

PLEA BARGAINING AND THE STRUCTURE OF THE CRIMINAL PROCESS*

MALCOLM M. FEELEY**

This article examines plea bargaining in historical perspective. It argues that plea bargaining and related inducements to plead guilty are not primarily the products of limitations of resources or the drive for organizational efficiency. Rather plea bargaining has its origins in changes in the very structure and theory of the criminal process that have taken place during the past 200 years: developments in the operative assumptions and theory about the criminal process; changes in the substantive criminal law and criminal procedure; and the rise of full-time professionals who administer the criminal process. The thesis is that negotiation has increased in direct proportion to adversariness; that is, the rise of plea bargaining is a consequence of increased adversariness, precisely the opposite of what is commonly thought.

Introduction

As a society we have high expectations for our courts, and when they are not met, as inevitably they will not be, we are disappointed. No doubt disappointment serves as an important stimulus for change, but it can also lead to exaggeration and misdiagnosis. An exaggerated sense of urgency can easily lead to misunderstanding and superficial analysis, lacking in perspective and context. In the concern with the practice of plea bargaining, something of this distortion has taken place. The result has been, I think, a misunderstanding of both the origins and nature of plea bargaining. This in turn has contributed to an inaccurate analysis of the operations of the courts and a downgrading of the magnitude and significance of changes in the adversary process in recent years. In general many so-called improvements, and indeed some of their seeming shortcomings can also be seen as signs of strength. Plea bargaining is one such change.¹

*This study is part of a project supported by the National Institute of Justice, whose aid is deeply appreciated.

**Visiting Professor, School of Law, University of California.

1. By plea bargaining I mean the waiver of the right to trial and the exchange of a guilty plea by the defendant for a promise of more lenient treatment than would be meted out if convicted at trial. Thus, I use the term generically to include several quite different types of bargaining—over the number of counts, the number and types of charges, the length of sentence, and the like. Plea bargaining can also take place at various stages of the pretrial process and involve different officials (e.g., judges are more likely to be involved in sentence bargaining than in charge bargaining) which in turn can significantly affect the nature of this process. But whatever the structure, plea bargaining provides inducements to the accused for waiving their rights to trial or conversely provide threats of enhanced sanctions if they do not. It is this common feature that I wish to address here. I should also

We have been told time and time again within recent years that plea bargaining has reached epidemic proportions, that reliance on the guilty plea has all but displaced the traditional trial as the means for handling criminal cases. In a widely read book Abraham Blumberg concludes that the defense attorney has shifted from a fighter in behalf of his client to a "confidence man", whose primary function is to "manipulate the client and stage manage the case so that help and service at least appear to be rendered" (Blumberg, 1967: 111). Blumberg sees in this shift the "twilight of the adversary system" and the emergence of bureaucratic justice, where nominal adversaries—the prosecutor and the defense attorney—are bound together in a common desire to maintain a smooth functioning system. Organizational maintenance and financial self-interest, he argues, have replaced a concern with justice. Hence the demise of the adversary process and the rise of plea bargaining, a device which can *appear* to operate in the interests of the accused but in fact serves other more salient organizational interests.

Blumberg is not alone in ascribing the demise of the adversary system to the rise of plea bargaining. In what have quickly become classics, University of Colorado law professor Albert Alschuler has examined plea bargaining from the perspectives of the prosecutor, judge and defense attorney (Alschuler, 1968, 1975, 1976, 1979). He concludes that from each of these views the prevailing incentive is one of institutional convenience and organizational maintenance rather than the interests of the accused and the concern with justice. What disturbs Alschuler most is the threat

note that there are a host of factors other than expeditious dispositions that can motivate prosecutors and defendants to negotiate pleas. In white collar crime cases, considerations when prosecuting a low-level employee, where the investigation points to high level corporate involvement, are different from considerations when prosecuting most ordinary street crime. Similarly, negotiating concessions with defendants who provide evidence against others is generally seen differently from negotiating with single defendants in isolated cases. This is not the place for an exhaustive catalog of types of and reasons for plea bargaining. Suffice it to say that this article focuses primarily on bargaining in so-called street crime cases not encumbered by the types of factors just suggested.

Even this relatively simple focus on plea bargaining is difficult to define operationally. Not all bargains are explicit (many jurisdictions have implicit bargaining—going rates for those who plead guilty to certain offenses), nor are all guilty pleas bargained (there are a host of reasons for pleading guilty). Furthermore, not all negotiations involve "bargains" (charges may be reduced because a defense attorney has convinced the prosecutor that the original charges cannot be sustained; many negotiations result in dropping *all* charges—without the *quid pro quo* normally associated with the term bargaining). While these and other factors mean that any operational definition must necessarily be fuzzy, my discussion here is aimed at the core and less ambiguous cases. It should be noted, however, that scholars have not given adequate attention to the process of dropping *all* charges. This is too bad, since what little evidence there is suggests that in these cases the structure and process of negotiation is not appreciably different from negotiation in those which result in guilty pleas (Feeley, 1979; Utz, 1978). This suggests that plea bargaining may be more principled than is ordinarily thought. For insightful reflections on the principled nature of negotiation, see Eisenberg (1976) and Utz (1978).

