PLEA BARGAINING IN HISTORICAL PERSPECTIVE

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This paper, using mostly data drawn from a study of the criminal work of the Superior Court of Alameda County, California, from 1880 on, explores the history of plea bargaining. Plea bargaining, it turns out, was used in Alameda County from at least 1880, though it was by no means as common in the late 19th century as it is today. There is also ample evidence of "implicit plea bargaining," that is, pleading guilty in expectation of a lighter sentence. The data from this study suggest that plea bargaining cannot be explained simply as a reaction to crowded court conditions. It is connected with structural and social changes in criminal justice, in particular, the rise of professional police and prosecutors.

The history of plea bargaining is a fairly blank chapter in the history of criminal justice. This is hardly surprising since, until recently, the history of criminal justice itself was quite generally neglected. Furthermore, the materials are local and elusive. Of course, there are scattered remarks about how and why the system began, but most are nothing more than guesswork.[1] One law review note put together a rather skimpy collection of cases from the nineteenth and twentieth centuries. These were supposed to show that plea bargaining had deep roots in the past (Wishingrad, 1974). Actually, many of the cases were not about the bargained plea at all but about inducements to turn state's evidence.[2] None has much to say about bargaining patterns in the trial courts. We cannot tell if the cases represent isolated situations only, or whether they can be compared with modern practice. Milton Heumann (1975) has written the only *quantitative* historical study of plea bargaining. He feels plea bargaining is at least as old as the end of the nineteenth century. Although his study is valuable, he has no *direct* evidence of plea bargaining and can only infer it from a high rate of guilty pleas. Later I will discuss whether this assumption is justified.

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[1] Bond (1975:11-12) states that "plea bargaining is not a new phenomenon. It apparently originated in seventeenth century England as a means of mitigating unduly harsh punishment." But it is unrealistic to think in terms of such long lineage.

[2] See, e.g., *Camron* v. *State* (32 Tex. Crim. 180, 22 S.W. 682, 1893); a clearer case of plea bargaining was *Myers* v. *State* (15 Ind. 554, 18 N.E. 52, 1888).

What we have does suggest that there was some sort of plea bargaining in the nineteenth century, at least in certain places. As far as I know, systematic studies go back no earlier than 1880; but there are allusions to plea bargaining in the 1860s. One is English: a letter from the Home Office to a magistrate in Southwark complaining about the practice. Offenders (the letter said) were eagerly pleading guilty to the charge of "stealing from the person" in order to avoid the charge of robbery, which carried a heavier penalty. "Permission to plead guilty followed by a trifling sentence," said the Home Office sternly, was no deterrent to crime at all.[3] In New York, at roughly the same time, we are told that the district attorney encouraged defendants to plead guilty to lesser offenses. Such bargains were "always under the table" (Miller, 1977:80). In the early twentieth century, the practice was common in some cities and critics already blamed it on congestion in the courts. An editorial in the Boston *Transcript*, about 1910, complained that "Armenians, Poles and Greeks" were given light treatment for assault during times of labor troubles. The district attorney had no time to worry about assault; to make way for "murders and other great cases," he was "apparently obliged to throw overboard, in order to lighten the ship, a very large proportion of the petty cases, or at least agree to settlements." Defense attorneys used delay as a club to "force a compromise with the district attorney" (*Journal of Criminal Law*, 1910).[4] In the 1920s and 1930s, plea bargaining was more widely discussed; data about the practice began to appear in studies, articles, and crime commission reports (Miller, 1927; Morse and Beattie, 1932:137-38; see Haller, 1971).[5] And, of course, from the 1950s on, plea bargaining has become famous (or notorious), and has given rise to an enormous literature (see, e.g., Rossett and Cressey, 1976; Newman, 1966; Kaplan, 1977; Klein, 1976; Heumann, 1978; Alschuler, 1976).[6]

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[3] Public Records Office, Home Office Papers No. 60, Vol. 7, p. 57 (from H. Waddington, Whitehall, to T. B. Burcham, Esq., Southwark, Sept. 16, 1862).

[4] Lowrie (1912:17) tells about a "professional" in California who had "taken a plea" and gotten a low sentence for burglary. Lowrie himself, against his lawyer's advice, stood out for trial and got 15 years.

