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AN ANALYSIS OF PLEA BARGAINING

A THESIS PROJECT
PRESENTED TO THE
FACULTY OF
CALIFORNIA STATE UNIVERSITY,
SAN BERNARDINO

In Partial Fulfillment
of the Requirements for the Degree
Master of Arts
in
Criminal Justice

by
Gabriela Aceves
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A Thesis Project
Presented to the
Faculty of
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Gabriela Aceves
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Approved by:

Frances S. Coles, Professor,
Department of Criminal Justice

Frank P. Williams, Chair,
Department of Criminal Justice
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INTRODUCTION

The purpose of this Master’s Project was to analyze plea bargaining. In the analysis journal articles and books written between the years 1956 to 1990 were reviewed. The analysis covered readings from historical writers such as Sudnow, Blumberg, and Newman to more recent authors such as Casper, Feeley, and Heumann.

One of the primary goals of this project was to find ways in which the court system could operate more efficiently. Reading plea bargaining material from various perspectives gives a good insight into how plea bargaining began. The review also shows the different areas that plea bargaining was used for and shows how plea bargaining affected criminal justice courtroom workgroups. The analysis covers articles and books which examine the perspectives of the prosecutor, judge, public defender, police, and the defendant. Several of the articles reviewed served as comparative material about plea bargaining procedures used in the United States. In fact, as Baldwin & McConville and Felstiner have found, plea bargaining occurs in other countries other than the United States. Although the practice may have another name, plea bargaining nonetheless occurs.

Another goal in this project was to examine ways in which the criminal justice system could operate without plea bargaining, and the implications of such a procedure. But, as Rosett and Cressey discuss in JUSTICE BY CONSENT (1976), it appears that plea bargaining is here to stay. Rosett and Cressey
argue that plea bargaining occurs often. They also note that most citizens have had some experience with the guilty plea from appearing in court in response to a traffic ticket, for example. In such a case, it appears easier to citizens to plead guilty, pay a fine and go home rather than pleading not guilty because another visit to the courthouse would be necessary.

The journal articles, book analyses, and abstracts are not in any specific order of importance. It was decided to put the analysis and abstracts in chronological order. In conclusion, this review will allow the reader to examine the process of plea bargaining in the court, and the impact of plea bargaining on the other components of the criminal justice system.
PLEADING GUILTY FOR CONSIDERATIONS: A STUDY OF BARGAIN JUSTICE

DONALD J. NEWMAN

1956

One of the major problems faced by social scientists in studying criminal behavior involved obtaining samples of offenders to be used as units of research. Ordinarily, such samples are drawn from those who have already been convicted and who are or have been previously incarcerated. Such samples usually arise because it is difficult to study those who have not yet been caught, charged, and convicted.

Newman's article discusses plea bargaining as a gross misuse of justice which is used by criminals, political officials, and the business elite to avoid a conviction. In his study, Newman interviewed a sample of men who were all convicted of "conventional" felonies in one court district in regard to the process involved in their own convictions. These 97 men came from a "medium" size county where felony convictions would normally follow a quasi-automatic "combat" theory of criminal justice involving a jury trial or at least an unconditional plea of guilty. In studying these convictions, 93.8 percent were not convictions in a combative, trial-by-jury sense, but merely involved sentencing after a plea of guilty had been entered. It is important to note that 38.1 percent of the men had originally
entered a not guilty plea, changing to guilty only at a later procedural stage of an actual trial.

An interesting difference between those who pled not guilty and those who pled guilty arose. For instance, men entering an initial plea of not guilty were significantly more often represented by defense attorneys than the men who immediately pled guilty. The men with the lawyers (52.6%) when first apprehended often pled not guilty and later changed to guilty pleas. The fact that the retention of counsel correlated with a change of plea to guilty might mean that the lawyers, having a better grasp of the legal worth of the evidence against their clients, advised them to plead guilty and that the clients followed their advice. Another indicator of why offenders would change their pleas would be that attorneys had arranged with the district attorney satisfactory charges or more lenient sentences then originally expected by the offenders. In most cases, these offenders were first time offenders.

The second group; those who pled guilty without counsel were offenders, in most cases, who had some prior experiences with the criminal justice system. These recidivists hoped (by pleading guilty) that their cases would expediently go through the conviction process. These recidivists were both conviction wise and conviction susceptible in the dual sense that they knew of the possibility of bargaining a guilty plea for a light sentence and at the same time were vulnerable, because of their records, to threats of the prosecutor to "throw the book" at them unless
they confessed. A more general fear, however, was that the judge would be especially severe in sentencing if they did decide to fight and then lost.

The considerations received by the offender in exchange for their guilty pleas were of four general types:

1. **Bargaining concerning the charge.** A plea of guilty was entered by the offenders in exchange for a reduction of the charge from one alleged in the complaint.

2. **Bargaining concerning the sentence.** A plea of guilty was entered by the offenders in exchange for a promise of leniency in sentencing.

3. **Bargain for concurrent charges.** A guilty plea exchange for the concurrent pressing of multiple charges.

4. **Bargain for dropped charges.** Involved an agreement on the part of the prosecutor not to press formally one or more charges against the offender if he in turn pled guilty to the major offense.

In instances where informal methods were used the roles of the various participants were cooperative rather than combative. That is, defendants and their counsel participated with the prosecutor’s position rather than demanding a trial.

In concluding his article, the most significant general finding of the study was that the majority of the felony convictions in the district studied were not the result of the formal, combative theory of criminal law involving in effect a legal battle between prosecution and defense, but were compromise
convictions, and the result of bargaining between defense and prosecution. Instead of proceeding through all the formal stages of conviction such as a hearing before a magistrate, preliminary hearing, arraignment etc., the majority of the offenders waived most of these procedures partly due to the informal promises of leniency or threat of long sentences. Hence, they entered guilty pleas.

In reviewing the literature, Donald Newman's study of plea bargaining is considered to be a classic piece of research. His findings help to portray many of the injustices which occurred in 1956. Further, Newman discusses an issue of whether plea bargaining is legal; that is, whether people convicted as the result of bargaining are convicted by due process of law.
Blumberg gives a brief description of three landmark decisions which impacted criminal law procedures and enforcement in the United States of America. The first is *Gideon v. Wainwright* (1963) which required states and localities to furnish counsel in the case of indigent persons charged with a felony. In *Escobedo v. Illinois* (1964), an important issue arose as to when or at what point in time is a suspect entitled to counsel. In *Escobedo v. Illinois*, the US Supreme Court held that counsel was to be permitted (either retained or appointed) when the process of police investigations shifts from merely investigatory to that of accusatory. The third case presented by Blumberg is *Miranda v. Arizona* (1966). In this case, counsel is to be permitted prior to police interrogations as required by the 5th Amendment.

The purpose of Blumberg’s article is to furnish preliminary evidence of the role of a counselor and to see if such a role deals with social reality. Blumberg states that the overwhelming majority of convictions in criminal cases are not the product of a combative, trial-by-jury process but rather a sentencing of the individual after a negotiated, bargained-for plea of guilty has been entered. In fact, when an accused person goes to his
lawyer, the lawyer seems to merely help the accused redefine his situation and restructure his perceptions in accordance with a guilty plea. Hence, the defense attorneys, whether privately retained or a public defender, are ultimately concerned with strategies which tend to lead to a plea of guilty.

Blumberg also mentioned that of all the occupational roles in the court, the only private individual who is officially recognized as having a special status and concomitant obligation is the defense lawyer. He has a duty to his client as well as to the court. "Regular" lawyers are those who work on a day-to-day basis who constantly handle case workloads. Intolerably large caseloads of defendants produce intense pressures to process large numbers of cases, hence, lawyers usually convince their clients to plead guilty as a way to reduce such pressures. In all reality, much plea bargaining occurs.

Blumberg discusses the key issue of understanding the role of a defense lawyer as it pertains to the process of fixing the fee to be charged and how such a fee is to be collected. Blumberg introduces the "confidence game" which is played. For instance, a lawyer will not represent a defendant unless his services are paid for prior to going to court. Lawyers often contact the defendant's next of kin in order to get their money. Since a typical felony case which results in merely a guilty plea ranges anywhere from $500 to $1,500, many family members are known to contribute to the lawyer's fee. Blumberg also mentions that the courtroom work group assists the lawyer in getting his
fee by putting on a "performance" so as to make it seem as if the lawyer is really working. Further, judges are known to keep defendants "locked up" a little longer or until a defense lawyer is paid for his services.

Blumberg mentions that criminal law operates in a bureaucratic, assembly-line fashion. Defendants are processed in an assembly-line fashion so as to relieve the attorneys of the case workload which involve much pressure. In fact, a good defense lawyer will be able to persuade the defendant's family to help him/her persuade the defendant to plead guilty.

In conclusion, Blumberg mentions, in his article, the three major functions which a defense lawyer must serve. They are 1) the lawyer must arrange for his fee; 2) the lawyer must prepare and then, if necessary, "cool off" his client in case of defeat; 3) he/she must satisfy the court organization that he/she has performed adequately in the process of negotiating the plea (according to due process procedures) so as to preclude any sort of embarrassing-outside scrutiny.
In the introduction of his book, Casper states that he is examining the criminal justice process from the perspective of the defendant because a defendant is perhaps the most important "consumer" of criminal justice. Casper argues that it is the defendant who must most directly live with the consequences of the administration of criminal justice. Hence, it is the defendant's past and future behavior that is of concern not only to him but also to society at large. Casper argues that to examine what the defendant thinks is happening to him, the roots of his behavior, and the lessons he learns from his encounter with criminal justice is of importance in understanding the operation and impact of one set of institutions of American government.

In conducting his research, Casper interviewed seventy-one defendants who were interviewed for periods averaging about an hour and a half. All men interviewed had been charged with felonies in Connecticut. Forty-nine of the men were incarcerated in Connecticut Correctional Institutions; of the remaining twenty-two, sixteen were on probation, and six had received dismissals or acquittals. The men in prison were selected randomly. The men on the street were a self-selected sample.
The interviews were tape recorded and transcribed verbatim. Since the sample of men came from only one jurisdiction, generalizing from this group to all of American criminal justice can be very risky, according to Casper.

In another section of the book, Casper argues that though defendants are human beings, they are not treated as such. The majority of defendants are treated as if they are outsiders in American life. In fact, the application of the criminal sanction is perhaps the most serious and destructive measure that the government can take against a citizen. In Casper's opinion, the character of the administration of justice is a crucial indicator of the "justness" of the government and of the quality of life in a society regulated by law.

Casper argues that defendant's are also treated in an "assembly line" fashion. In his words, "The system is a machine which begins with raw material consisting of those arrested" (Casper, 1972, pg. 2). Further, Casper argues that defendants are processed and emerge as a product. The convicted criminal is sentenced to prison or released on probation. Between arrest and disposition there are a series of points on the assembly line: the preliminary hearing, the stay in jail awaiting trial, the bargaining about a "deal", the cop-out, and sentencing day. Casper further argues that the machine has some quality controls, and some of the objects are "rejected" and thrown off the assembly line at various stages, as charges are dropped, witnesses do not show up, and imperfections in the state's case
emerge. Hence, the reality of the system varies from perspective to perspective.

In one of the interviews Casper talked to a thirty-three year old man convicted of manslaughter. In the interview, the defendant discusses the process which he encountered from the point of arrest to the point of his sentencing. This man had no prior record and had one year of college education. He was not typical of most defendants which were interviewed. The defendant stated, like most other defendants, that he felt that the police were just doing their job when they arrested him. The police are also seen as adversaries in a game of cops and criminals. Further, according to other interviews, police are seen as performing the valued task of providing order and protecting life and property. When the defendant convicted of manslaughter was arrested, he felt very nervous and uncomfortable because he thought that the police were going to harass and hurt him. From his expectations (based on media coverage episodes), the defendant was surprised that the arresting officers were not physically brutal to him while arresting him.

After arrest, the defendant stated that he willingly confessed everything that he had done, even after being Mirandized. Though the defendant knew he was entitled to a lawyer, he felt, in a sense, responsible for what he had done. When he finally received a public defender, he had already made several recorded statements about the facts of the crime. When
put in jail, the defendant describes the unsatisfactory living conditions in the jail.

The defendant convicted of manslaughter describes his relationship with his public defender. He states that he had been in jail two and one-half months before he finally got someone who was to represent his case. When the public defender worked on his case, the defendant was left out of any decision making processes which concerned his life. The public defender met with the defendant two months after being assigned to the case and once more before the preliminary hearing. The defendant and his defender met the day before the defendant was to enter a plea. The charges went from first to second degree murder to that of manslaughter without the defendant's knowledge. In fact, the defendant wanted to discuss the issue of going to trial with his public defender, but the public defender never took the time to meet with his client to discuss the issue.

In another area of the book, Casper argues that arrest and the placing of charges against a defendant are but the first episodes in the defendant's journey through the legal system. Immediately after the filing of charges, bond is set for defendants not charged with capital crimes. If a defendant cannot post bond, he remains incarcerated until the end of trial, sentencing, or upon release. While in jail, defendants complain of the conditions which are substantially more unpleasant and demeaning than those afforded to convicted criminals. After a
preliminary hearing, most defendants' cases are disposed of by the entering of a guilty plea.

In Casper's view, most defendants avoid the backbone of our system of justice—the trial. In fact, the lack of trials reduces the significance of the procedural guarantees that our system putatively offers to defendants. In particular cases, this may mean that people who are not "legally" guilty, ie whose guilt cannot be proven given the constraints imposed on police, are in fact convicted with their own tacit or explicit consent. With the presumption of innocence and the burden of proof on the state, and with plea bargaining, the defendant is not presumed innocent but guilty. Defendants feel that they must prove their innocence and since doing so may seem difficult, they would rather just plead guilty instead of going through the trial.