(implicit or explicit) that the accused who exercises his right to trial and is convicted will be sentenced more severely than one who pleads guilty. That such practices are common few would seriously deny. Systematic studies of a number of courts all indicate that the practice of offering "discounts" for guilty pleas—or conversely penalties for trials—are common, although they are not always explicitly acknowledged by court officials. Even where such penalties do not occur, court officials, defense attorneys, and defendants clearly believe they do and act accordingly (Feeley, 1979).

Prosecutors and judges agree with the scholars that plea bargaining has become the primary means of securing conviction, but tend to be less critical of the practice. Some see it as a necessary evil, a practical response to rising crime and limited resources. Others view plea bargaining more positively, arguing that it introduces flexibility into an otherwise rigid system. Despite some dramatic pronouncements and much rhetoric, few practitioners seriously work to abolish the practice of plea bargaining. Indeed, there seems to be a growing belief that plea bargaining is inevitable.

My intention here is neither to defend the institution of plea bargaining nor to challenge its critics. Rather it is to examine its antecedents, origins, practices and functions in light of the charge that it signifies a decline of the adversary process and the rise of bureaucratic justice. Put bluntly the charge against plea bargaining is that it is a cooperative practice which has come to replace the combative trial, and as such has reduced the vigor of the adversary process. This charge, if that is what it is, is false. It is a charge unduly fettered by the constraints of organizational theory; it lacks historical perspective and fails to place plea bargaining in broader structural and social context.

My thesis here is that adversariness and negotiation are directly related. Plea bargaining is not a cooperative practice that undermines or compromises the adversary process; rather, the opportunity for adversariness has expanded in direct proportion to, and perhaps as a result of, the growth of plea bargaining. As the requirements of due process have expanded, as resources have become more accessible to both the prosecution and the criminally accused, as the substantive criminal law has developed, and as the availability and role of defense counsel have expanded, the opportunity for both adversariness and negotiations has increased. At first glance, this thesis runs counter to most of the theoretical and practical discussions of the criminal process. But when examined in historical perspective and seen in comparative context, the argument can be sustained.

This thesis does not so much purport to refute the findings of contemporary studies on or critics of plea bargaining as it means to build on them and place the process of plea bargaining in broader perspective and context. By identifying the importance of hitherto un- or under-recognized factors shaping the institution of plea bargaining (and negotiation in the criminal process generally), I hope to broaden and correct the conventional understanding of plea bargaining that has risen in recent years.

Organizational Analysis and Plea Bargaining

One concern to students of formal organizations is the process by which the formal goals of an organization are displaced as a consequence of pressures to adapt to the larger environment, to serve the personal interests of its members, and to cope with scarce resources. This approach, which by now has become the conventional approach to studying criminal courts, accounts for plea bargaining in terms of goal displacement and adaptation (Nardulli, 1979a). The frequent contact between defense attorneys and prosecutors fosters a tendency to replace formal adversarial roles with cooperative relationships. Others emphasize that the pressure to "produce" within the constraints of severely limited resources leads to the replacement of slow and deliberate formal practices with more expeditious forms of decision making. Thus plea bargaining comes to be understood as a consequence of these and related extra-legal organizational factors.

This approach is not without considerable merit and insight. It has successfully challenged long-standing myths about the causes and consequences of plea bargaining. For instance, it has revealed dynamics that foster cooperation in a system that many feel should be conflictual (Skolnick, 1967). It has challenged heavy caseloads and limited resources as the primary causes for plea bargaining. For instance, Heumann (1975, 1978), Feeley (1975, 1979), Nardulli (1979b), Rosett and Cressey (1976), and the Vera Institute (1980) have marshalled evidence suggesting that heavy caseloads are not necessarily the important causes of plea bargaining so many practitioners assert they are. Other studies anchored in organizational theory examine the incentive structures of the primary participants, and in doing so have shed considerable light on the ways courts operate, and on the functions of plea bargaining (Eisenstein and Jacob, 1977; Nardulli, 1978; Mather, 1979; Utz, 1978; Cole 1970). Some of these studies examined the important policy issue about the extent to which a defendant who exercises a right to trial is or is not penalized for exercising this right. Although the results of these investigations are mixed, and indeed different jurisdictions may follow different policies (Miller, *et al.*,

1978), these studies have provided useful theoretical insights into the operations of courts and contributed important data for the policy issues about the desirability and nature of plea bargaining. Above all, what these studies have shown is that factors fostering plea bargaining are not confined to a few unskilled lawyers, over-worked prosecutors or uncaring judges, but are part and parcel of the *structure* of the criminal court system itself. Both individual case studies (e.g., Nardulli, 1978; Mather, 1978; Feeley, 1979; Utz, 1979) and ambitious comparative analyses (Miller, *et al.*, 1978) show that plea bargaining must be seen in a larger context, as only one facet of an elaborate structure of negotiation in the criminal courts. These insights go a long way to explain the findings of Church (1976), Heumann and Loftin (1979), Rubenstein and White (1979), and others who have found that when plea bargaining is "abolished," it usually reappears in slightly different forms elsewhere within the court system.

