) It was not dysfunction in the trial process that caused the prosecution to excuse the crown witness from punishment, but rather inadequate evidence-gathering capacity in the pretrial process, which is why the crown witness was already prominent in the first half of the eighteenth century when jury trial was still a summary proceeding and true plea bargaining still unknown.

[9] See, for example, the forgery prosecution recounted in Alschuler (*supra*:222-23).

[10] Casper and Zeisel (1972:146-47, 150-51). In the middle of the nineteenth century, when German criminal procedure was being given its modern shape, German scholars routinely studied English procedure as a reform model. They found much to admire and to borrow (including the principle of lay participation in adjudication and the requirement that trials be conducted orally and in public), but they were unanimous in rejecting the guilty plea. It was wrong for a court to sentence on "mere confession" without satisfying itself of the guilt of

common law treated confession as a waiver of trial, by contrast with the Continental practice of viewing it as merely evidence of the most cogent kind; as we have seen, during the centuries when jury trial was still a summary proceeding the courts discouraged defendants from entering guilty pleas. But in retrospect we can see that the guilty plea had an intrinsic convenience[11] that pointed the Anglo-American system towards a nontrial procedure once jury trial had undergone the transformation that stripped it of its former efficiency.

Another historical relic may also have influenced the common law in its tendency to construct the modern nontrial procedure on the basis of the accused's waiver of his right to jury trial: the rule that the accused had to elect trial by jury and could not be so tried without his consent. This rule, whose medieval origins and fortuitous post-medieval survival are elsewhere explained (Langbein, 1977:75-76), had no practical importance so long as jury trial was still in its summary phase. When an accused refused to elect jury trial, he would be pressed to death without trial; accordingly, few accused placed much value on the right to decline. But the theory lived on, ready for an opposite usage in a later day. When jury trial had undergone its great transformation, the authorities would cease coercing the accused to elect jury trial and instead—by more polite means—they would coerce him to waive it.

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the accused (Arnold, 1855:275; see also Walther, 1851; Goltdammers Archiv, 1870).

[11] This point is reinforced by Professor Cockburn's recent discovery that common law criminal procedure experienced an earlier cycle in late Elizabethan times of what appears to be plea bargaining, in response to a relatively sudden increase in felony caseloads. Working from the indictment files that survive from the assizes held on the Home Circuit around London, Cockburn (1978:73) finds that "[f]or the first thirty years of Elizabeth's reign confessions of guilt are virtually unknown at assizes" (as they are again by Hale's time in the second half of the seventeenth century, see the discussion *supra*:264-65). "Quite suddenly, between 1587 and 1590, 'guilty' (*cognovit*) becomes a routine plea; at every assizes thereafter five or six prisoners—sometimes as many as half the calendar—confessed to their indictments and were sentenced without further process" (*ibid.*). A number of indictments from this period appear to reflect negotiated charge reductions exchanged for guilty pleas. Stolen goods were revalued to below twelve pence, in order to bring the offense down from grand to petty larceny. Indictments alleging burglary were revised to charge larceny instead; "benefit of clergy" pertained to larceny, so that a first offender would routinely escape with branding on the thumb rather than death. These amendments were entered on the original pieces of parchment that charged the higher offenses, doubtless to save the expense of new parchment, which is why evidence of the practice has survived (*ibid.*).

Cockburn's discovery of the Elizabethan practice is too recent to have allowed anyone to explore what factors subsequently relieved the pressure and permitted substantially every case of felony to go to jury trial, as had occurred by Hale's time. It would be necessary to study the seventeenth-century evidence with a view to identifying changes in caseloads, trial management, court time devoted to the criminal calendar, and so forth.

C. Insistence on Jury Trial

An adaptation seemingly less radical than the nontrial procedure of plea bargaining would have been to institute trial without jury, what we now call bench trial, in cases of serious crime. Although it has become a familiar *via media* between jury trial and the guilty plea in our own day, in the nineteenth century bench trial was resisted. Once again we are touching upon a subject that has not been seriously investigated in the historical literature and can therefore address it only in outline.