According to Casper, after the defendant has been arrested, arraigned, and bond has been set, the stage is set for the crucial activity of the criminal justice system: plea bargaining. In fact, plea bargaining is, in many ways, a game. There are at least two, perhaps three, "sides" of the game (or opponents) and each possesses resources and goals. The outcome of any case depends largely upon the vigor and skill with which each side exploits its resources. In general, if a defendant has a privately retained attorney, the attorney is perceived by the defendant as being on his side. If a public defender is involved, the public defender is viewed by the defendant as being a member of the prosecutor's team.
In reality, defendants view the criminal justice process as being a game; a game that they, as defendants, cannot "win." To some extent, the defendant's ability to play depends upon the prosecutor's willingness to bargain. The prosecutor holds most of the cards in the plea bargaining game. The prosecutor is viewed as having the power to determine the sentence. From a defendant's perspective, a prosecutor's goal is to get convictions and turn cases over as quickly as possible. In fact, from a defendant's point of view, "money talks" and any defendant with sufficient resources can buy his way out of almost any trouble. Though many defendants do not have many resources, they still have the ability to demand trial. But, according to Casper, demanding a trial is really a bluffer's game: it is a threat and a bargaining counter, but most cases would not actually go to trial.

According to Casper, the peculiar and somewhat hypocritical nature of a system which is based upon the presumption of innocence, due process values, and the criminal trial, but which in practice is a game of plea bargaining, is reinforced by what is known as the cop-out ceremony. After a defendant agrees to plead guilty, he appears before a judge to enter his plea. The defendant is asked questions about whether he is pleading guilty because he is in fact guilty, about coercion or inducements to plead, and about his satisfaction with representation afforded him by his attorney. The questions are designed to make sure that defendants are not pleading guilty to things they did not
do. Thus, a defendant must appear before a judge and go through a ritual. The judge asks the defendants questions and the defendant responds with lies; the judge knows they are lies and accepts the defendant’s answer as true.

In concluding his book, Casper discussed an area in which he interviewed defendants to find out how they felt about the laws they violated. With the exception of a few arrested on drug charges, all the defendants believed that they had done something "wrong." Defendants felt that the law they violated represented a norm that was worthy of respect and that such law ought to be followed. Without exception, all defendants felt that laws against taking property from others were "good" laws and that such behavior should not be tolerated but, in fact, merited punishment. The men interviewed "accepted" the norms implicit in criminal law. But they have not "internalized" them. More important, the interviews suggest that most of the men believe that law-abiding behavior is the product not of convention, morality, or internalization of the norm itself, but rather of external forces imposing constraints upon a person.

Reading and analyzing Casper’s book, gives a good insight as to how defendants feel about the criminal justice system. In general, the book described the process from arrest of a potential defendant to final disposition. The book gave excellent examples of how cases are disposed of either through plea bargaining or trial. The book discusses the points of view of defendants, public defenders, prosecutors, the police and the
judge. The book gives a detailed portrayal of the operations of the criminal justice system.
According to Heumann, plea bargaining can be defined as the process by which the defendant relinquishes his right to go to trial in exchange for a reduction in charge/or sentence. The pervasiveness of plea bargaining is suggested by the fact that roughly only 10% of all criminal cases go to trial. In his article, Heumann discusses an issue that plea bargaining and case pressure "go together."

Much of the informed thought and literature on plea bargaining assumes (or at least conveys the impression) that plea bargaining can be best (though not necessarily exclusively) understood as a function of case pressure. This idea comes from many sources. For instance, in reviewing the literature:

"only the guilty plea system has enabled the courts to process their caseloads with seriously inadequate resources. Growing concessions to guilty plea defendants have almost matched the growing need to avoid burdensome business of trying cases" (Alschuler, 1968) and,

"So long as it remains impossible for our criminal system to permit every defendant to claim his right to a jury trial, some inducements for the surrender of that right will be necessary (Yale Law Journal, 1972). Hence,

"Realizing the need to relieve their congested dockets, the courts have resorted to various methods to expedite the legal process. In fact, plea bargaining is not designed to accelerate the trial level but instead eliminate it (Duquesne Law Review, 1971)."
According to Blumberg, "...the emergence of bureaucratic due process--a nonadversary system of justice by negotiation...consists of secret bargaining sessions, employing subtle, bureaucratically-ordained modes of coercion and influence to dispose of onerously large caseloads in an efficacious-rational manner" (Blumberg, 1967).

Heumann argues that comments like these are illustrative of the purported case pressure-plea bargaining linkage, but, he states that there is no evidence known to support this assumption.

In conducting his own study to analyze whether or not a linkage between plea bargaining and case pressure occurs, Heumann reviewed published reports from the State of Connecticut. He also conducted 71 interviews with judges, prosecutors, public defenders and private criminal attorneys. In his findings, he states that it is at least eight times more likely that the defendant will choose to plead guilty in lieu of trial. However, the relative infrequency of trials compared to alternate modes of disposition is not a recent phenomenon. It appears that the trial, as far back as 1880, did not serve as a particularly frequent source of case dispositions.

In concluding his article, Heumann states that guilty pleas, and to a lesser extent nolo contendere pleas, have always been the best traveled routes to case dispositions. Though indicating that some of the steps followed in negotiating dispositions have changed, the core notion of arranging a deal with the state's attorney in return for a guilty plea was always central to the practice of criminal law. Heumann states that; 1) between 80 to
90% of the defendants in the superior court are factually guilty, 2) of these, a sizeable percentage have no substantial grounds to contest the state's case, that is, they are factually and legally guilty, 3) if the defendant pleads guilty, he is likely to be rewarded in terms of a reduction in charge and/or sentence. Thus, Heumann argues that there are other issues in which plea bargaining arises rather than just case pressure.

Heumann's article seems to agree with two other pieces of research (Newman and Blumberg). These classic pieces, like other research, in a sense, state that plea bargaining is a type of assembly line justice which is performed in a bureaucratic style. According to these authors, plea bargaining is a negotiation which occurs between a prosecutor and defense attorney with or without the defendant's knowledge.
Rosett and Cressey's *JUSTICE BY CONSENT* is a description of the criminal justice system at work. The book provides a solid introduction to the context of plea bargaining as well as possible remedies to help control the overload of cases which come to the American courthouses daily. In their book, Rosett and Cressey argue that though plea bargaining can be defined or viewed in various ways, it is basically the process by which the defendant in a criminal case relinquishes his right to trial in exchange for a reduction in charge and/or sentence. According to Rosett and Cressey plea bargaining occurs so often in the courthouse that the "trial court" should be viewed as a "plea bargaining court". One interesting issue was brought out in their book. Since plea bargaining occurs so much in our courthouses most citizens have had some experience with the guilty plea, perhaps from appearing in court in response to a traffic ticket. The authors argue that citizens feel that for a traffic ticket, it is easier to plead guilty, pay the fine, and go home rather than pleading not guilty because another visit to the courthouse will be necessary. Plea bargaining, therefore, occurs even at the lowest level of the criminal justice system.
Rosett and Cressey state that plea bargaining occurs almost instantly when a case is brought to court. For instance, only a limited number of cases are chosen for trial and they have an ending result of severe punishment. Rosett and Cressey state that out of every one hundred adults arrested for felony charges, fewer than three are sent to prison. Thus, cases are not tried or even decided, but are settled by compromise. Hence, the criminal justice system, dominated by discretionary decisions, is designed primarily to convince defendants to plead guilty.

Rosett and Cressey discussed the term "justice" in a section of their book. Though they agreed that defining justice is very difficult, nevertheless, justice is done when like situations are treated alike. Each individual is to be subjected to general rules, regardless of who they are. On the other hand, justice is also done by giving each person what he/she deserves, by making the punishment fit the crime and the criminal. However, Rosett and Cressey also argue that a system of criminal justice that did not take into account people's uniqueness and personality would be so unmerciful and wasteful of human lives that few thinking citizens would support it.

Rosett and Cressey argue that justice seems to be bought on the cheap. Tactical considerations appear to dominate. Prosecutors and defense lawyers dismiss or reduce charges and agree upon sentences at times without ever consulting the accused. Attorneys rarely expect to try a case and they appear willing to strike any bargain that will allow them to avoid
trial. In fact, the core of plea bargaining criticism is that there seems to be something in it for everyone—defendant, prosecutor, defense counsel, courts, jails, and prison administrators—except the victim, society, and the police. According to Rosett and Cressey, there is something deeply disturbing about a criminal justice system in which the outcome of cases depends on the personal interest and convenience of those at the bargaining tables. In fact, it is deeply disturbing when sentences are unrelated to the crime committed or to the defendant's correctional needs. In all reality, the criminal justice system seems to be harsher to the least powerful—the poor, the black, and the young.

Rosett and Cressey introduced the issue of discretion in their book. The authors mentioned that in our courthouses, the courtroom actors (prosecutors, defense attorneys, judges, probation officers, etc.) have a great amount of discretion especially with cases which involve plea bargaining. In fact, the actors are given ultimate discretion, no factual basis for making reliable predictions, a command to do "justice" and resources and due process demands that limit the capacity for a trial about the facts of a crime to less than 15% of the serious crimes brought to court. Thus, negotiated results dispose of most criminal cases. In fact, as the volume of cases grows, the courtroom actors develop their own intimacy and habits. Thus, the disposition of criminal cases becomes a bureaucratic ritual performed by professionals who feel that society has delegated to
them a hopeless task. In conclusion, the disposition of criminal charges by agreement between prosecutor and the accused sometimes loosely called "plea bargaining" is considered an essential component of the administration of justice.
As late as the eighteenth century, ordinary jury trials at common law were a judge-dominated, lawyer-free procedure conducted so rapidly that plea bargaining was unnecessary. The rise of adversary procedures and the law of evidence made jury trials unworkable as a routine to dispose of so many cases. A variety of factors advanced the common law procedures in which caseloads began to increase and thus, plea bargaining was in demand.

Langbein's article discusses five areas which he used to describe plea bargaining:

1. Plea bargaining is a nontrial mode of procedure.

2. This nontrial procedure subverts the design of our Constitution which provides that "in all criminal procedures, the accused shall enjoy the right to... trial... by an impartial jury".

3. ...We make it costly for an accused to claim his Constitutional right because right now when an accused is convicted following a jury trial, we punish him twice: once for the crime and for "enjoying his right to a trial". We rely on a deterrent effect to dissuade him to claim his right to trial.

4. With plea bargaining, the accused cannot present defenses and have guilt proved beyond a reasonable doubt.

5. Plea bargaining has won the endorsement of the Supreme Court because it is an "essential component of the administration of justice."
In his article, Langbein discusses how jury trials were used in the middle of the eighteenth century. For instance, no voir dire process was used, and between twelve and twenty felony cases were tried per day. When jurors were chosen, they usually sat in on and heard cases for a number of days. They also heard a few cases at a time before making a decision as to the outcome of the particular cases.

It is important to note that the most important factor that expedited jury trials was the want of counsel. Hence, counsel later took time to interview prospective jurors prior to letting them sit on the jury. Another important issue was that defendants were exercising their "privilege against self incrimination" in a way that encouraged the accused to rely entirely upon the pressure of counsel. A fourth area which was discussed was that the presentation of evidence and the cross-examination of witnesses was performed in a businesslike fashion but lacked the time-consuming stiffness of a modern adversary trial. Further, the common law of evidence was virtually nonexistent and in the eighteenth century, there was no appeal process in criminal cases. Hence, all these rights or privileges which were not ordinarily observed by defendants was taking much of court time and thus, was clogging up the system.

Historically, defendants were coerced into exercising their rights of a jury trial. When jury trials were transformed, however, the authorities would cease coercing the accused to elect jury trial and instead, by more polite means, they would
coerce him to waive his jury trial rights. Hence, defendants were getting what is known as a "bench trial". In conclusion, plea bargaining was the result of the reduction of the trial by jury process.
Friedman's article explored the history of plea bargaining as far back as 1880. He discussed a study examining Alameda County, California from 1880 to 1970. In his article, Friedman argues that plea bargaining does not stand by itself; it is part of a process which is by no means new. Friedman argues that the historical record supports those who doubt that plea bargaining can be "abolished". He states that the problems of criminal justice have deep roots, and reform will be difficult and slow.

Friedman states that the plea bargaining process certainly does not serve as a deterrent to crime. For instance, in a cited case, offenders were eagerly pleading guilty to the charge of "stealing from a person" in order to avoid the charge of robbery, which carried a heavier penalty. Friedman cited a New York example where the district attorney encouraged defendants to plead guilty to lesser offenses. Such "under the table" bargains were the result of the district attorney not having time to worry about petty crimes such as assault when there were murder crimes to be solved.

In his article, Friedman argued, like Blumberg (1966), that defense attorney persuaded their clients to plead guilty. In most cases studied in Alameda County, California, many offenders
changed their not guilty pleas to that of guilty because they were either persuaded by their attorneys, were promised a lighter sentence for a lesser charge, or out of remorse, self-hate etc. (which was rare).