Although these and other related studies have made significant contributions in clarifying the nature and function of plea bargaining and the operations of the criminal courts in general, they have been most successful in debunking myths and cataloging the functions of plea bargaining. *But what the organizational approach does not and cannot easily explain is why the practice of plea bargaining grew up in the first place, and what legal, theoretical and structural factors (as opposed to organizational functions) gave birth to and help sustain it.* The exigencies of the pressures on organizations with limited resources may help to explain the contemporary practice of plea bargaining in America, but these same factors cannot easily account for its rise in the first place. Nor do they account for the limitations of resources that in turn encourage such practices as plea bargaining. To pursue the full explanation for plea bargaining a historical and comparative perspective examining practices in light of a host of social, doctrinal, and structural factors is required.

A Broader Framework for Understanding Plea Bargaining

Below I sketch out a broader framework for understanding plea bargaining. This approach identifies the historical origins of plea bargaining in terms of the influence of legal doctrine and the formal legal process. My argument is that plea bargaining has become the standard method for securing convictions for a complex set of reasons that go well beyond limitations of resources. Indeed I argue that it has been the increase in resources and opportunities that has in fact fostered the rise of plea bargaining. To sustain this thesis, I will first demonstrate the shortcomings of conventional discussions of the origins of plea bargaining by re-

viewing its history, and then I will turn to comment on five factors that together have fostered the rise and helped sustain the practice of plea bargaining. These factors are:

- (1) Plea bargaining in relation to the operative assumptions of the criminal process as it developed from a tradition of private prosecution.
- (2) Plea bargaining in relation to changes in the substantive criminal law.
- (3) Plea bargaining in relation to changes in criminal procedure.
- (4) Plea bargaining in relation to the rise of full-time criminal court "professionals", specialists who replaced "amateur" officials who once staffed the court system.
- (5) Plea bargaining in relation to the expansion of the availability of defense attorneys.

Plea Bargaining in Historical Perspective

A cursory look at court records reveals that disposition by means of guilty pleas are phenomena of the late nineteenth and twentieth centuries. What little readily available evidence there is all points in the same direction. In 1928 Raymond Moley reported on his survey of dispositional practices in American criminal courts in the early part of this century. In the 1920s in New York City, guilty pleas accounted for 88% of all convictions; in Cleveland 86%; in Chicago 85%; in Des Moines 79%; and in Dallas 70%. Moley presented additional figures to show that these high rates of guilty pleas were not restricted to large or rapidly growing urban centers, but were found in less populated areas with less crowded courts as well. For instance guilty pleas accounted for 91% of all convictions in rural upstate New York in the 1920s, a figure even higher than that for New York City during the same period (Moley, 1929: 163-4). Similarly high figures were presented for other rural and less congested courts. Two recent studies of Connecticut reveal that while trial rates have fluctuated over the past ninety years, they have hovered around ten percent throughout this period (Feeley, 1975; Heumann, 1975). These data suggest that plea bargaining—or at least the guilty plea—has a long history that predates the reported dramatic increase in crime and arrests of the past two or three decades.

Was there a time when trials were much more common? In a word, yes. Albert Alschuler reports that in the United States the guilty plea began to replace the trial as the dominant mode of disposition at around the time of the Civil War (Alschuler, 1979). My own work with court records in New Haven, Connecticut, New York, and London's Old Bailey reinforces this impression. Analysis of these records are still underway, but the broad

trends they reveal are instructive. In London's Central Criminal Court in the 1830s, trials accounted for over ninety-five percent of all dispositions. This figure steadily declined throughout the nineteenth and into the twentieth century. An even more pronounced pattern of decline is found in the United States. For instance, in Superior Court in New York City in 1846 only 28% of dispositions were by confessions; by 1860 this figure had risen to 47%; in 1890, it was 61%, and by 1919 it was 88%. A sample of criminal court records from New Haven, Connecticut, during roughly this same period reveals a similar shift: in 1837, 21% of my sample cases were disposed of by guilty pleas; in 1860, the figure was 50%; in 1888, 73%; in 1914, 91%, in 1934, 97%. There has been little room for increase since then. Furthermore, another pattern emerged in the late 1800s: the practice of changing initial pleas of not guilty to guilty, which were accompanied by the prosecutor's decision to drop one charge or more in a multiple charge case. In 1873, this practice accounted for roughly one-half of all guilty pleas; by 1934 two-thirds of all guilty pleas involved switches of this nature, and of these who switched almost half involved pleas to lesser or fewer charges than they had originally faced. The only striking difference in disposition patterns since the 1930s has been the increased tendency to plead guilty to lesser or only some charges, a practice that clearly indicates *plea bargaining*.