In England the great political trials associated with the fall of Stuart autocracy and the evolution of the eighteenth-century constitution had sanctified jury trial in political theory. The changes that were taking place within the institution of jury trial came interstitially and were, therefore, hard for contemporaries to notice or evaluate. The seventeenth-century political trials that were the source of so much of the esteem in which the jury was held were responsible for a good deal of continuing distrust for the English judiciary. The behavior of Justices Scroggs and Jeffreys was not easily forgotten even after the independence of the judiciary was established. Blackstone, writing in the 1760s, was still worried that in misdemeanor cases tried without a jury, the accused was exposed to the arbitrariness of a single crown hireling. The accused, he warns, "is acquitted or condemned by the suffrage of such person only, as the statute has appointed for his judge" (1769:277).

In America, where the judiciary's association with the excesses of English colonial administration had led the framers to make jury trial a constitutional right, bench trial was all the harder to envision. There is a splendid case from the New York Court of Appeals in 1858 (*Cancemi* v. *People*, 18 N.Y. 128) that illustrates the continuing force of this sentiment in the age when plea bargaining was creeping into ordinary practice. Some distance into a jury trial for murder, one of the twelve jurors was "withdrawn" (*ibid.* at 130) with the written consent of the accused, his counsel,[12] and the public prosecutor. (The report does not make clear whether the juror became indisposed, or whether he was removed for cause on a kind of delayed challenge.) The jury of eleven then proceeded to verdict, finding the accused guilty, and he was sentenced to death. The Court

[12] Where assigned counsel was not readily available, an indigent accused in nineteenth-century America may have had a considerable incentive to plead guilty rather than try to defend himself at trial—whether jury or bench—against a lawyer-public prosecutor. (I owe this point to Professor William Nelson.)

of Appeals reversed, reasoning that if the accused could dispense with one juror, he could waive eleven; such innovation threatened "the ancient and invaluable institution of trial by jury . . ." (*ibid.* at 138). Once "issue is joined on an indictment, the trial must be by the tribunal and in the mode which the constitution and laws provide, without any essential change" (*ibid.*). However privatized the steps leading to the initiation of criminal proceedings, the actual conduct of a criminal trial is undertaken for public purposes. Hence, "the right of a defendant in a criminal prosecution to affect, by consent, the conduct of the case, should be much more limited than in civil actions" *ibid.* at 137).

Twenty years later the Supreme Court of Connecticut concluded that a statute authorizing the accused to elect bench trial was valid under the state constitution, although it was "unwise and impolitic . . . to place the life or liberty of any person accused of crime, even by his own consent at the disposal of any one or two men, so long as man is a fallible being" (*State* v. *Worden*, 46 Conn. 349, 367, 1878). American judges did not welcome the responsibility for bench trial in cases of serious crime, especially in an age that still employed a good deal of capital punishment. Commenting on the Connecticut case early in the twentieth century, Simeon Baldwin—a sometime Connecticut governor, supreme court justice, founding member of the American Bar Association, and Yale law professor—emphasized what an advantage it was to have jury trial diffuse responsibility. "Each juror is but one of twelve," and when the twelve have convicted the accused, "the judge, for his part, is only the channel through which the statutory penalty is proclaimed" (1908:316).

Not only was the nontrial solution of plea bargaining more rapid than bench trial, it also protected the weak, elective American trial bench from the moral responsibility for adjudication and from the political liability of unpopular decisions. In an ideological milieu in which the mounting defects of adversary jury trial could not have been admitted and discussed even if they had been correctly understood, it was easier for the judiciary to tolerate trial waivers than jury waivers—easier, that is, for the judges to allow the prosecutor to wring out a plea concession than to bring themselves to insist on adjudication before condemnation.

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