In his article, Friedman divided his study between three distinct periods. In the first period beginning in 1880, Friedman found that many defendants took a chance on trial by jury, others pled guilty; and still others pled guilty and claimed their "reward". In the second period, lasting until about the 1950s, the guilty plea was much more dominant. It was really worthwhile to plead guilty as trials became less common and fewer cases were dismissed then before. In this period, Friedman found that the defendant had less chance of acquittal if he went to trial. Hence, pleading guilty was the only road to probation. In the third period, after the 1950s, defendants most always pled guilty. In this current period, defendants relied on negotiations between attorneys more than anything. In fact, the trial by jury option had decreased to a very small percentage as did the percentage of acquittals.

In many instances, the trial by jury option was rarely used. Now, the majority of trials are cut and dry with brief informal trials being conducted. In conclusion, where trial by juries was considered a norm between 1880-1950, society no longer feels that jury trials are the normal way of dealing with those accused of a crime.
Mather argues that if any material is to aid our understanding of contemporary plea bargaining, then the conditions in which the plea bargaining practice began must be explored. It is the author's opinion that plea bargaining began based on two changes in the substance of the criminal law during the mid-nineteenth century. Now, when cases undergo extensive pretrial screening before they reach the court, there are relatively few genuine disputes over guilt or innocence.

According to Mather, criminal law in the early nineteenth century was based on the penology of Beccaria, Bentham, and other utilitarian philosophers. Because the primary goal of punishment was deterrence, sentences were to be determined according to the offense rather than the offender. By the end of the century, a "new penology" had emerged, based on a philosophy of individualized sanctions that sought to reform (later rehabilitate) the offender. In an effort to make the punishment fit the individual, a variety of new procedures were introduced, such as "determinate" sentences, prison classification systems, juvenile courts, different penalties for youthful offenders, and presentence investigations (Vasoli, 1965). Parole and probation also developed during this period. In fact, probation evolved
from the common law practice of suspending sentence into a more formal program involving probation officers who made written reports to the court. Between 1903 and 1923, California’s Penal Code Section 1203 was amended eight times to refine probation as an alternative in sentencing.

Plea bargaining facilitated the individualization of punishment. It was a way for judges and prosecutors to reach a sentence that, in their view, would be more appropriate for the needs of the individual offender. An important question is the extent to which plea compromises actually reflect a concern for substantive justice in the individual case rather than the pressures of administrative expediency or simply political influence. According to Moley though, "real justice can sometimes be achieved best by compromising a case out of court" (Moley, 1929).

The second change which Mather feels helps promote plea bargaining was the tremendous growth of the criminal law. Alschuler discusses this factor primarily in terms of the administrative problems which face the courts as they try to cope with the increased caseloads (Alschuler, 1968). According to Mather, not only were the cases appearing in greater numbers, they were also of a distinctly different type. In fact, the offenses most frequently compromised included issuing bad checks, forgery, auto theft, larceny, nonsupport, statutory rape, liquor law violations, and motor vehicle offenses. For some of these crimes, there was difficulty obtaining convictions and in others,
civil remedies had been secured. For instance, defendants made restitution for bad checks, returned stolen cars, provided for their families, or married the underaged girl (Miller, 1927). Hence, there was no serious infractions of the law being committed.

In conclusion, the author states that many cases are now being plea bargained because prosecutors feel that cases "do not warrant felony treatment." Further, it is the author's opinion that the problem of criminal law administrators is that they are not only supposed to keep order and settle disputes, they must also dramatize the moral values of the community and perhaps, that is why plea compromises are seen as unacceptable because law administrators tarnish the ideal of law enforcement.
According to Haller, plea bargaining apparently arose independently in a number of criminal courts in the 19th century. These simultaneous developments were presumably related to a number of broad structural changes that characterized American Criminal Justice at the time. In his article, Haller discusses ways in which such developments may have provided the context for the institutionalization of plea bargaining as a method of case disposition.

Both Alschuler and Friedman agree that plea bargaining was probably nonexistent before 1800, began to appear during the early or mid-nineteenth century, and became institutionalized as a standard feature of American urban criminal courts in the last third of the 19th century. In fact, during the twentieth century there may have been periods of renewed growth of plea bargaining: in the 1920s, especially in the federal courts faced with large numbers of prohibition cases, and in the 1930s, perhaps related to the growth of street crime.

In his article, Haller states that if plea bargaining developed relatively independently in a number of local jurisdiction at approximately the same time, the development was most likely related to broad structural changes in the role of
the courts. For instance, one factor shaping the criminal courts in the nineteenth century was that the courts lost their dominant position in criminal justice. That is, through the colonial period, the courts generally controlled their caseloads because they issued arrest warrants on complaint of aggrieved citizens. By the 1840s and 1850s, however, modern police departments were created to exercise patrol and detective functions. Police departments also apprehended criminals. Further, full time prosecutorial staffs developed and often handled charging decisions, at least in serious cases. As a result, the control that courts exercised over caseloads declined.

Another change which Haller mentioned in his article is the development of imprisonment as a standard form of case disposition. In the 19th century, the rise of state and local prisons, combined with penal codes prescribing incarceration as a standard penalty for a variety of crimes, introduced a new element in sentencing. Hence, no longer was the sentence designed to repair the damage to the victim; instead, fines or imprisonment were penalties to deter or rehabilitate the offender.

An important issue which is mentioned in Haller’s article is that the criminal justice system was not perceived by experienced criminals as a place for legal adjudication but rather as a system for bargaining and manipulation. For instance, Haller discusses instances in which police departments recruited men who had no formal schooling beyond the age of 13 or 14. Further, in
the lower courts, the justices were nonlawyers and defendants usually appeared in court without legal representation. Further, legal attorneys usually had low social status which, in a sense, forced them to bargain to any extent to get what they wanted. Hence, the criminal justice system was dominated by actors neither trained nor oriented toward legality. Thus, the relative lack of legal orientation was another part of the context within which plea bargaining developed. As a result, the criminal justice system was not perceived by experienced criminals as a place for legal adjudication but rather as a system for bargaining and manipulation. Plea bargaining, thus, arose at a time when the actors in the system perceived the criminal justice process as an arena for deals and favors.

In conclusion, it is reasonable to expect that at least two types of plea bargaining may have coexisted in the late 19th Century. One stemmed from the fact that defendants were generally poor, sometimes foreign-born, and frequently underrepresented by an attorney. Another types, stemming from the political or corrupt nature of criminal justice would reflect an agreement in which the exercise of political influence or the use of bribery would be part of the deal.
Alschuler's article explores changes in guilty plea practices and in attitudes toward the guilty plea from the Middle Ages to the present. For most of the history of the common law, Anglo-American courts did not encourage guilty pleas but actively discouraged them. In fact, plea bargaining emerged as a significant practice only after the American Civil War, and it generally met with strong disapproval. The plea bargaining practice nevertheless became a dominant method of resolving criminal cases at the end of the nineteenth and beginning of the twentieth century.

To begin with, Alschuler defines plea bargaining as an 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. Such concessions 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.

During most of the history of our legal system, guilty pleas were more discouraged than welcomed. Alschuler states in his article that the practice of plea bargaining attracted significant attention and criticism as a result of crime commission studies in the 1920s. In his article, Alschuler
mentioned four specific indications of plea bargaining prior to the American Civil War. The first indication was that of John H. Langbein's study in which he discovered that jury trials were extremely rapid in an era when neither party was represented by counsel. During this era, an informally selected jury might hear several cases before retiring, and the law of evidence was almost entirely undeveloped. During this time, Langbein found a number of cases in which the court urged defendants to stand trial after they had attempted initially to plead guilty.

A second indication of plea bargaining prior to the Civil War emerged from J.S. Cockburn's examination of approximately 5,000 indictments between 1558-1625. During the first 30 years of this period, confessions of guilt were virtually unknown. In some cases, the indictments to which defendants confessed had been altered: burglary charges had been reduced to larceny charges, etc. During the final 35 years of Cockburn's study, the altered indictments disappeared and the defendants entered confessions in only 15 to 20% of the cases heard.

In a case conducted by David H. Flaherty (1749), there were three defendants who pled 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 found that during this time guilty pleas were uncommon for crimes tried and, even if a defendant had signed a confession upon a preliminary examination, that confessions were usually rescinded and the defendant sought trial by jury.
A fourth study conducted by Charles Cottu involved a defendant who was charged with forging bank notes. In this case, two indictments were prepared, one for forgery and the other for possessing forged notes with the intentions of uttering them. For the first indictment, punishment was death. In this case, if the defendant pled guilty to the second indictment, he would be convicted for a lesser offense upon his confession.

Alschuler stated that in order for plea bargaining to occur, such pleading must be conducted strictly on a voluntary basis. In fact, 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] which declared that a guilty plea arising from "fear, menace, or duress" should not be recorded. Further, the four types of confessions (extrajudicial, confessions during interrogation, nolo contendere, and guilty plea confessions) must also occur on a voluntary basis.

In concluding his article, Alschuler states that 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 police, prosecution and defense functions have also played crucial parts where plea bargaining is concerned. For a variety of reasons, Alschuler argues that society has come a long way from the time when guilty pleas were
discouraged and litigation was thought "the safest test of justice." Further, society has 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."
Kipnis' paper is a reply or critique to two defenders of a reformed system of plea bargaining: Thomas Church and Conrad Brunk. In his paper, Kipnis argues that plea bargaining is a twofold conflict with the constitutive purposes of the liberal-democratic idea of a criminal justice system: the practice is not conducive to the punishment of the guilty in accordance with their deserts and it violates basic liberties. Among such liberties is the right against self-incrimination and the right to the lowest reasonable sentence.

Kipnis critiques Thomas Church and Conrad Brunk's papers in which they both argue that plea bargaining, as presently practiced, is improper. Though Church and Brunk give varying views of plea bargaining, they are both reformers of the system of plea bargaining. In their papers, their general thrust is to rebut what they take to be the main arguments of the abolitionists in order to lay to rest the most important doubts about plea bargaining and begin the task of instituting the needed reforms.

In his article, Kipnis discusses an area which he feels is very important to the issue of plea bargaining. Kipnis argues that jury trials remove the disposition of criminal cases from
the control of bureaucrats and professionals. Where Church argues that "trials are costly and psychologically unpleasant," Kipnis argues that jury trials serve many purposes for which citizens may hold great responsibilities. Kipnis argues that jury trials have: (1) **stability**: it immunizes the state against much of the responsibility it would otherwise bear for the miscarriages of justice, (2) **security**: they incorporate protection against official abuse of the criminal justice system, (3) **openness**: by opening up through citizen involvement, the jury trial reduces the cynicism and contempt bred by less visible proceedings, (4) **democracy**: the jury trial builds a kind of check against dated law and overzealous officials and finally, (5) **participation**: jury trials offer an opportunity for persons to assume an important responsibility as citizens in a democracy. Hence, Kipnis is in favor of abolishing the plea bargaining system.

In his article, Kipnis argues that our system of criminal justice can be best understood as an institutionalization of two principles. The first is that those individuals who are clearly guilty of serious specified wrongdoing deserve an officially administered punishment proportional to their wrongdoing. In fact, justice in punishment is realized when the guilty person receives neither more nor less punishment than is deserved. However, under the reforms advocated by Church and Brunk, those accused who are tried by juries would be guaranteed "theoretically correct" sentences, the sentence deserved by
persons who have done that with which they are charged. According to Church and Brunk, those taking advantage of plea bargains would have these sentences discounted in some way. Kipnis argues that this systematic misapplication of punishment, this structural injustice, is what discredits the legitimacy of plea bargaining.

The second principle which Kipnis introduces in his paper is that certain basic liberties shall not be violated in bringing the guilty to justice. The second principle underlies the system of checks and balances. This principle addresses the right against self-incrimination. Kipnis argues that under plea bargaining and its system of discounted sentences, the accused runs the risk of increased punishment if he refuses to incriminate himself by pleading guilty. Hence, Kipnis argues that plea bargaining violates a constitutional right secured by the plain language of the Fifth Amendment.

In concluding his article, Kipnis argues that if he is correct, then even the reformed plea bargaining system advocated by Church and Brunk violates an inalienable right. Kipnis argues that if bargained for sentences are reasonable sentences, then in order for the bargain to be attractive, the bargained for sentence must be lower than the sentence that could be expected after conviction at trial. Hence, defendants under plea bargaining are thus being permitted or encouraged to give up a right that they should not be permitted to alienate. Kipnis
feels that defendants should be entitled to both a fair trial and the lowest reasonable sentence upon conviction.
The purpose of McDonald's paper is to provide an adequate conceptualization of the phenomena referred to as "plea bargaining" or "plea negotiation." McDonald argues that the concept of plea bargaining should not be restricted to either pleas or bargains. In his opinion, the fundamental phenomenon is the state's use of coercion to obtain the legal grounds for imposing a penalty.

In his article, McDonald states that some prosecutors will tell that in their jurisdictions no "plea bargaining" goes on, but readily admit that many cases are "settled" before trial. Even judges deny that any "plea negotiations" go on in their courts. (In other countries, many conclude that they do not "plea bargain" as we do in America, but however, many engage in plea bargaining's functional equivalent). All these people are right according to McDonald: there is nothing negotiable about pleading guilty in those courts. Instead, defendants are simply informed that they have a choice: they can either "plead guilty" and get mercy or go to trial and face the consequences. Further, defendants who do not challenge the prosecution's case can expect greater leniency than those who deny their guilt.
In his article, McDonald uses Newman's (1966) distinction between explicit and implicit plea negotiations. In explicit negotiations, the defendant agrees to plead guilty in exchange for some specified concession by the state. In implicit negotiations, there is no bargaining but defendants learn they will be punished more severely for going to trial. Negotiations vary along three other important dimensions: whether the agreement is treated as a legal contract, the amount of haggling permitted, and who negotiates. Explicit bargains have some of the earmarks of a legal contract, and thus, provides the defendant with some procedural protection when the "contract" is broken.