What can we make of all this? Certainly these figures support Raymond Moley's 1928 argument, lamenting "our vanishing jury" (1928). And they appear to support the more recent contention that we are witnessing the "twilight of the adversary process" which is being replaced by a cooperative bureaucratic process that relies upon the guilty plea.

But, let us penetrate the surface of these data and consider the *substance* of these processes. Once we do, the "decline" thesis loses much of its power. Indeed it can be stood on its head.

Recall my original thesis. It was not that things have remained relatively constant, but that in fact the adversary process has become more vigorous in recent years, and that plea bargaining is in fact an indicator of this vigor. To examine this argument we must go beyond rates of trial, and inspect the *process* of court decision-making more closely. Two issues concern us here. What were trials like in this earlier era when they were more frequent? And, what is entailed in the modern process of pleading guilty?

First the trials. Lawrence Friedman and Robert Percival have sifted through the court files in Florida and California for the period around the turn of the century. While they found that there was an appreciably higher

rate of trials at that time than there is today (although trials still constituted a distinct minority of dispositions), they proceeded to inquire into the nature of these trials. Let them describe what they found (Friedman and Percival, 1981: 194).

We have to ask, however, what kind of trial? Trial to most of us conjurs up a definite image: a real courtroom battle, with two sides struggling like young stags and the judge acting as umpire, applying fair and honorable rules. Reality was quite different. In many places, the normal case was nasty and short. We examined the minute books of a Florida county from the 1890s. Here 'trials' lasted a very short time, half an hour at most. A jury was hurriedly thrown together. Case after case paraded before them. The complaining witness told his story; sometimes another witness or two appeared; the defendant told his story, with or without witnesses; the lawyers (if any) spoke; the judge charged the jury. The jury retired, voted and returned. Then the court went immediately into the next case on its list.

My own inspection of contemporary accounts on the trial process in London and New Haven, Connecticut, are equally revealing. Transcripts of the trial court proceedings in mid-nineteenth century London reveal practices that are at odds with our image of the trial. Defendants were *not* represented by counsel; they did not confront hostile witnesses in any meaningful way; they rarely challenged evidence or offered defenses of any kind. Typically when they or occasionally someone in their behalf did take the witness stand they requested mercy or offered only perfunctory excuses or defenses. Similar practices appear to have characterized trials in Connecticut during this same period as well.

Perhaps what is most revealing about their substance is the speed at which these early trials were conducted. The record of proceedings in London reveals that the same judge *and* jury would hear several cases per day with hardly a pause between them. Similarly, the New Haven court register indicates that the same judge and jury might handle several cases in a one or two-day period; trial, deliberation and sentencing could all occur within the span of an hour or two. It should be emphasized that these cases usually involved felonies and that substantial sentences were often involved.

Contemporary accounts flesh out still more the nature of the nineteenth century trial. In all but the occasional celebrated cases, preparation was negligible. For all practical purposes, the courtroom and trial was the location and the event at which evidence and witnesses were gathered and

examined *for the first time* by both the prosecutor and (when there was one) the defense attorney. Trials during this period must be understood as events where those centrally involved met for the first (and usually only) time to "muck about" with the available evidence in order to arrive at an immediate judgment.

This brief examination points to an inescapable conclusion: there was no golden era or "high noon" of the adversary process. To speak of the "twilight" of the adversary process is to foster a myth of a nonexistent past. When trials were once extensively relied upon, they were perfunctory affairs that bear but scant resemblance to contemporary trials, which while few and far between are often deliberate and painstaking affairs, at least as compared to what they once were. In a very real sense, the very nature of what a trial is has undergone revolutionary changes to such an extent that comparisons across lengthy periods are not even meaningful.

Indeed it is my contention that when it was used with great frequency, the criminal trial was one of the very few devices available to the accused to try to protect his interests. That is, the trial was relied on extensively when criminal justice was administered in a rough way, often by "amateurs". During this time it served to protect the interests of a largely dependent accused. But as other institutions emerged to protect these interests, the significance and frequency of the trial declined. In brief, as the criminal process became more professionalized, as other opportunities for the defense expanded, the need to rely on the trial to protect the interests of the accused declined.

From this historical perspective, the ability to negotiate and bargain must be seen as an extension of or increase in adversariness. The very terms "negotiation" and "bargaining" imply some degree of parity between prosecution and defense, something that was often lacking in an earlier era when trials were more prevalent but an unrepresented defendant was more likely to be at the mercy of the court. While I do not want to argue that the process has shifted from a position of complete dependency to one of full equivalency, I do mean to argue that some movement in this direction has taken place, and that this change can go a long way in accounting for the vanishing jury and the rise of plea bargaining. Several components of this thesis are examined below.