[5] Clark and Shulman (1937:188-89) studied the Superior Court for New Haven County, Connecticut, in the 1920s, where they found that pleas of not guilty "constituted 53.2 percent of the total of the recorded first pleas at New Haven," but only 21.3 percent of the "total of the recorded final pleas." In other words, much plea changing took place. Most changes were to pleas of guilty as charged, but a significant minority were to guilty of a lesser offense or to fewer charges.

[6] There are also several good broader studies of criminal justice, which have valuable material on plea bargaining, e.g., Eisenstein and Jacob (1977);

I. PLEA BARGAINING IN ALAMEDA COUNTY: THE DATA

My material on plea bargaining comes out of a larger study of criminal justice in Alameda County, California, from 1880 on. The material includes a random sample of felony cases in Superior Court between 1880 and 1970. The registers provided basic facts about the cases; the case files themselves put flesh on these rather bare bones. Sometimes, newspapers filled in more details.

Of course, all this is documentary evidence. Most of it, indeed, is in the form of official records. Can we be sure we know plea bargaining when we see it? The answer, for the most part, is yes. Some cases have unambiguous signs—most notably a change in plea from *innocent* to *guilty of a lesser charge*. Table 1 shows how many defendants initially pleaded guilty in Alameda County Superior Court and how many changed their pleas from innocent to guilty. If we add the two together, we see that most cases have ended with *some* kind of guilty pleas since the early twentieth century and the number has risen steadily. *Initial* pleas of guilty crested (in 1930-49) and have

TABLE 1

TYPES OF PLEAS IN A SAMPLE OF FELONY CASES IN THE SUPERIOR COURT OF ALAMEDA COUNTY, CALIFORNIA, 1880-1974 (PERCENTAGES)

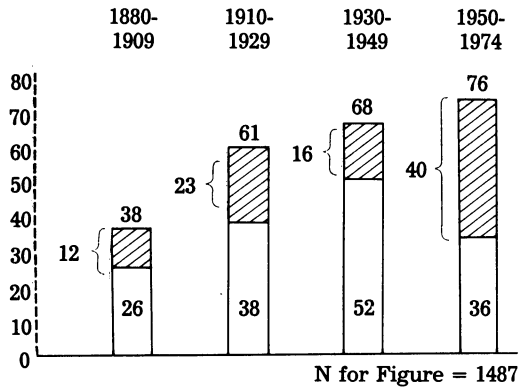
	1880-1909	1910-1929	1930-1949	1950-1974
Plea				
Initial plea of guilty:				
to offense charged	25	37	47	29
to reduced charge	1	1	5	7
Initial plea of innocent changed to guilty of:				
offense charged	8	19	10	18
reduced charge	4	4	6	22
Total final guilty pleas	38	61	68	76
Total final pleas of innocent	62	39	32	24
Analysis of guilty pleas				
Initial plea of guilty	26	38	52	36
Initial plea of innocent changed to guilty	12	23	16	40
Regardless of original plea, final plea is:				
guilty to original charge	33	56	57	47
guilty to reduced charge	5	5	11	29

Levin (1977); on the attitudes of defendants toward plea bargaining, see Casper (1972).

since declined. In the most recent period, the proportion of defendants who pleaded guilty initially was smaller than the proportion who changed their pleas to guilty. As we see in Figure 2, the new plea was often not simply guilty but guilty to reduced charges. This behavior, we can be fairly confident, is the result of plea bargaining.

The Superior Court of Alameda County was organized in 1880. Plea bargaining was present from the very beginning. For example, Albert McKenzie was accused of embezzlement in

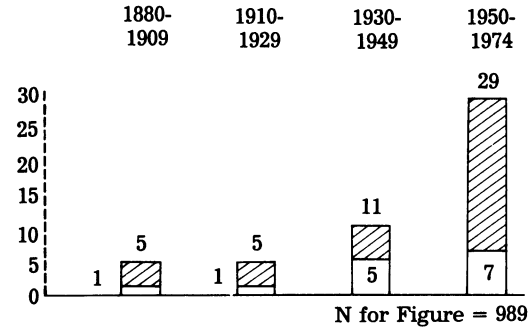
GUILTY PLEAS (INITIAL AND CHANGED FROM INNOCENT) AS A PERCENTAGE OF ALL PLEAS, SUPERIOR COURT, ALAMEDA COUNTY, 1880-1974