McDonald discusses a survey of plea bargaining by the Georgetown Institute of Criminal Law and Procedure which found that most negotiations were fairly explicit. Negotiations usually involve defense counsel and prosecutors (and often judges) who generally treated the agreement as contractually binding. The survey conducted by Georgetown defined a negotiated plea or plea bargain as "a defendant's agreement to plead guilty to a criminal charge with the reasonable expectation of receiving some consideration from the state." Hence, plea bargaining involves reasonable expectations on the part of the defendant as to a more lenient sentence if the defendant pleads guilty.

In concluding his article, McDonald feels that the fundamental evil of plea bargaining is the state's improper use of its coercive power. McDonald argues that the distinction
between the compulsion to plead guilty and the compulsion to turn state's evidence or render other services does not alter the essential evil involved. Convictions obtained through coercion are also evil. In his concluding remarks McDonald states, "Does the state use its power to penalize in order to obtain the grounds for imposing a penalty or obtaining a special service?" Hence, the state's use of coercive power should be questioned rather than the "plea bargaining" or "negotiated justice" process.
Felstiner's paper describes the West German version of the plea bargaining. The paper explores the degree to which the use of penal orders have avoided some of the negative practices allegedly inherent in plea bargaining in the United States namely, overcharging defendants, penalizing defendants who insist on going to trial, and manipulating jail time to persuade defendants to plead guilty. In West Germany, cases are concluded by the use of penal orders which are written proposals by the state to a defendant stipulating the crime committed and the penalty to be levied if the defendant does not object.

In his paper, Felstiner discusses in great detail penal orders. He states that penal orders are prepared by a prosecutor and signed by a judge. The penal order describes the wrongful behavior of the defendant and the evidence gathered by the state and indicates the applicable provisions of the criminal code. The penal order then specifies the punishment to be imposed upon the defendant and if the defendant does not object in writing or in person within one week, the order becomes effective and has the same status as a conviction after trial. With penal orders, no imprisonment may be imposed, only fines and suspension of driver's licenses.
Penal orders may be used only for crimes called *Vergehen*, the American equivalent of which is misdemeanors involving criminal intent or criminal negligence and felonies concerned with protecting property. Through the use of penal orders, 70% of criminal cases were disposed of in the 1960s. In 1976, though many motor vehicles and administrative law violations were decriminalized, penal orders still disposed of nearly 70% of cases.

It is important to mention that though prosecutors prepare penal orders, their roles are quite different from that of American prosecutors. For instance, a West German trial is run by the judge not by the prosecutors and defense counsel. A German trial is prepared by police officers who conduct evidentiary hearings, interview victims/witnesses and defendants. The police conduct their own investigations to determine the facts of a case. If there is enough evidence against the accused, then the police turn over all their evidence and investigatory information to the prosecutors who then file a penal order with the courts.

In concluding his paper, Felstiner argues that a West Germany penal order is equivalent to plea bargaining an American traffic ticket. Felstiner had proposed that the American courts adopt a penal order system but, that system, or a system like it, is already being used in America—that system being plea bargaining. Though the functions of a judge, prosecutor, and the
police vary from West Germany to the United States, the disposal of criminal cases remains, in a sense, the same.
Feeley's paper examines the practice of pleading guilty to petty offenses in lower courts and questions some of the long-standing assumptions about the plea bargaining process. In his paper, Feeley argues that though plea bargaining of the classical type rarely occurs, the term itself and certain aspects of bargaining continue to serve important symbolic functions. Feeley states that the simple logic of plea bargaining is so compelling that it is now often taken for granted.

Feeley argues that in the conventional view of plea bargaining, the defendant extracts concessions; either the reduction of charge or sentence recommendation, in exchange for pleading guilty. This view is based on the assumption that the defendant will go to trial. However, many defendants in lower criminal courts never seriously contemplate trial, although they do plead guilty. Further, defendants plead guilty for various reasons. For instance, people may plead guilty for the mere fact that private attorneys may charge $200 or more per day to conduct a trial, yet few fines exceed $50. Hence, prosecutors are aware of the possible costs to the defendant and they know that defendants threats to go to trial are rarely carried out.
In his article, Feeley compares the plea bargaining process to that of a supermarket. He states that the reality of American lower courts is akin to supermarkets in which prices for various commodities have been clearly established and labelled in advance. Arriving at an exchange in this context is not an explicit bargaining process designed to reach a mutually acceptable agreement. In a supermarket, as in a lower court, customers (or defendants) complain about prices, but they rarely "bargain" to get them reduced. In a lower court setting, like in a supermarket, prices or punishments are fixed as compared to a higher court level.

In his article, Feeley states that many of the trappings of the classical plea bargaining process still exist and that they serve important symbolic functions. For instance, the trappings furnish the illusion of a "deal" and allow an attorney to muster tangible evidence of the value of his service to allay the doubts of an often skeptical client. In a classic plea bargain, the defendant attempts to secure a reduced charge or a guaranteed sentence in exchange for his guilty plea. In the lower courts though, both types of concessions occur on a regular basis. However, the "deals" which are made in the lower courts are not in fact "deals" but are the "going rate" for certain crimes as compared to felony level courts.

In concluding his article, Feeley states that those who generalize about plea bargaining have only a small set of criminal cases in mind, usually felony rather than the petty
offenses. Hence, Feeley tries to caution against unwarranted inferences and overgeneralizations about the notion of plea bargaining. Feeley states that the process of pleading guilty has almost become synonymous with plea bargaining and Feeley cautions against this.
PLEA BARGAINING AND PLEA NEGOTIATION IN ENGLAND

JOHN BALDWIN
MICHAEL McCONVILLE

1979

Plea bargaining is a fact of life in the English criminal justice system. Though it is not practiced on the same scale as it is in the United States, its true dimensions are only now beginning to emerge. Although the plea bargaining practice is denied and/or opposed by English Appellate courts, plea bargaining thrives in a climate actually determined by the principles and procedures approved by the Court of Appeal itself.

In both England and the United States, a great majority of cases will be settled by a plea of guilty. In England, for example, about 85 percent of defendants charged with indictable criminal offenses plead guilty. In the United States, it would seem that the proportion of guilty pleas is even higher (90 percent). Since plea bargaining occurs quite often, the importance of the guilty plea has been recognized and has led American researchers to devote considerable attention to examining the factors that cause defendants to plead guilty.

The American evidence clearly demonstrates that a large majority of guilty pleas are the result of some kind of out-of-court bargaining. By comparison though, researchers in England have displayed little interest in guilty pleas and the courts have been reluctant to acknowledge that a plea of guilty can be
anything other than a full, free, and voluntary decision by the defendant. More specifically though, the idea of plea bargaining has traditionally been regarded as repugnant to the English legal system. In fact in England, it is believed that such bargains or pressures do not exist.

It is interesting to note a comparison between United States and England prosecutor roles as mentioned in Baldwin and McConville's article. For instance, in the United States, the prosecutor wields considerable power: he decides whether or not to proceed with a prosecution; he may agree to reduce a particular charge; and he can recommend a particular sentence to the court. In England, on the other hand, criminal prosecutions are not usually conducted by professional prosecutors at all. In the English courts, prosecutions are conducted by barristers who act both as prosecutors and defense lawyers in various cases. A barrister does not have an unsupervised power to manipulate charges and a specific sentence recommendation by prosecuting counsel would be quite unethical. Hence, it is the trial judge who has power to make decisions.

In conclusion, no matter who has the final decision making power in either the United States or in England, according to Baldwin and McConville, defendants are still "pressured" into pleading guilty for numerous considerations. Though it is quite clear that there is no highly organized "system" of plea bargaining in England, many defendants seem to have been involved
in a process that resembles plea bargaining more closely than has been appreciated.
Sam Callan's article discusses a dissatisfaction of plea bargaining on the part of judges and the public. The author discusses an experiment conducted in El Paso County, Texas, in which plea bargaining was abolished between 1975 to 1978. In his article, Callan found it necessary to distinguish between "plea bargaining" and "plea negotiation." He argues that any inducement to plead guilty, whether expressed or implied, negotiated or fixed, constitutes the odious practice of plea bargaining. He feels that a plea of guilty is produced by the implied threat that, if the defendant refuses to accept what the prosecutor believes is a just sentence, the prosecutor and the judge will see to it that the defendant gets an unjustly harsh sentence.

The El Paso system which was established for experimental purposes was due to a reaction to public dissatisfaction with four aspects of plea bargaining. Such dissatisfaction was based on: (1) plea bargaining inevitably produces the ridiculous result that, as crime grows worse, sentencing becomes more lenient. As crime grows worse, the number of cases on the criminal docket increases, hence, prosecutors need to offer better deals; (2) plea negotiation is the focal point of public distrust of the law; (3) plea negotiation produces unequal justice and, (4) the
The experiment conducted in El Paso, Texas, consisted of abolishing plea negotiations. Though the statistics used were difficult to generalize from due to the population of 400,000 nevertheless, the crime rate and statistics used were not too far from the national average. In his experiment, Callan adopted as the purpose of sentencing to be: "let the control fit the criminal" rather than "the punishment fit the crime." Callan argues that "imposing adequate control incidentally produces whatever general deterrence can be achieved through punishment. Further, by control, Callan means controlling the number of cases in which probation is offered as opposed to incapacitation. Hence, Callan introduces a point system to be adopted.

With Callan's point system, various factors are considered important when determining whether to grant probation, imprisonment, or the length of sentences to be considered. If the defendant has a prior record, probation is usually not considered. The purpose of the point system is broken down into four elements: (1) it focuses the judge's mind on the factors proper to sentencing; (2) it commits the judge in advance to the factors he will consider, thus allowing observers to see and publicize any special treatment of a criminal that violates the principle of equal justice; (3) it allows the defendant to
predict what the judges sentence is apt to be; and (4) it contains the express promise that the defendant can withdraw his plea if the judge believes he should impose a more severe sentence. It is important to mention that the point system does not control the sentence, each case is evaluated on an individual basis.

By adopting a system as that in El Paso, Texas, cases in the docket will move more rapidly, the public distrust will be reduced, unequal justice will be diminished, and the judge's decision will be much more respected. In concluding his article, Callan states that the El Paso experiment has failed to prove that "El Paso can do without plea negotiations." Though the experiment has created a docket crises, Callan argues that his system is a worthwhile system which should work in any area with minor improvements. He argues that finding worthwhile judges who will help to move the case docket more rapidly is of great importance if the system is to work.
IN DEFENSE OF "BARGAIN JUSTICE"

THOMAS W. CHURCH, JR.

1979

According to Church, the strongest critics of plea bargaining argue that the practice should be abolished because it coerces defendants to give up their right to trial and because it results in irrational sentences for criminal defendants. In fact, there are two separate arguments to support the recommended abolition of plea bargaining. The first focuses on procedural fairness for individual defendants. The second argument is geared towards societal interest of rational criminal sentences. For instance, plea bargaining particularly in pressured urban jurisdictions, is said to encourage harried prosecutors and judges to make dispositional concessions to defendants on the sole ground of administrative expediency. In the author's opinion though, reforming rather than eliminating plea bargaining should be of greater importance.

According to Church, if plea bargaining cannot readily be eliminated and operated in a tolerable or even desirable manner in many jurisdictions, than a careful examination of abolitionist arguments is surely in order. In fact, according to Church, bargain justice does not appear to suffer from the systematic irrationality and unfairness attributable to it by many critics. As a matter of fact, according to Chief Justice Burger, in the case of Santobello v. N.Y. (404 U.S. 257-260, 1971):
"Plea bargaining...is an essential component of the administration of justice. Properly administered, it is encouraged. If every criminal charge were subjected to a full-scale trial, the states would have to multiply the number of judges and court facilities."

In his article, Church discusses the issue of defendants who are factually versus legally innocent. He argues that the factually innocent defendant at times would be willing to plead guilty if he knows that his chances of a harsh sentence and/or acquittal are slim. An innocent defendant would plead guilty if he and/or his counselor feel that the defendant would be found guilty depending on the circumstances or evidence held by the prosecutor. On the other hand, a legally innocent defendant is one who has illegally obtained evidence used against him in a court of law. Further, a legally innocent defendant is one who for some reason or another cannot be tried possibly, due to some weakness in the case (acquittals).

In the author's opinion, the case against bargain justice is typically based upon the widespread view that plea bargaining results in excessive and undeserved leniency in the sentencing of admitted criminals. According to Church, "Since the prosecutor must give up something in return for the defendant's agreement to plead guilty, the frequent result of plea bargaining is that defendants are not dealt with as severely as might otherwise be the case." Thus, plea bargaining results in leniency that reduces the deterrent impact of the law. However, Church argues that this problem can be solved by eliminating the sentencing differential between plea and trial convictions. But, like the
due process critique of plea bargaining, however, Church's argument ignores the uncertainty and risk of trial.

Church argues that plea bargaining, particularly when judge or prosecutor manipulate post-trial sentences to "punish" those who refuse to plead guilty can also operate to coerce or unfairly encourage guilty pleas. Further, Church states that bargain justice in a court whose resources are inadequate to its caseload may very well result in excessively lenient sentences. But, in Church's opinion, it is quite possible to construct a system of plea negotiation that is at least as defensible as the trial process upon which it is based.