(1) *Plea bargaining in relation to the operating assumptions and structure of the criminal process.* Criminal law has its roots in the law of torts, private wrongs pursued at the initiative of the aggrieved party. Although crimes are now offenses against public, the criminal process retains residual practices of this earlier era. For instance, even today in England, the

fiction remains that prosecutors are private parties acting in behalf of private complainants.

Even more important is another vestige of private prosecution. In the United States and England, the prosecutor in "public" criminal law has inherited the private complainant's discretion to bring or drop charges. Under both common and statutory law in the United States, the prosecutor's power to *nolle prosequi*, that is, to suspend prosecution, has remained intact and complete. Although there is some move towards judicial supervision of this function, legal controls are generally weak and American judges remain quite passive (Davis, 1971; Goldstein, 1981). The residue of this practice under the common law goes a long way toward explaining a *structure* that permits, if not encourages, plea bargaining.

The authority and discretion of the prosecutor has fostered a passivity on the part of the judiciary. Historically this has led to heavy reliance on confessions as sufficient to prove guilt. While confessions in capital cases and obtained under coercion have long been prohibited, freely made confessions in lesser cases have long been recognized if not encouraged by law and by the very structure of Anglo-American criminal process. For instance, a bifurcated court structure, which provides limited sentencing authority in lower courts, has long functioned on an inducement for the accused, if given the opportunity, to plead guilty in order to avoid exposure to harsher penalties that could be meted by a higher court (Langbein, 1974; Vera Institute, 1981; Feeley, 1979).

In the United States, we find a long tradition of prosecutorial discretion, judicial passivity, and court structures with overlapping jurisdictions. While these factors alone do not explain plea bargaining, they do foster the practice by creating and legitimizing structures that invite it. It is interesting to note that in Germany where plea bargaining is largely unknown, prosecutors do not have such discretionary authority and judges are much more active than their Anglo-American counterparts (Langbein, 1974, 1979; Langbein and Weinreb, 1978). More generally, see Damaska (1973), Weinreb (1977), Goldstein and Marcus (1977).

(2) *Plea bargaining in relation to changes in the substantive law.* This century has witnessed a mushrooming of new criminal offenses and redefinitions of old ones. Not long ago criminal laws were brief statements written in broad language.

Today they are long; types of crimes are defined in minute detail and distinguished in several degrees. Plea bargaining can in part be accounted for by this change. Rather than falling under a single broad definition, any given incident of criminal conduct may now easily be defined as illegal in

any of several ways or degrees. In short, we have an overdetermined system of law that invites the exercise of discretion and negotiation. Indeed much of what is characterized as "plea bargaining" involves assessment or reassessment of the facts as they fit under various definitions or categories of offenses (Feeley, 1979; Utz, 1978). Because many of these fine-lined distinctions involve exposure to sentences of quite different lengths, the incentive to clarify them is obvious and important in a way and to a degree that it was not when there were simpler and more sweeping definitions of criminal offenses.

(3) *Plea bargaining in relation to changes in criminal procedure.* Changes in the law of evidence and criminal procedure have paralleled developments in the substantive criminal law. The criminal trial is governed by more carefully constructed rules than its counterpart in the nineteenth century, and the criminally accused are today surrounded by many more procedural protections than they once were when trials were more common. Many of these new or newly enforced provisions come into play at the early stages of the criminal process. Probable cause hearings, bills of particulars, motions to suppress evidence and the like all shape the criminal process prior to trial and formal adjudication of guilt or innocence. In many cases, pretrial hearings—or for that matter negotiations in the shadow of the law—can become mini-trials. Whether the early review of the evidence reveals a strong or weak case or whether the testimony of a particular witness or the introduction of a specific piece of evidence will or will not be admitted into the record can make or break a case, and depending on the conclusion reached, charges may be dropped, reduced, or the accused may plead guilty or take his case to trial. So, while we have witnessed the demise of the trial, we have at the same time experienced an increase in pretrial opportunities to review in adversarial context some of the same types of issues that once were *less* carefully considered by the jury at trial.

Similarly the rules for introducing evidence into trial have been refined and tightened since the mid-nineteenth century. While once the jury was expected to weigh the value of a vast amount of evidence, the modern tendency has been to screen out problematic information from the jury (presumably on the theory that it cannot recognize the possible weaknesses in the evidence). The objective has been to improve the trial process, to insure fairness in decision-making. But one consequence is that these refinements have placed increased importance on pretrial decision-making and have made the trial more costly, more time-consuming, and perhaps more unpredictable. Although there are many other differences

between American and European criminal justice systems, it is perhaps not surprising that on the Continent, where a larger proportion of cases are taken to trial, trial procedure and the rules of evidence are much simpler—as they once were in the United States when, here too, trials were more common. Thus, ironically, as the price for this quest for perfect justice has increased, so too has the incentive to avoid it. Plea bargaining is one such alternative.