KEY: Pleas of Innocent, Later Changed to Guilty; Initial Guilty Pleas

FIGURE 1

PLEAS OF GUILTY TO REDUCED CHARGES AS PERCENTAGE OF ALL PLEAS, SUPERIOR COURT, ALAMEDA COUNTY, 1880-1974



KEY: Pleas of Innocent, Changed to Guilty of Reduced Charges; Initial Pleas of Guilty to Reduced Charges

FIGURE 2

1880. He was an agent of the Willcox and Gibbs Sewing Machine Company. The charge was that he took in $52.50 in "gold coin" and simply kept the money. On December 15, 1880, McKenzie pleaded not guilty. The court set the case down to be tried on February 7, 1881. On that date, McKenzie came to court with his lawyer, asked to withdraw his plea, and offered to plead guilty to embezzling an amount less than $50, "which with the consent of the District Attorney is by the Court allowed." He was sentenced to six months in jail.[7] This was as plain a case of plea bargaining as can be imagined and it was by no means unique. The following year, for example, a defendant accused of grand larceny pleaded not guilty and later changed his plea to guilty of petty larceny (No. 248, 1881). Sometimes the "deal" consisted of forgetting about prior convictions. When Charles Dana was arrested in 1888, he told the policeman "he would go down and plead guilty if we would take the priors off of him" (No. 930, 1888).

These and other cases make clear, then, that plea bargaining is by no means a recent development in Alameda County; it is a century old or older. This fact alone makes it hard to attribute the practice to the crowded dockets of modern cities. The population of the county was about 60,000 in 1880 and the felony caseload was small—about 100 cases a year in the 1880s. Nor can we shrug off plea bargaining as the product of "corruption." No doubt crowded courts, or corruption, provide a soil in which plea bargaining can grow. But we have to look further for its historical meaning.[8]

The table does suggest that plea bargaining has changed its scope over the years. It certainly was not dominant in the late nineteenth century, as it is in some places today. Nor was the form identical. In the late nineteenth century, negotiation usually led to a plea of guilty to some lesser charge. At present, the prosecution often charges the defendant with a long list of offenses (or "counts") and then bargains to drop some or most of them. This was occasionally true in the late nineteenth century, too. For example, in 1881, Ah Oh was charged with burglary, grand larceny, and assault with intent to commit murder, all arising out of the same fracas (Nos. 291, 292, 293). Ah Oh pleaded not guilty, but then changed to a plea of guilty to the assault charge. The prosecution dropped the other two

[7] Crim. No. 51 (1880), Alameda County Superior Court, Case Files. Such cases will be cited hereafter simply by case number and date.

[8] Examples of plea bargaining in the 1880s and 1890s have also been found in other counties in the Bay Area. These counties were thinly populated, and their courts were even less crowded than those of Alameda County.

charges.[9] But this was hardly a pervasive practice. "Overcharging," if it existed at all, was rare. Alschuler, writing in the 1960s, talks about prosecutors who "throw everything in . . . down to and including spitting on the sidewalk." He quotes an Oakland prosecutor as saying: "If a robber forced his victim to move from a front room to a back room, I would probably file a kidnapping charge" (1968:85, 88). There is little direct evidence that this went on in the late nineteenth century. But we cannot be sure that it did not happen once in a while.

Why was a prosecutor willing to bargain? The main reasons are fairly obvious. If he had a weak case, he might try to salvage his situation by persuading the defendant to plead guilty to *something*. William McCormick, a horse trainer, shot and killed a groom on a ranch in 1902 and was charged with murder. The Assistant District Attorney moved in Superior Court to reduce the charge to manslaughter. He admitted he could not prove malice—McCormick had been dead drunk when he killed the groom. The court granted the motion; then McCormick pleaded guilty to manslaughter (see *Oakland Tribune*, May 16, 1903, p. 3). In another case, in 1890, John Ulrich was accused of taking $1,000 from a woman who was waiting for a train. The charge was grand larceny. Ulrich pleaded not guilty. The victim lived in Tulare County and refused to attend the trial because her child was sick. The District Attorney, perhaps doubtful he could convict Ulrich without his star witness, let him plead guilty to petty larceny (No. 1142, 1890).[10]