In concluding his article, Church introduces four theoretical assumptions concerning the operation or reform of plea bargaining. First, those cases that go to trial must be decided on the merits, without penalizing the defendant for not pleading guilty. Second, every defendant should be represented by counsel throughout the negotiations. Third, if plea negotiations are to focus on predicted trial outcome, all information and evidence bearing on that outcome should be available equally to prosecution and defense. The final requirement for a defensible plea bargaining system may be that most defendants who do go to trial may be unable to absorb the costs, thus, maybe getting unfair treatment. Hence, each side should possess or have access to sufficient resources to take a case to trial. Church's concluding remarks are that a system of
negotiated justice can be as defensible as the trial system upon which the negotiations are based.
Plea bargaining which is the primary mode of criminal charge disposition has been under sustained attack for some time. In fact, the U.S. National Advisory Commission on Criminal Justice Standards and Goals urged that such negotiations should be abolished. But, despite criticism from many, there are few indications that the practice is about to disappear. The major criticism of plea bargaining is that it penalizes the defendant who wishes to assert his constitutional right to trial (U.S. National Advisory Commission, 1973). As a consequence, innocent persons may plead guilty to avoid the more severe sanctions that follow conviction at trial. Though plea bargaining cannot or has not been abolished, many changes are currently being introduced to help eliminate the backlogging of courts.

In 1974, Norval Morris proposed that judges should play a more active role in plea negotiations and that the victims and defendants should also be invited to participate. To fulfill this proposal, Heinz and Kerstetter conducted a field experiment design in which they randomly chose 1074 cases, 378 were assigned
to use a pretrial settlement conference; the remainder were the control group.

The field experiment in Dade County, Florida, evaluated the use of a pretrial settlement conference as a means of restructuring plea negotiations. All negotiations took place in front of a judge, victim, defendant, and arresting police officer who were invited to attend.

In order to minimize administrative problems which may occur, Heinz and Kerstetter used only cases that had already passed the arraignment state. Victims and police officers were invited by the prosector to attend the conference unless their eyewitness identification of the defendant was a crucial element in the case. The victims were neither subpoenaed nor compensated. The defendant could decide to attend with counsel, not to attend but to be represented by counsel, or fail to confirm the conference, thus cancelling it. At the conference, the judge would indicate the purpose of the meeting and state that, for purposes of discussion, the defendant's guilt of the charge was to be assumed. Such assumption was necessary to make it clear that the defendant was not admitting guilt by participating in the discussion.

Prior to the implementation of the conference procedure, the average time from arraignment to disposition was 126 days; the conference procedure reduced the time of disposition to roughly three weeks. But, the actual negotiation process had not been significantly altered by the use of the conference. Hence, the
greatest impact of the conference procedure was to shorten the length of time it took to close cases.

It would be difficult to ascertain whether or not this experiment would be a feasible solution to the plea bargaining problem. It seems as yet another alternative to reduce the amount of time that a case takes to get through the criminal justice system. However, if such a change would help reduce the amount of time to settle a case, a change such as this would seem to improve the plea bargaining--court process.
Plea bargaining was banned by Alaska's Attorney General in August of 1975. The Attorney General issued written instructions forbidding all district attorneys and their assistants from engaging in plea bargaining for all felony and misdemeanor prosecutions filed as of August 15, 1975. The Attorney General announced this new policy in a jurisdiction in which explicit sentence bargaining had been central to the practice of criminal law. In fact, prior to August 15, 1975, plea bargaining was a fully institutionalized reality in Alaska; a reality that had gained total judicial acceptance.

The Attorney General's purpose of his new policy was to "return the sentencing function back to the judges." His goal was to "clean up the least just aspect of the criminal system." The Attorney General wanted to eliminate the former practices in which district attorneys, defense lawyers and judges settled cases, in an assembly line fashion. Neither district attorneys nor defense lawyers liked the new policy because they were going to have to work much harder in preparing for more trials, but they did feel a sense of relief to be out of the sentencing business.
In order to find out if the Attorney General's policy improved the quality of justice, Rubinstein and White conducted a longitudinal study which covered a period of two years (1975-1978). During their research, 400 interviews were conducted in three major cities of Alaska. Further, 3,586 case files involving about 2,300 defendants were also analyzed. These cases came to the court prior to the ban and served as comparison cases during the study. The statistical objective was to discover variables associated with any of a variety of outcomes (such as charge rejection, dismissal, acquittal, conviction, probation, and sentence length). The statistical evidence showed that the frequency of what was once the dominant practice among experienced criminal attorneys declined drastically: sentence recommendations occurred in only 4 to 12 percent of convicted cases. In fact, where charge bargaining occurs now, it usually involved dropping one or more counts from multiple-count indictments.

When the Attorney General first advanced his decision to plea bargaining, panic spread through the Alaska court system. There was concern that without plea bargaining, many cases would have to go to trial. In fact, a massive slowdown in the criminal docket was anticipated. Though none of these predictions occurred, what was interesting was that there was a dramatic decrease in disposition time (measured from the date of filing a complaint to final trial court outcome). In analyzing the data, it was found that the plea bargaining ban did not cause this
decline. In fact, the court administrators have been preparing for the worst and changed their calendar procedures to eliminate most all types of delay.

One important change which occurred was the impact of sentencing practices. In fact, sentencing became much more severe but, the new plea bargaining policy was not found to impact sentences. The increase of sentences was said to be attributable to a demand to "get tough" on violent crimes. However, the only real increase which occurred was for defendants with first-time felony convictions. Hence, the defendants with first-time felony convictions were no longer given merely probation.

In concluding the article, Rubinstein and White argued that though the ban on plea bargaining has placed more decisional responsibility on judges, the ban has been unable to eliminate badly exercised discretion. For instance, a defendant's income still affects the quality of the trial. Hence, there are indications that race, income and employment status still determine the impact of sentencing.

In evaluating the article, most all literature which discusses plea bargaining is concerned with abolishing plea bargaining or reforming it in some way. But, like all other literature, no simple solution to the plea bargaining process can or has been found. The most important question in regards to plea bargaining should be "how will the courts function without plea bargaining?"
THE SENTENCE BARGAINING OF UPPERWORLD AND UNDERWORLD CRIME IN TEN FEDERAL DISTRICT COURTS

JOHN HAGAN
ILENE NAGEL BERNSTEIN

1979

The authors of this article explore the use of different types of sentence bargaining tactics in ten federal district courts. Hagan and Bernstein distinguish between proactive and reactive prosecutorial functions and they hypothesize that proactive prosecution of upperworld crime is associated with more explicit sentence bargaining than is the reactive prosecution of underworld crimes.

In their article, Hagan and Bernstein argue that federal courts, unlike state courts, have the capacity and jurisdiction to prosecute many forms of upperworld crime, although they do not always exercise that authority. Further, Hagan and Bernstein argue that a prosecutorial focus on upperworld crimes in the federal district courts is associated with the use of specific types of bargaining tactics that involve a strategic and explicit position of coercive threats and promised concessions.

In their article, Hagan and Bernstein conducted research based on field work done on federal courts in ten districts. They considered qualitative data obtained through site visits to each of the ten districts during which they observed approximately 200 hours of court proceedings. Hagan and
Bernstein conducted approximately 600 hours of interviews with court personnel involved in decision making functions in criminal courts. Among those interviewed were the chief judge and three to five presiding judges, the United States Attorney, and Assistant United States Attorneys responsible for subsections of the office dealing with criminal matters. The chief probation officer and other court officials were also interviewed.

There are differences between state and federal prosecutorial functions. According to Hagan and Bernstein, the state system of prosecution is, in a sense, reactive whereas the federal system is proactive. Hagan and Bernstein argue that state courts are organized almost exclusively to respond to cases brought to them by local police. As the federal level, on the other hand, the courts have much greater potential for selectively determining the composition and size of their case loads. Despite the fact that federal courts receive the bulk of their case referrals from federal enforcement agencies (FBI, DEA, IRS), they are not limited to agency input. In fact, at the federal level, prosecutors prosecute crimes which seem to be rare so as to limit the crime from growing.

Another difference between state and federal courts is the way in which each plea bargains. For instance, state criminal codes include lesser offenses to which charges frequently can be reduced whereas federal criminal codes cannot. Further, according to Hagan and Bernstein, charge reduction is extremely common at the state level and relatively infrequent in federal
courts. Hence, federal criminal codes less frequently include graded offenses.

In concluding their article, Hagan and Bernstein presented evidence which suggest that proactive prosecution of upperworld crime leads to more explicit sentence bargaining, whereas reactive prosecution of underworld crime involves less. Hagan and Bernstein argue that since federal crimes have less witnesses or highly visible victims to testify about the criminal events; it is usually necessary to cultivate sources of information and evidence from within the criminal operation. Hence, a favorable plea bargaining settlement must arise prior to the defendant's willingness to help solve the criminal activity.
In his article, Jack Katz mentions differences in the prosecution of white-collar and common crime in order to draw out implications for equality in current proposals to reform plea bargaining. Katz argues that in the case of plea bargaining, proposals to reform have tacitly been aimed at a subset of crimes and their corresponding enforcement roles. According to Katz, reforms that would make bargaining over formal dispositions more consistent with legality or "due process" appear likely to discourage lenience in the prosecution of common crimes while leaving largely unaffected the low visibility exercise of the power not to prosecute white-collar crime.

According to Katz, one of the most common criticisms of plea bargaining is that charges are unaccountably reduced between arrest and final disposition. Further, critics assume that plea bargaining takes place against a background of formal charges that have already been filed. However, none of these perspectives appear to apply to plea bargaining in cases where there is no arrest, no alibi defense, no "police report," no readily identifiable victim. Hence, understandings (or plea bargains) are reached before any charges are filed. According to
Katz, current analysis of the problems of plea bargaining and proposals for reform by and large ignore the prosecution of white-collar crime.

In his article, Katz discusses the fact that definitions of white-collar crime have been notoriously unsatisfactory. He argues that the term is filled with political overtones--it seems inevitably to imply "unequal treatment." Various inconsistent meanings have been advocated thus, many of the difficulties with current definitions fall into three categories. The first is a failure to separate analytically the criminals social class position from the criminal behavior. The second category is that there are relatively few crimes that can be committed only by those in white-collar occupations (ie: price fixing, political contributions by corporations, and extortions under color of official right). The third category is that most common crimes can be committed by members of both "white-collar" and "blue-collar" classes (ie: a Patsy Hearst can commit a bank robbery). In Katz's opinion though, if the social class of the criminal is not sufficient to define the category, than neither is the structure of criminal behavior.

An important issue mentioned by Katz which is used as a comparison of white-collar crime to that of common crime is that in the purest "white-collar" crimes, white-collar social class position is used: (1) to diffuse criminal intent into ordinary occupational routines so that it escapes unambiguous expression of any specific discrete behavior; (2) to accomplish the crime
without incidents or effects that furnish presumptive evidence of its occurrence before the criminal has been identified. The position is also used (3) to cover up the culpable knowledge of participants through exerted action that allows each to claim ignorance. Katz argues that in order to convict someone of a "pure' white-collar crime, prosecutors must build a case to show that a crime has been "disguised" in each of three ways. The position or scheme was designed so that neither its means nor its consequences would reveal that a crime had occurred. Hence, criminals would be able to maintain silence or ignorance should there be an investigation.

In his article, Katz discusses the social organization of the prosecution of white-collar and common crimes which present prosecutorial discretion in two different forms. First, social distance between prosecutor and police produces a public record of law enforcement against common crimes that overrepresents decisions not to prosecute (giving an impression that the prosecutor is bargaining away legitimate power). The exercise of the power not to prosecute is often invisible to the public eye in regards to prosecuting white-collar crime. On the other hand, when common crimes are concerned, decisions to file, dismiss charges, accept pleas, or go to trial will be subject to public scrutiny which will, more than likely, influence a prosecutor's decision in regards to the cases.

In concluding his article, Katz argues that plea bargaining frustrates equal justice especially since the white-collar
defendant will be able to retain more effective counsel. But, many substantive irrelevant factors influence plea bargaining in both categories of crime. In Katz's opinion, if plea bargaining is objectionable because it permits variation in the availability and quality of counsel to affect convictions and disposition, that objection is equally applicable to prosecutions of white-collar and common crimes alike.
According to the authors, two features of the American criminal justice system most often criticized are unbridled prosecutorial and judicial discretion. Further, prosecutors engage in a wide variety of plea bargaining practices unencumbered by appellate court constraints and similarly, judges have a wide range of sentencing options for any particular defendant or charge. In fact, critics of plea bargaining and indeterminant sentencing are quick to point out the shortcomings of the present system. For instance, on the one hand, it is argued that undue leniency results from prosecutorial and judicial eagerness to grant concessions to the defendant who pleads. On the other hand, defendants who do not plead or who are "singled out" by the prosecutor or judge are subject to harsh treatment.

In their article, Haemin and Loftin attempt to study the consequences of abolishing plea bargaining along with the introduction of mandatory sentencing simultaneously. Heumann and Loftin examined Wayne County in Detroit, Michigan. In that county, the prosecutor prohibited his subordinates from plea
bargaining in any case in which a recently enacted state statute warranted a mandatory sentence in regards to firearms. Michigan's Felony Firearm Statute went into effect on January 1, 1977. The statute mandated a two-year prison sentence in addition to the sentence for the primary felony for any defendant who possesses a firearm while engaging in a felony. The two year consecutive sentence cannot be suspended nor can an individual be paroled while serving time for a firearm offense. While mandating this two year sentence, the prosecutor of Wayne County publicly announced that his office would not engage in any plea bargaining in cases in which the Gun Law applied.