(4) *Plea bargaining in relation to the rise of full-time professionals.* Reports on the operations of the criminal justice system in the United States and England at the turn of the century and earlier reveal a time when trials were much more frequent than they are today. But they also describe practices that by today's standards are wanting. Frequently courts were staffed with part-time officers; often prosecutors and judges were not trained in the law (as most magistrates in England still are not). Typically, the accused was not represented by counsel of any sort. Police officers often acting as prosecutors in court were unfamiliar with the rudiments of the law and cared even less (Haller, 1970, 1979). Admissibility of evidence was capricious, points of law were treated with casualness.

Historically, the modern trial by jury emerged when the criminal justice system was staffed by untrained amateurs who were charged with the task of trying to cope with the problem of accusing, trying and convicting or acquitting someone. Presumably the public and collective nature of the proceedings and often the personal knowledge of the judge and jury compensated for the lack of training of officials and the simplicity of the proceedings.

Although trained professionals—judges, prosecutors, defense attorneys—have over the years assumed increasing importance in handling criminal cases in the courts, especially with major felony charges, it is only in the relatively recent past that courtrooms have routinely been staffed by law-trained specialists who devote substantial portions of their time to criminal matters. Universal representation by counsel of those accused of criminal charges and who cannot afford their own attorney has not yet been fully realized.

What we have witnessed in recent years is—in the most basic and obvious sense of the term—the professionalization of the court system. Part-time lay officials have been replaced by full-time officials, and in many instances lay officials have been replaced by law-trained specialists. The demise of the trial and the rise of plea bargaining has paralleled this development, and I am suggesting there is a connection.

Why? The modern trial by jury, as I have suggested, originated at a time

when laymen administered many of the positions in the criminal justice system, and at a time when few resources were available and few rules governed pretrial and trial practices. The trial was the major focus and institution in this simplified process. It was usually the first time that the evidence was collectively considered. But as reliance on professionals with staffs has expanded, opportunities for considering issues, other than at trial, have also emerged. Ironically, the expanded use of defense counsel may have sounded the death knell for the trial. A defendant who might have once sat passively through a perfunctory trial without an attorney is now likely to be represented by counsel, who has an opportunity for early review of evidence and who may prefer to bargain under the shadow of the law than go to trial. Similarly, full-time prosecutors with staffs have replaced part-time and untrained police prosecutors, who earlier had replaced private prosecutors. They have the opportunity to scrutinize cases prior to trial in ways that once were largely unavailable. Thus, as trials have decreased pretrial activities have assumed many of the functions that were once performed at trials themselves. And as professionals have replaced untrained lay people, some of the benefits provided by trials have declined.

Let me summarize the essence of my argument about the impact of professionalism: The trial declined in the latter part of the nineteenth century (in both England and the United States) at roughly the same time the criminal process was undergoing a transformation from a lay-administered process to one dominated by legally-trained, full-time professionals. (It should be noted also that in the United States this transformation took place during the same period that the modern university-associated law school was rapidly expanding, and more generally during a period when the modern professions were gaining in strength and prestige (Larson, 1977).) During this same period both pretrial procedures and the rules of evidence expanded in number and complexity. These various rules were designed in large to structure and restrict the power to lay decision makers, but they had the effect of giving greater authority to lawyers who could then exercise their expertise prior to trial. And as resources earmarked for criminal justice expanded, these professional decision makers had increased opportunity and incentive to use the pretrial process. Ironically, if I am correct, if resources for prosecutors and defense attorneys are further increased, one might expect an increase in negotiations and a further decrease in trials—precisely the opposite of what is often assumed!

Still, there is a troublesome problem. If, as I contend, plea bargaining is the result of an expansion of adversariness, why is plea bargaining so often

perceived as a sign of decline, decay or demise of the adversary system? Why do the old days of frequent trials appear to be preferable to the bargained justice of today? Let me suggest two reasons. The first I have already alluded to—the romantic yearning for a nonexistent yesterday. But in fact trials of say the nineteenth century were perfunctory affairs, where meaningful defenses were rarely offered and the accused was often dependent on the court.

Second, discontent is inherent and is a by-product of the rise of professionalism in general (Freidson, 1970). Even as it fosters valuable talents that serve useful functions, professionalism brings with it a distinctive set of problems. Because of his or her own monopoly on information, training, access, and language, there is the danger that the (professional) agent becomes the master. Professionals foster client dependence, which in turn breeds discontent and suspicion. Furthermore, the technical language of professionals fosters rapid communication among themselves that is not easily understood by their clients, and as such, links them together in a way that alienates professionals from clients. This tension is common in all walks of professional life. Patients are suspicious of doctors, homeowners of architects, students of teachers, and the like, but it creates special strains in an adversarial setting.