To conduct their study, Heumann and Loftin examined the impact of the new Gun Law simultaneously with the abolition of plea bargaining (the abolition of plea bargaining as related to firearm offenses). They studied a period of six months both before and after the Michigan Statute came into affect. Heumann and Loftin limited their study to only one jurisdiction from Wayne County. In their study, twenty-three interviews were conducted with court personnel (judges, prosecutors, and defense attorneys). In addition, crime, defendant, and disposition data were collected for seven categories of offenses (armed robbery, felonious assault, murder, criminal sexual conduct, etc.). The issue which was explored was whether the Gun Law together with the Prosecutor's policy have increased the certainty of sentences delivered by the court and whether the sentence is five years or more. The strongest statement that can be made is that for every
100 robbery cases, an average of seven defendants who would have received a two-to five-year sentence prior to the new statute now receive a sentence of five years or more.

In concluding their article, Heumann and Loftin found that sentence bargaining and sentence adjustment was still occurring. For instance, though the prosecutors could not bargain with the two-year sentence of crimes which involved the use of a firearm, prosecutors were still bargaining with the other portion of the sentence (i.e.: assault and assault with a firearm--the assault portion was still being bargained). Hence, prosecutors were giving the two-year mandatory sentence which was required, but were bargaining or adjusting the rest of the sentence according to the "going rate" which occurred six months prior to the Gun Law Statute.
If there is any proposition at the heart of the common wisdom about criminal courts, it is the assertion that defendants who plead guilty are likely to receive less harsh sentences than defendants with similar characteristics and charges who are convicted after trial. It is this sentence differential which has traditionally been seen as the engine driving the plea-bargaining assembly line. The notion that guilty-pleaders receive lighter sentences than similarly situated defendants has been viewed with increased skepticism in recent research.

In this article, Brereton and Casper presented a case study confirming the existence of sentence differentials to accomplish two tasks. The first is to present evidence for the existence of differentials in three court systems they have been studying and to discuss issues of generalizability from these courts to other courts. The second is to caution against the recent skepticism about the existence of such differentials.

After asking judges, prosecutors, defense attorneys etc., whether or not a differential sentencing exists, many of the courtroom actors strongly feel that it pays to plead guilty. In this respect it could be argued that court participants tend to
exaggerate the costs of going to trial because they fail to take sufficient notice of the fact that the more serious crimes, and defendants with worse records are over-represented in the trial category. Further, some cases which go to trial are regarded as doing so justifiably because they raise important legal questions, because the defendant's guilt is in questions and so on. In these cases, it is unlikely that the defendants who choose trials will suffer a penalty for they are considered to have wasted the courts time (Heumann, 1979). By contrast, defendants whose cases are regarded as "dead bang" are much more likely to receive a more severe than usual sentence if they go to trial, either because the court wants to discourage others from doing the same or because, as some judges and prosecutors claim, such "frivolity" deserves to be punished for its own sake.

Brereton and Casper's study focuses on disposition patterns for robbery and burglary arrests in three large California jurisdictions for the period of 1974 through 1978. They analyzed 1759 cases from San Bernardino county, 2514 from San Francisco, and 2520 from Santa Clara county. They were also able to obtain records from the original charge, the type of attorney who handled the case, the defendant's previous record, plus the standard demographic variables of age, race, sex. A straightforward comparison of the disposition patterns in each of the three jurisdictions shows that a higher proportion of trial defendants went to prison than did those who pled guilty. But, Brereton and Casper argue that this type of comparison may be
quite misleading because those with prior records often overrepresented the trial category.

In concluding their article, Brereton and Casper argue that sentence differentials characterize most criminal courts and sentence differentials are viewed as one of functional necessity. Sentence differentials are common because they are considered by courtroom participants as the only way to induce sufficient numbers of defendants to plead guilty. Hence, when guilty plea rates are high, expect to find differential sentencing.
In his article, Maynard examined the ways in which decisions are a product of direct interaction. Maynard's article shows how trial options are devalued by the system of discourse employed in negotiation. Further, Maynard identified three distinct patterns of negotiation and a mix of bargaining outcomes that any comprehensive theory of case processing will need to address.

In his study, Maynard examined transcriptions of tape-recorded plea bargaining sessions. The tape-recordings were obtained at weekly "Pretrial and Settlement" conferences during which defense lawyers and district attorneys assemble to discuss misdemeanor cases, "bargain," and present the results of their negotiations to defendants and the judge. Maynard's data or method of study included fifty-two cases which ranged from theft, drunk driving, battery, drinking in public, loitering, resisting public officers, etc. In all, nearly ten hours of recordings were obtained. Maynard's methodological perspective was that of conversational analysis.

In his paper, Maynard treats plea bargaining as a naturally occurring activity and seeks to discover formal decision making patterns. Maynard argues that in plea bargaining, participants
have ways of exhibiting and responding to positions on how the case they are involved in should be handled. According to Maynard, a decision is reached when the negotiating parties agree on a single position. Such position is achieved by one of three patterns: 1) one party takes up a position and the second agrees to it; 2) both parties advance positions but one relinquishes his position to agree with the other's; and 3) the parties compromise. Each pattern involves (A) the presentation of ways to handle the case which can be considered as "opportunities" for the prosecution and defense to arrive at a mutually acceptable disposition. When an opportunity is not taken up, the system allows (B) the option of delaying the determination of a disposition by "continuing" the case or setting it for trial. Both dispositions and delay are accomplished through the use of bargaining sequences.

In concluding his article, Maynard argues that the system exerts a "pressure" for the here-and-now resolution of cases independent of negotiating parties' desires and inclinations. Further, Maynard argues that this system of negotiation can be related to exchange approaches to plea bargaining. Maynard states that the prosecution and defense can and do trade real benefits by engaging in plea bargaining. However, exchange is mediated by a discourse system in which routine practices, rather than rational calculations are the central phenomena.

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According to the authors, the social problem of driving under the influence of alcohol and/or drugs (DUI) has received considerable attention from social scientists in recent years. For the most part, studies in this area have focused on the deterrent value of the criminal law, proposals for prevention, and analyses of social movements that seek to address the problem through legislative reform. Furthermore, analysis of the implementation of DUI legislation offers an opportunity to extend the rich criminological literature that addresses the modification of legislative reform by "courtroom work-groups."

It is important to note that in 1982, California, along with 26 other states, revised its vehicle code sections dealing with the prosecution and sentencing of defendants charged with driving under the influence of alcohol and/or drugs. Some of these revisions include an increase in the severity of penalties, while others sought to increase the certainty of application of the new penalties by imposing a number of constraints upon the plea bargaining process and by redefining the relationship between blood alcohol concentrations (BAC) and criminal liability. Most
of these changes followed the recommendations of the Governor’s Task Force on Alcohol, Drugs, and Traffic Safety.

The article by Kingsnorth and Jungsten is divided into two basic areas. The first area deals with plea bargaining DUI offenses to that of reckless driving. The authors state that until 1982, plea bargaining occurred in two forms. A defendant charged with DUI could have the offense reduced to reckless driving in exchange for a guilty plea. Such reduction offered the defendant a reduced fine, a lower probability of a jail sentence, and a nonpriorable conviction. A recent study by DMV, based on data from seven California counties, suggests that in 1981, 13 percent of all misdemeanor DUI arrests in the state resulted in a charge reduction to reckless driving. The authors found that 3,500 DUI cases were reduced to reckless driving between 1978-1981.

The principal means by which the legislature sought to curtail charge reduction bargaining was the enactment in 1981 of the 0.10 percent "per se" law (California Vehicle Code, Section 23152(b)). Such law was meant to create a presumption of guilt of driving under the influence. However, under said law, evidence of the individual's physical performance can be used to rebut a presumption of being under the influence and hampers the prosecutor's ability to use BAC in conducting a prosecution. The law also caused inappropriate plea bargaining for offenders with BACs in excess of 0.10 percent.
The second area which the authors discussed and which was a second form of plea bargaining was that of prior conviction bargaining. This process involved the practice of striking prior convictions in return for the defendants guilty plea. This practice was very common between 1980-1981. During this period, 34.6 percent of the defendants in the sample were charged with prior convictions and in 86 percent of these cases, one or more prior convictions were struck. However, in an attempt to restrict this practice, the new legislature prohibited the striking of prior convictions for purposes of sentencing in order to avoid minimum jail terms, fines, or license restrictions. Hence, now even first offenders were receiving jail time for their offenses. Second time offenders were receiving slightly stiffer sentences but, third time offenders were receiving incarceration for almost double the time after the new law was enacted.

In concluding their article, Kingsnorth and Jungsten found that though the new legislation had good intentions, it was grounded with false assumptions about court sentencing practices. The BAC law failed to reduce the amount of trial rates and increase in conviction rates that was anticipated. Further, problems of court congestion have not been eased but have been exacerbated by the new law.
According to the authors, for over half a century, sociologists have expressed concern with the relationship of social status to crime. In fact, despite an extensive literature on differential justice, relatively few studies have examined whether inequities occur in legal decisions that precede sentencing. This is in fact a problem because the majority of criminal cases prosecuted in the United States are disposed of through guilty pleas to reduce charges. In their article, the authors examined legal, status, and resource determinants of both charge reductions and final dispositions in cases involving burglary and robbery in two United States jurisdictions. The purpose of the authors' article is to find out whether minorities are disadvantaged by discriminatory processing.

According to the authors, most studies in the area have sought to identify the effects that social characteristics of alleged defendants have on decision making at the latter stages of the legal process. Such research typically addresses whether black, poor, and male defendants receive more severe criminal
sentences. However, according to the authors, the findings of most studies are inconclusive. The authors argue that a neglected stage of legal processing involves decisions regarding charge reductions, especially charge reductions against nonminority defendants. The authors argue that plea bargaining which involves charge reductions do not support conclusions or analysis of their research because there is little to prevent status influences from informally entering into them in ways that formally are considered illegitimate.

In conducting their research, data was collected from prosecutor's case files for "closed" cases. The cases were prosecuted during the period of January 1976 through August of 1977. The vast majority of cases involved arrests for alleged violations of burglary and robbery statutes. Cases that went to trial were eliminated since the current research focuses on guilty pleas.

The variable categories consist of legal, status, resource, and dispositional attributes of defendants. Legal factors included prior felony conviction record, number of indictments, and types of indictments. Status variables were the age, race/ethnicity, and employment status of defendants. Legal resources were construed as representation by a private attorney and pretrial release. The dispositional variables were number of conviction charges, charge reduction, and final disposition severity. The jurisdictions analyzed were Delaware County, Pennsylvania and Pima County, Arizona.
In concluding the article, the findings suggest that the effects of the status characteristics of defendants tend to operate indirectly through their influence on access to legal resources. For instance, in Delaware County, black and unemployed defendants were less likely to be represented by private counsel; the lack of which increased the likelihood of pretrial detention and a more severe final disposition. In Pima County, a retention of a private attorney was rare. Employed and older defendants were more likely to obtain bail; a resource that ultimately advantaged them at final disposition. Race/ethnicity had some unexpected effects in the two jurisdictions. In Delaware, blacks received greater charge reductions than did whites. In Pima County, Mexican-origin defendants received more favorable final dispositions than did their counterparts. Hence, status and race/ethnicity play a very important role in plea bargaining.
PRIVATE COUNSEL AND PUBLIC DEFENDERS: A LOOK AT WEAK CASES, PRIOR RECORDS, AND LENIENCY IN PLEA BARGAINING

DEAN J. CHAMPION

1989

According to Champion, in recent years, the criminal justice literature has consisted of research which focuses upon the strengths and weaknesses of plea bargaining in state and federal courts. Champion argues that though plea bargaining is a very controversial issue, such practice accounts for over ninety percent of all criminal convictions. Further, Champion argues that plea bargaining may involve (1) charge bargaining, in which the original charges are reduced to less serious ones; (2) count bargaining, in which many charges are reduced to only one or a few; and (3) sentence bargaining, in which less severe sentences are imposed, perhaps including probation or little actual jail/prison time to be served.

The purposes of Champion's research piece are threefold: (1) to examine a random sample of prosecutors and determine the kinds of priorities they assigned in plea bargaining to factors such as prior record, seriousness of the offense, or the strength of government evidence; (2) to investigate the influence of socioeconomic background of defendants on prosecutors and the leniency or harshness of terms included in plea bargain agreements; and (3) to see whether representation by private
attorney versus a public defender changes the position of a case or the nature of plea bargaining terms.

Champion's research examined a random sample of city and county prosecutors in Tennessee, Virginia, and Kentucky who prosecuted criminal cases during the years 1981-1984. A random sample of 260 city and county attorneys and their assistants were identified and were given questionnaires by local bar association representatives in 1985. The final participating sample of the 260 was 166. The questionnaires obtained information concerning the age of prosecutors, the number of years they had been prosecutors and other background information. The questionnaire also had a number of questions relating to plea bargaining agreements which were made amongst the prosecutors.

The conclusions or findings of Champion's work were that a majority of prosecutors indicated that they would intensify the punitive conditions of plea bargain offers when the crime or crimes alleged were serious offenses (i.e. crimes which involved primary crimes against persons including homicide, forcible rape, aggravated assault and robbery). The least influential variable in this instance appeared to be the strength of government evidence. Importantly, most prosecutor's stressed the importance of avoiding trials and working out plea agreements with various defendants.

As to the second purpose of Champion's research piece—socioeconomics of defendants, access to conviction records made considerable information available concerning the socioeconomic
and educational background of the defendants. It was found that a rather large number of cases involved guilty pleas from indigent defendants who do not know or understand their rights even when various attempts were made to explain the various options under the law. Defendants from lower socioeconomic background tend to plead guilty, take a light sentence, and such defendants "lets things go as that." However, defendants from a higher socioeconomic status are more informed of their rights and more often take steps to see that their rights are well protected.

In regards to the third area of Champion's paper, it was found that in those cases in which the prosecution elected to drop criminal charges, a majority of defendants were represented by private attorneys. Hence, defendants did not fare nearly as well in their punishment and in the punitive terms of plea bargain agreements when they were represented by public defenders. In fact, out of 28,315 cases studied, 17,912 involved privately retained defense counsel and 10,403 involved public defenders. Forty-eight percent of cases defended by private counsel were dropped compared with on 11.3 percent of cases involving public defenders. Plea bargaining leading to convictions accounted for 36 percent of private counsel cases versus 87.7 percent of public defender cases.

In concluding his article, Champion brought up an interesting issue in regards to the Constitutional rights of defendants who come from lower socioeconomic backgrounds and
their treatment in the criminal justice system. He argues that such mistreatment should be viewed as a violation of due process based on unequal representation of the law. He argues that there is a problem in the way prosecutors discriminate against defendants in that lower socioeconomic status defendants receive more plea bargaining. Hence, they receive more convictions and stiffer sentences, too.
According to Champion, by the mid-1980s, a trend had been observed because approximately ninety percent of all criminal convictions were being secured through plea bargaining. Further, since Brady v. U.S. (1970) there has been a general increase in the use of plea bargaining in the last decade. Hence, critical issues in regards to plea bargaining are the use of probation in felony cases. According to Champion, when a person has committed a felony, the minimum sentence that can be imposed upon conviction is one year in prison. But, in Champion's opinion, there are indications that convicted felons are receiving probation in lieu of incarceration to an increasing degree in certain jurisdictions.

The purpose of Champion's article was to (1) explore recent trends in the use of felony probation in a random sample of jurisdictions in Kentucky, Tennessee, and Virginia, (2) compare plea bargaining convictions with trial convictions concerning the frequency of use of felony probation, and (3) consider the bases for the differences between the states. For his research, Champion sent a survey to 260 city and county prosecutors in 1985. The final sample of prosecutors consisted of 166 respondents. A random sample of city and county prosecutors
selected from state directories were provided questionnaires by local attorneys in selected areas of Tennessee, Kentucky, and Virginia. For the most part, these prosecutors were from predominantly rural, small southern counties, hence, a contrast with larger urban jurisdictions could be expected. Participating prosecutors completed a questionnaire containing items related to plea bargaining issues, prosecutorial priorities in such issues, the frequency of usage of the insanity plea in criminal cases, and substantial sociocultural data.

A content analysis of felony convictions in the 105 participating city/county jurisdictions was conducted for the years 1970-1985. The resulting figures permitted determination of the proportion of felony convictions obtained through plea bargaining and trial. Beginning in 1970, for instance, 64 percent of convictions were obtained through plea bargaining. In 1971-72, about 61 percent of convictions were obtained through plea bargaining. During 1974-78, about 75 percent of convictions were plea bargained. From 1979 to 1985, the conviction rate through plea bargaining ranged from 81 to 89 percent. The rest of the convictions were obtained through trial. Though there were varying reasons why plea bargaining was used rather than jury trial, for one, Tennessee had enacted into law the number of inmates that the prisons could hold, making it a law to release inmates that the prisons had no room for. Hence, prosecutors in Tennessee knew the conditions and consequences of sending more people to prison.
When a case involved trial convictions, probation was used significantly less frequently. Probation was also used less frequently when similar offenses were compared, when persons with prior records were compared, and when comparisons were made according to offense seriousness. Thus, there appeared to be a greater "penalty" associated with taking a case to trial. In fact, according to Champion, if an individual was convicted through trial, his or her chances of securing probation were lessened considerably compared with the chances of those who agreed to plead guilty in an earlier plea bargain arrangement. Prosecutor's agree that such is a risk a person incurs by exercising fully the right to trial.

In concluding the article, Champion reiterated the fact that now, more than ever before, cases are being plea bargained rather than going to trial. And, more and more people are being given probation rather than incarceration. For instance, between 1970 and 1985, the number of felony convictions obtained by the 166 prosecutors was 64,372. Of these convictions, 50,498, or seventy-eight percent, were obtained through plea bargaining while the rest resulted from trial verdicts.
According to Green, in multidefendant criminal cases, the prosecutor sometimes offers the defendants an "all or nothing" deal, providing that one defendant will be treated leniently only if all the defendants plead guilty. This practice sometimes known as "package" or "contingent" plea bargaining, has been upheld by courts when challenged on constitutional grounds. Hence, this article undertakes a detailed examination of the ethical problems raised by package plea bargaining.

In a series of opinions in the 1970s, the United States Supreme Court has rejected a variety of constitutional challenges to plea bargaining, finding that, properly administered, plea bargaining can fairly benefit both the defendant and the prosecution. Thus, it is permissible for a prosecutor to treat the accused more leniently in exchange for a plea of guilty. At the same time though, the Supreme Court explicitly withheld judgment on a propriety of a prosecutor's offer during plea bargaining of adverse or lenient treatment for some person other than the accused.

While tolerating this type of plea bargaining, courts have recognized that such practices place a special responsibility on prosecutors to exercise good faith in making contingent plea offers. However, the meaning of prosecutorial good faith is far
from certain. This article looks at the question of prosecutorial good faith when contingent plea offers involve unrelated codefendants. The author argues that there is a danger that one defendant may pressure another to plead guilty and prosecutors should not make such plea bargaining offers for the purpose of exploiting this responsibility.

Another area that the article discusses is the area of conserving prosecutorial resources by offering "package deals." The article analyzes the principal justification that has been advanced in support of the practice: that a contingent plea bargain is a means of conserving prosecutorial resources, but it should not be used to preclude one defendant from testifying on another's behalf.

Green also examines the meaning of good faith in cases involving related defendants. In fact, Green argues that it is improper to threaten to prosecute the defendant's loved one absent probable cause. If there is probable cause to charge the defendant's loved one, it is permissible to do so to gain bargaining leverage over the defendant. Green argues that it is improper for a prosecutor to use an offer of leniency to the defendant's loved one to induce the defendant to plead guilty.

In his article, Green discusses prosecutorial "good faith" when contingent plea offers involve unrelated codefendants. He states that there is a danger that one defendant may pressure another to plead guilty. Hence, prosecutors should not make
contingent plea offers for the purpose of exploiting this possibility.

In concluding his article, Green argues that courts have rejected a number of arguments and have upheld this plea bargaining practice. Further, Green argues that courts have hesitated to inquire into the prosecutor's motives for fashioning a package plea bargain. However, a prosecutor should refrain from charging or threatening to charge innocent third parties. In Green's opinion, this inducement is not necessary for the prosecution to achieve its legitimate aims and it encourages the defendant to waive his right to trial on the basis of a factor that is extraneous to his actual guilty and to the strength of the government's case.
McAllister's article introduces and discusses an experiment which was conducted to test the effects of eyewitness evidence on plea bargaining. In his experiment, two hundred eighty-two attorneys were mailed survey material. For each of 47 states, three defense attorneys and three prosecutors were chosen. California, Alaska, and Rhode Island were not included in the survey. The purpose of the survey was to find out how two types of eyewitness evidence (identification and nonidentification) influenced plea bargaining decisions by both prosecutors and defense attorneys.

In the article, a hypothetical case involving a robbery was mailed to three prosecutors and three defense attorneys in each of 47 states. The attorneys were randomly assigned to receive a case in which an eyewitness claimed: (a) the defendant was the criminal (identification), (b) the defendant was not the criminal (nonidentification), or (c) it was not possible to tell whether the defendant was the criminal (the control group). Rather than focusing on juror understanding of eyewitness accuracy, McAllister's research focused on how jurors cognitively handle
the eyewitness evidence. In McAllister's opinion, the most crucial issue in a case involving an eyewitness is not the eyewitness accuracy itself, nor is it juror perception of eyewitness accuracy; rather, it is how the potential eyewitness testimony influences the plea bargaining decisions made by prosecutors and defense attorneys.

The major issue of McAllister's paper is whether prosecutors and defense attorneys would be vulnerable to the same types of cognitive biases that jurors are. For example, jurors often trust eyewitness identification as informative and nonidentification as not informative, even though they should both be of value in deciding defendant guilt. McAllister found that prosecutors and defense attorneys, like jurors, underutilize nonidentification testimony when making plea bargaining decisions. That is, if there is no positive identification of a criminal, then the chances of a plea bargaining agreement would be much stronger.

In order to explore the impact of eyewitness testimony on plea bargaining decisions, prosecutors and defense attorneys were asked about three different perceptions of defendant's guilt: (a) a juror's, (b) their own, and (c) their opponent's. In this area, it was found that the plea bargain decisions were influenced by what prosecutors and defense attorneys estimated the reaction of the jury or their opponent would be rather than their own personal opinions of defendant guilt. Hence, results showed that, for prosecutors and defense attorneys, both own
perceptions and estimated juror perceptions were significantly affected by the eyewitness manipulation.

In conclusion, McAllister found that both prosecutors and defense attorneys showed the same underutilization of nonidentification information in their plea bargain decisions as shown by jurors in their judgments of defendant guilt. When trying to determine the outcome of a case, prosecutors were more accurate than defense attorneys. Further, McAllister mentioned the importance of the need to conduct more research in the area so as to be able to explore the impact of eyewitness evidence in the 90 percent of plea bargaining cases that jurors never saw.
According to the authors, the Sentencing Reform Act of 1984 was enacted to correct two major flaws in the sentencing process of the criminal justice system. First, defendants who had committed the same crimes were receiving widely disparate sentences, depending on the sentencing judge, the district within which the crime was committed, and a wide variety of factors that Congress deemed no longer appropriate considerations in sentencing. Second, the sentences that had been imposed did not accurately reflect the actual time the offender would serve. The statute provided that the then-existing system of completely individualized sentencing would be replaced with a guideline system to be promulgated by a sentencing commission, created by the Act.

The purpose of the commission was to direct and establish federal sentencing guidelines for federal offenses to identify the factors that were to be used in determining individual sentences while advancing the statutory goals of the Act. The commission completed its initial set of guidelines in 1987; the guidelines took effect on November 1, 1987. The federal sentencing guidelines structure the sentencing discretion of the trial judge and change the way practitioners must look at...
sentencing consequences in general and their plea bargaining discretion and options in particular.

The federal sentencing guidelines require that the participants in the federal criminal justice system learn not only the mechanics of the new sentencing guideline but also the ways in which the guidelines affect their work, particularly with respect to their effect on plea bargaining. Guideline sentencing will affect counsel's role throughout the criminal justice process, beginning with pre-indictment negotiations. Counsel must be especially cognizant of the fact that the defendant's actual criminal conduct and criminal history have major significance under guideline sentencing. In fact, both the guidelines and the Sentencing Reform Act provide that personal characteristics of the defendant are far less important than under pre-guideline sentencing.

With these guidelines, prosecutors now have a relatively strict national policy governing their plea bargains that require close adherence to the spirit and letter of the guidelines. The acceptance of plea agreements will be affected by guideline sentencing because judges and the parties will use applicable guideline range as a basis for evaluating the appropriateness of the plea agreement in light of the real offense conduct. Under the Act, both parties are given the right to appeal a guideline sentence for improper guideline application and the losing party may appeal departure from the applicable guideline range. It is
the presiding judge who chooses the guideline range for specific cases.

In concluding their article, the authors argue that acceptance of a responsibility and providing substantial assistance to authorities play crucial parts in final disposition of a case. Hence, counsel may urge a reduced sentence for a defendant if the defendant meets the two criteria listed. Hence, the Sentencing Reform Act of 1984 corrects the flaws which were inherent in plea bargaining cases.
According to Gertz, plea bargaining is an informal method of compromise imposed upon the formal judicial process for the sake of expediency and efficiency, and it has become the norm in the American criminal justice system. Gertz’s article considers the extent to which plea bargaining in uniquely American and the degree to which other criminal court systems will allow for compromise of their formal procedures for the sake of expediency, efficient, predictability, or other purposes. In his article, Gertz examines the criminal court process in three countries--the Federal Republic of Germany, the Netherlands, and Denmark. These countries are examined to determine the extent to which plea bargaining, in one form or another, takes place in these countries.

With the Federal Republic of Germany, there are four levels of West German courts: local, district, state, and national. The West German court mixes professional judges with law judges of assessors. In a courtroom, the presiding judge controls the proceedings absolutely. With West Germany, three cities were studied--Frankfurt, Kassel, and Marburg totalling 1,550,000 people. In his study, Gertz found that West Germany operated using the legality principle. This principle obligates the
police and the prosecutor, by law, to prosecute all charges for which there is sufficient evidence to reasonable justice the possibility of a conviction. However, it was also found that the legality principle is not always utilized in practice. In fact, the case for the existence of plea bargaining is buttressed by the fact that under the German system, there are social official procedures that give the prosecutor wide discretion to handle a case without pursuing the formal process that one would expect under strict observance of the legality principle. For instance, Section 153A of the Code of Criminal Procedures enables prosecutors to handle cases informally. With this section in use, cases are suppose to be terminated if the public interest would be better served by the accused paying charity, making restitution, doing community services, or offering a public apology. Hence, this is a form of plea bargaining.