The evils of plea bargaining are asserted more frequently than they are documented (although undoubtedly a great many of them are real and deplorable), and the explanation, in part, is due to a suspicion and discontent with professionals in general. Ironically much of the discontent with the rapid and seemingly perfunctory decision-making in the criminal courts may be an inevitable by-product of the *increased* resources available to the accused rather than any decrease in standards, practices, or capacity.

(5) *Plea bargaining and the rise of public defense services.* There is one particular feature of the rise of professionalism that merits special attention. It is the expanded role and availability of defense counsel. Until well into the nineteenth century in England, defense counsel had only a limited role in felony trials. They could help prepare a defense but could not appear at trial (Langbein, 1978). Thus throughout much of the period during which the criminal trial emerged in its modern form, counsel for the accused was not allowed to take part. Although the theory on which this exclusion rested was relaxed and eventually rejected in the nineteenth century, the actual impact of these changes were evolutionary, because most criminally accused could not afford counsel. In the United States the first legal aid societies were formed in the late nineteenth century as

services provided by ethnic organizations to help newly arrived immigrants. During the twentieth century, provision of defense counsel for the poor has expanded, first on a volunteer basis, then in many jurisdictions by legislation, and finally as a matter of constitutional right. I think there is a link between the expansion of this resource for the defense, and the decline of the trial.

A perusal of accounts of criminal court proceedings when trials were common reveals a process that is difficult for the contemporary observer to recognize: those accused of criminal offenses—misdemeanor or felony alike—were typically rushed through crowded and noisy courts either subjected to a perfunctory trial lasting an hour or two or pressured to plead guilty by overbearing prosecutors whose practices were condoned by judges. All this often took place without benefit of counsel. While expansion of the right to counsel has not provided all the benefits many had hoped for, the change has made a substantial difference in the ways criminal courts now operate. Current observers of American courts would be hard-pressed to find many of the practices that were commonplace when trials were more common. Seen from this perspective, the presence of an attorney who is able to *bargain* with the prosecutor constitutes something of a substantial increase in adversariness. The attorney's presence replaces intimidation with negotiation, domination with exchange. The very terms *negotiation* and *bargaining* imply that both the prosecutor and defense possess resources, a relationship that did not hold in a great many criminal cases when trials were more prevalent but the accused was more dependent. Even if defense attorneys do not pursue their tasks as vigorously as we would like, their collective presence and their familiarity with the courthouse all go a long way towards preventing the types of problems of dependence that once were commonplace. In this respect, whatever one thinks about plea bargaining, it is difficult to characterize it as ushering in the "twilight" of the adversary process. On the contrary, it appears to be a step toward a more evenly balanced relationship between the state and the accused, and as such it represents an increase not a decrease in adversariness.

Conclusion

My objective in this discussion is to demonstrate that plea bargaining has its roots in a host of often overlooked factors which are part and parcel of generally acknowledged improvements in the modern criminal process. That is, plea bargaining is a product of the very nature and structure of the modern criminal process rather than a result of extra-legal factors or

organizational pressures that have caused the criminal process to deviate from its true purposes. In elaborating this thesis, I do not mean to give the impression that I think plea bargaining is either inevitable or desirable. Indeed, I think it is neither. But I do want to emphasize that the factors that give rise to plea bargaining are intertwined with a host of factors that are generally regarded as highly desirable. In our quest for perfect justice, we have constructed an elaborate and costly criminal process. When this reality confronts the longstanding discretion granted to prosecutors, plea bargaining emerges. I do not believe that plea bargaining can be eliminated or even substantially reduced over the long run, without either significantly restricting prosecutors' discretion or relaxing the rigorous standards that currently infuse the criminal process. Despite a great deal of opposition to the practice of plea bargaining, I see little support for either type of these fundamental changes. More generally, the policy debate over plea bargaining has all too often taken place in a vacuum, neither placing bargaining in a broad perspective nor seriously contemplating the nature and implications of a criminal process that could handle cases expeditiously in the absence of plea bargaining. Nor, as I suggested at the outset, has plea bargaining been treated as part of a broader process of negotiation that permeates the entire criminal process. This no doubt goes a long way in explaining why so many policies banning plea bargaining have had such short lives.