With the Netherlands, there are 19 criminal district courts. In each district, there are police courts where a single judge hears the least serious cases and can impose a maximum sentence of six months. Approximately 90 percent of cases are handled in police courts, the remaining are sent to multiple-judge courts.

The criminal justice system in the Netherlands espouses a philosophy called "the opportunity principle." Under this ideology, the police and prosecutors have wide discretion in the processing of cases to achieve the "best result." In other words, cases may be dropped if they do not serve the ends of justice, the needs of the defendant, or the desires of the public
to proceed. The opportunity principle is used in 60 to 70 percent of cases.

In Denmark, the system begins with the city courts in 84 districts plus the Faroe Islands. Almost all crimes, except for the most serious in which the defendant denies guilty, are dealt with by the city courts. If a defendant pleads guilty, one judge will hear the case. Further, if a defendant pleads not guilty, then two law assessors will join the professional judge in adjudicating the case. The Danish system is a compromise between a legality principle and opportunity principle.

In fact, the Danish system involves many bargains and confessions. In reality, confessions account for almost half of cases. With this type of system, counsel usually advises his clients to confess. Further, in Denmark, police also have the ability to plea bargain. Police are permitted wide discretion in notifying defendants that if they accept a certain deal, they will get a fine and there would be no need to appear in court.

In concluding his article, Gertz argues that plea bargaining occurs in one form or another in the three countries which were studied. In fact, the procedures which were sued allow key actors in the criminal justice system to exercise a significant amount of discretion in lieu of traditional legal approaches to courtroom decision making. Hence, though it may be called other names, plea bargaining occurs in other countries and not just in the Untied States.
Rough Justice was written by David Heilbroner who served three years as an assistant DA in Manhattan, New York. In his book, the author gave a portrayal of the New York City Criminal Justice System. He also discussed many factual instances which occurred during his service with the DA's office. Towards the end, the author gave many suggestions on how to help the criminal justice system run smoother.

The author divided the book into three parts. In the first part he discussed the Early Case Bureau (ECAB) which was known as the complaint room or the heart of the DA's office. Upon his arrival to ECAB, he discussed a situation in which he noticed about a dozen police officers in full uniform who were sleeping on the floor. These police officers were "scattered along the corridor, they looked like blue whales washed up on short," and they were snoring loudly (Heilbroner, 1990, pg. 4). This incident was a sign of how busy the DA's office was. In fact, the majority of police officers had to wait anywhere from two to four hours prior to being able to discuss their arrest with the assistant DA's. In most cases, these officers had already worked their eight hour shifts.
While in ECAB, the author describes instances in which he is interviewing witness, victims, and police officers. He mentioned filling out paper work for a lady who was filing charges against a man because the man kicked her in the "butt" for no apparent reason. Another case involved a victim who received three knife wounds from a perpetrator who was trying to steal her purse. The point is that after filling out so much paperwork for each individual case, the Assistant DA found it difficult to file charges on each and every case because he realized that he only had the arresting officer's and the victim's word to go by. For instance, with out more evidence, "it seemed impossible to make any judicious decision about guilt or innocence. The fact that the filing DA would not see any case to the end, Assistant DA Heilbroner began to discover the ECAB operated like a legal assembly line. An assembly line meaning that the DA's office moved cases in bulk, saving a close look at the facts for another prosecutor on another day who took the case to court. The filing DA copied complaints out of the ECAB manual, copied the names and telephone numbers of police officers and witnesses into grids on write up sheets and compressed the facts of each crime into barely more than a sketch for the prosecutor who handled the case. "The routine was simple: interview the cops, get the fact of the case on paper, copy a complaint out of the ECAB manual, and hurry on to the next arrest. The object of the assembly line was to keep cases moving (Heilbroner, 1990, pg. 11).
The majority of crimes which came through ECAB were considered petty crimes. For instance, a large number of crimes were farebeats--not paying the subway fare. Another crime which was discussed was the crime which was called "stuff 'n' suck." With this crime, there were kids who were into token-sucking. That is, the perpetrators would wait for someone to insert a token into the slot of the token machine and the kid would suck with his mouth at the slot to get the token out. If the kid was lucky, he would sell the token for $1.00.

At ECAB, during his first week at work for the DA's office, Heilbroner had filed more than one hundred complaints, he already had a caseload of 150. There were shoplifters, farebeaters, and con men. There were auto thieves breaking into cars on ill-lit side streets. There were street vendors selling imitation Rolex watches for $25.00 (Heilbroner, 1990, pg. 13). Further, some of the arrest reports ranged from victims of spousal abuse, prostitution, drug crimes, pickpocketers, shoplifting, and street fighting. Hence, the crimes too, are all considered petty crimes but unfortunately, all require the same amount of paper work, victim/witness interviews, and police officer briefs or reports of each and every crime. Unfortunately though, cases moved so quick that there was really no time to seek justice. It appeared as if Assistant DA's only filed paper work.

In an area of the book, Heilbroner discusses certain crimes which were more serious than petty crimes. For instance, while assigned to a case which required a hospital hearing, Heilbroner
was to prosecute a taxi cab driver who practically cut off a customer's hand with a machete because the customer did not have $9.00 for the cab ride. The cut was so severe that the man's hand was merely hanging from a piece of skin which was holding it intact.

Heilbroner gave examples of how most of the cases were disposed of. For instance, deals were made by the prosecutor and the defense lawyer which involved plea bargaining. In most cases, both misdemeanor and felony cases were plea bargained quite often. If the DA was pressed for time, then he would be willing to settle for a lesser degree crime as long as the defendant was punished somehow and not just set free to commit another crime. An important issue of plea bargaining, according the Assistant DA was that if defendants had a serious rap sheet (prior arrest and conviction record), then the likelihood of plea bargaining was very limited. For those defendants who did have a rap sheet, their punishment usually involved probation with some type of incarceration. In a section of the book, the author gave a good example of defendant's "copping out" pleas almost instantaneously. Defendants were plea bargaining because they did not want to do "hard time" if they did not "cop out." In a sense, defendants were forced into "copping out" without the opportunity of a trial. Though these defendants were perfectly welcome to take their case to trial, they did not dare because the judge and DA would strive for almost double or harsher sentences if the cases went to trial. According to Heilbroner,
plea bargaining was somehow illegal and immoral and possibly causing the city's crime problem. Plea bargaining allowed criminals to escape just punishment, and return recidivists to the streets all that more quickly. But could plea bargaining be removed?

Heilbroner discussed a voir dire process in which attorneys look for the best person/people to sin in on a jury. In Heilbroner's words "voir dires are used to keep nuts off the jury panel" (Heilbroner, pg. 70). For most cases, a good jury would be made of middle-class, middle-aged people, the types who have held the same job for a number of years, and preferably, those who have children. Jury members should be no/nonsense people who don't mind following orders and have a sake in the community (Heilbroner, 1990, pg 79). Though it may be hard, jury member should be people who have not been victimized for the same type of crime as the one they are going to hear. Such people will certainly be biased.

In the second part of the book, titled MADMEN AND FUGITIVES, the author was assigned to the Special Project Bureau. Special Project deals with two area of prosecution rarely encountered in criminal court: insanity and extradition cases. With insanity cases, the M'Naughten Rule was formulated way back in 1843. Such rule reasoned that an accused should not be held responsible for his crimes if "a disease of the mind" prevents him from knowing "the nature and quality of his acts" or distinguishing "right from wrong" (Heilbroner, 1990, pg. 119). While assigned to the
Special Project Bureau, Heilbroner was sent to Kirby Forensic Psychiatric Center to prosecute cases for the state. All those who were incarcerated at Kirby Center were convicted for committing extremely violent, perverse crimes, have entered insanity pleas, and now spend their days inside closely monitored wards awaiting the moment when a judge will find the "nondangerous". For instance, some of the crimes which people were incarcerated for are: a man was accused of literally cutting up young boys. There was a case of a mother and daughter who cold-bloodily murdered the grandparents because of some spiritual belief and because of "little voices" telling them to do so. There was a Carolyn Appelsammy who cut up her two kids and took a bath in their blood. With this case, there was also some evidence of anthropophagy—drinking their blood or eating their flesh (Heilbroner, pg. 129). Ms. Appelsammy had been in various hospitals for at least ten years. Was she fit to be released to a nonsecurity facility? The judge of the case decided against her release to a minimum security facility. Then, there was the case of Plutowskin who cold-bloodily murdered a stranger who asked to have sex with him. After eight years, the court decided that some violent tendencies still remained and decided that the defendant/murderer was unfit to be classified as "nondangerous" due to some violent outbursts against the hospital staff. Throughout these cases, Heilbroner wondered if these defendants were really medically insane or had they just beaten the system?
In the third part of the book titled *FELONS*, the author discussed felony cases. The New York Penal Code defines a felony as any offense punished by more than one year in prison or a one thousand dollar fine. As distinguished from petty crimes, assault meant a stab in the back rather than a punch in the nose or a kick in the "butt"; larceny meant forging fifty thousand dollars of checks rather than stealing pantyhose. Victims of these crimes suffered serious physical, emotional, or financial injury. Robbery victims were terrified of riding alone in elevators and assault victims went to plastic surgeons. All these victims wanted to see just punishment meted out. Unfortunately, these victims later began to feel as if they were burned twice: once by the defendant and once by the system because they were treated very harshly.

In felony cases the author discusses an incident where a lawyer was mugged and beaten by a group of juveniles. With felony cases, there was much more work for the assistant DA’s to do. They had to investigate more extensively the facts of each crime from robberies, physical abuses, rapes, and murders. At the felony level, Assistant DA’s view every defendant as being crooks, "no one is innocent" (Heilbroner, 1990, 213). For instance, the author discussed a case where a man’s credit cards were found on a defendant that was being charged with a robbery crime. Since the owner never reported the cards stolen, it was later found through investigation that the owner too, was selling
drugs and letting the robbery defendant use the cards to purchase the drugs with.

In concluding his book, the author made many suggestions on how to help the criminal justice system run smoothly and efficiently. First of all, DA's should be encouraged to dismiss more of the marginal misdemeanor cases so that serious matters can receive the attention they deserve. Legalizing prostitution and marijuana, even though politically unpopular, would also help eliminate thousands more petty cases each year; cases that neither judges nor prosecutors take very seriously in any event. The artificial misdemeanor-felony distinctions should be reformed. For instance, one can punch fifty people in the face, loosening teeth, blackening eyes, and yet, because the crimes are misdemeanors, the perpetrator cannot receive more than one year for each assault. In contrast, a petty thief who steals purses and credit cards faces a minimum of fifteen to twenty-five years and a maximum of life for his third offense. Further, police officers should be fined every time they illegally search, question, or arrest a defendant. Similarly, lawyers and judges should be disciplined for the misrepresentations and countless undue delays that jam the wheels of justice. Thus, the viewpoint of the author is that the New York Criminal Justice System does not meet its potential to seek justice for every and all crimes due to the quantity of crimes and punishments which need to be sought. Of course, there are many areas which need to be changed
in the criminal justice system, but even if such areas were changed, would such changes help reduce crime?

In an area of his book, Heilbroner discusses the fact that victims were "burned" twice. In all reality, most if not all criminal justice literature stress the fact that victims are the unfortunate parties, not necessarily because they have been harmed by the defendants but because in many instances, there is not much that the criminal justice system can do for victims other than counsel and seek restitution on their behalf. According to the author, in all reality, the phrase "victims are the forgotten people in the criminal justice system, seems to be true. The criminal justice system seems to grant the defendants more right and thus, better treatment to those who commit crime rather than those who have crime committed upon them against their will.

ROUGH JUSTICE gives a portrayal of any criminal justice system, be it New York or California. In fact, most criminal justice system literature discuss the problems of the system such as the backlogging of courts with the big quantity of cases which must be processed through them. The over-crowdedness of jails and prisons does not leave any hopes for rehabilitation which used to be the main concern of any correctional facility. In fact, now the prison systems are considered merely a punishment and warehousing facility according to Heilbroner.

The author discusses many of the problems which occur in the New York Criminal Justice System. But the problems occur in
every other state as well. Most all law enforcement, courts, and correction facilities are very much understaffed according to most of the current literature. Thus, the author's book serves to portray the realities of any and all criminal justice systems.
CONCLUSION

Though the primary goal of this analysis was to find ways to help the criminal justice system operate more effectively and efficiently in the area of plea bargaining, a complete change in plea bargaining would seem to be disastrous. The fact that the courtroom actors are not willing to change makes any changes with plea bargaining that much more difficult. In addition, criminal justice budgets may not allow changes in the near future.

One of the goals of this analysis was to find a way in which the criminal justice system could operate without plea bargaining, but, after review, abolishing plea bargaining in its entirety would, in fact, be a nightmare for those who work in the system. Though abolishing plea bargaining, on its face, sounds good, imagine what that would do to the caseload of the criminal justice cases which need attention. Each and every defendant would have a full scale trial with a long wait in jail before the case would be considered. With the long jail wait, defendants would feel guilty even before their case gets to the court docket.

Since plea bargaining cannot be abolished, a restructuring of the process should strongly be considered, however. Finding a way to treat each and every defendant as equal should be adopted. That is, defendants who commit certain crimes should have to do a certain amount of time. Sentences should be fixed so that
discrimination would not occur with the meting out of punishment. Upperworld and underworld crimes should be treated alike, for example. Plea bargaining or sentencing guidelines should be used to eliminate the disparate sentencing which occurs. Additionally, judges could receive more training in sentencing. Plea bargaining practices should be reformed in ways that would allow the general public to have a better understanding of the process.
BIBLIOGRAPHY