REFERENCES

- ALSCHULER, Albert W. (1968) "The Prosecutor's Role in Plea Bargaining," 36 *University of Chicago Law Review* 50.
- _____ (1975) "The Defense Attorney's Role in Plea Bargaining," 84 *Yale Law Journal* 1179.
- _____ (1976) "The Trial Judge's Role in Plea Bargaining," 76 *Columbia Law Review* 1059.
- _____ (1979) "Plea Bargaining and Its History," 13 *Law and Society Review* 211.
- BLUMBERG, Abraham (1967) *Criminal Justice*. New York: Quadrangle.
- CHURCH, Thomas, Jr. (1976) "Plea Bargains, Concessions and the Courts: Analysis of a Quasi-Experiment," 10 *Law and Society Review* 377.
- COLE, George (1970) "The Decision to Prosecute," 4 *Law and Society Review* 331.
- DAMASKA, Mirjan (1973) "Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Contemporary Study," 121 *University of Pennsylvania Law Review* 506.
- DAVIS, Kenneth Culp (1971) *Discretionary Justice: A Preliminary Inquiry*. Urbana, Illinois: University of Illinois Press.
- DAVIS, William II (1974) *Nolle Prosequi in the Sixth Circuit Court: Prosecutor Discretion to Dispense with Charge*. Paper on file at the Yale Law Library.
- EISENBERG, Melvin A. (1976) "Private Ordering Through Negotiation: Dispute Settlement and Rule Making," 89 *Harvard Law Review* 376.
- EISENSTEIN, James and Herbert JACOB (1977) *Felony Justice*. Boston: Little, Brown and Co.
- FEELEY, Malcolm M. (1975) "The Effects of Heavy Caseloads." Paper presented at the annual conference of the American Political Science Association.

- _____ (1979) *The Process is the Punishment: Handling Cases in a Lower Criminal Court*. New York: Russell Sage Foundation.
- FLEMING, Macklin (1974) *The Price of Perfect Justice*. New York: Basic Books.
- FRIEDMAN, Lawrence (1979) "Plea Bargaining in Historical Perspective," 13 *Law and Society Review* 247.
- FRIEDSON, Eliot (1970) *Professional Dominance*. Chicago: Aldine Publishing Co.
- GOLDSTEIN, Abraham S. (1981) *The Passive Judiciary*. Baton Rouge: Louisiana State University Press.
- _____ and Martin MARCUS (1977) "The Myth of Judicial Supervision in Three 'Inquisitorial' Systems: France, Italy and Germany," 87 *Yale Law Journal* 240.
- HALLER, Mark (1970) "Urban Crime and Criminal Justice: The Chicago Case," 57 *Journal of American History* 619.
- _____ (1979) "Comment: Urban Courts," 13 *Law and Society Review* 273.
- HEUMANN, Milton (1975) "A Note on Plea Bargaining and Case Pressure," 9 *Law and Society Review* 515.
- _____ (1978) *Plea Bargaining: The Experiences of Prosecutors, Judges, and Defense Attorneys*. Chicago: University of Chicago Press.
- _____ and Colin LOFTIN (1979) "Mandatory Sentencing and Abolition of Plea Bargaining: The Michigan Felony Firearms Statute," 13 *Law and Society Review* 373.
- LANGBEIN, John H. (1974a) "Controlling Prosecutorial Discretion in Germany," 41 *University of Chicago Law Review* 445.
- _____ (1974b) *Prosecuting Crime in the Renaissance: England, Germany, and France*. Cambridge, Mass.: Harvard University Press.
- _____ () "The Criminal Trial Before the Lawyers," 45 *University of Chicago Law Review* 263.
- _____ (1979) "Land Without Plea Bargaining: How the Germans Do It," 78 *Michigan Law Review* 204.
- _____ and Lloyd WEINREB (1978) "Continental Criminal Procedure: Myth and Reality," 87 *Yale Law Journal* 1549.
- LARSON, Magali S. (1977) *The Rise of Professionalism: A Sociological Analysis*. Berkeley: University of California Press.
- MATHER, Lynn (1979) *Plea Bargaining or Trial*. Lexington, Mass.: Lexington Books.
- MILLER, Herbert S., William F. McDONALD and James A. CRAMER (1978) *Plea Bargaining in the United States*. Washington, D.C.: National Institute of Justice.
- MOLEY, Raymond (1928) "The Vanishing Trial Jury," 2 *Southern California Law Review* 97.
- NARDULLI, Peter (1978) *The Courtroom Elite*. Cambridge, Mass.: Ballinger Publishing Co.
- _____ (ed.) (1979a) *The Study of Criminal Courts: Political Perspectives*. Cambridge, Mass.: Ballinger Publishing Co.
- _____ (1979b) "The Caseload Controversy and the Study of Criminal Courts," 70 *Journal of Criminal Law and Criminology* 125.
- ROSETT, Arthur and Donald CRESSEY (1976) *Justice by Consent*. Philadelphia: Lippincott.
- RUBENSTEIN, Michael and Terressa WHITE (1979) "Plea Bargaining: The Alaska Experience," 13 *Law and Society Review* 367.
- SKOLNICK, Jerome (1967) "Social Control in the Adversary System," 11 *Journal of Conflict Resolution* 52.
- UTZ, Pamela (1978) *Settling the Facts*. Lexington, Mass.: Lexington Books.
- VERA INSTITUTE, revised edition (1980) *Felony Arrests: Their Prosecution and Disposition in New York City*. New York: Longman, Inc.
- WEINREB, Lloyd (1977) *Denial of Justice*. New York: Free Press.