Judges, as far as we can tell, did not play an active role in bargaining. But they clearly approved. They readily agreed to proposals for changing pleas and only rarely objected. This happened to Ah Young, who was charged with petty larceny but had a prior conviction that made petty larceny a felony. He offered to plead guilty to petty larceny if the prosecution would forget his prior conviction (No. 756, 1887). The judge refused and the defendant went off to Folsom Prison. But generally speaking, judges closed their eyes to whatever was irrational or inconsistent in the system. In McKenzie's case, the judge allowed him to plead guilty to embezzling less than $50 when the evidence plainly showed that he stole either more or nothing. In 1888, John Feno was charged with breaking into a railway

[9] It was not common in the 1880s to charge defendants with more than one "count"; rather, a defendant would be booked in two or more separate "cases," each with its own number. The bargain would consist of an agreement to forget about some of these cases.

[10] He was told he must pay the money back, and assessed a fine of $360 (or 6 months in jail)—a rather light sentence.

car (No. 840). He pleaded guilty to second-degree burglary and the court accepted the plea. But second-degree burglary meant burglary by day; first-degree burglary was burglary at night. This burglary *had* taken place at night; indeed, Feno's companion, E. H. Howard, had already been convicted of this crime.

II. IMPLICIT PLEA BARGAINING

Milton Heumann (1975; see also Alschuler, 1976) uses the phrase "implicit plea bargaining" to describe the situation in which there is no *actual* bargaining but defendants realize they are better off if they plead guilty. Many do plead guilty to reap their reward or at least avoid the "punishment" of a heavy sentence if they go to trial. Prosecutors and judges have a similar understanding, and defense attorneys pass the word to their clients. Hence defendants who plead guilty strike a kind of bargain even though no word of a "deal" has been spoken.

There is no doubt that this occurs today and has gone on for a long time. But it is hard to find much evidence. After all, implicit plea bargaining depends on scuttlebutt among defendants and the state of mind of judges, both of which are hard to show *systematically*. Occasionally, the curtain lifts a bit. Louis Schroeder pleaded guilty to grand larceny in Alameda County in 1910 (No. 4825). Judge Everett Brown told him he would reap a reward for this act of cooperation. Brown said he would be "lenient" and give Schroeder the "full benefit" and "credit" for the guilty plea: "I am going to give you a great deal lighter sentence than I would have given you. You can rest assured if you had gone on the witness stand and told some perjured tale about this affair, you would have received a heavier sentence. . . . You are entitled to the credit, and I am going to give you the credit for having entered a plea of guilty."[11]

We can take Judge Brown at his word. In that year, he granted probation to 42 adults. Nothing in the statute restricted probation to people who pleaded guilty.[12] But Judge Brown apparently felt otherwise. Of the 42 probationers, 41 had pleaded guilty; only one defendant who stubbornly insisted on trial (and lost) was granted probation. Of course, it is possible that

[11] In an interesting and unusual case, Walter T. Teale pleaded guilty to issuing a bad check, under the impression that the District Attorney would recommend probation and he would get it. Teale thought he had a good defense. He pleaded guilty, he said, to spare his old parents grief and to avoid bad publicity. When probation was denied, he demanded the right to withdraw his plea and start over. He got the right—and a jury acquitted him (No. 4226, 1908).

[12] Cal. Pen. Code § 1203, authorizing probation, referred simply to defendants who had pleaded guilty *or* been convicted of crime.

defendants who went to trial were systematically different from defendants who pleaded guilty. But the figures are so lopsided that this seems unlikely. In an arson case in 1910, the two defendants were both young men, both first offenders (No. 4866). One pleaded guilty and was granted probation. The other went to trial and was sentenced to five years in prison. Word about this kind of treatment almost certainly got around to defendants and their lawyers.

Sometimes it is possible to capture the effect of implicit plea bargaining in figures. According to the *Missouri Crime Survey*, an urban defendant reduced his chances of going to prison by about half if he pleaded guilty (for some reason, the rural defendant did not) (Missouri Association for Criminal Justice, 1926:316).[13] That the plea was rewarded was general knowledge. It sometimes meant the difference between life and death. In 1927, the Governor of California commuted the death sentence of Joseph Sandoval, partly because his lawyer, against his wishes, entered a plea of not guilty. Everyone agreed that if Sandoval had pleaded guilty the death sentence would not have been imposed.[14] Table 1 suggests that implicit bargaining was far more common than explicit in the 1930s and 1940s; guilty pleas outnumbered plea changes by more than 3 to 1. In the 1950s, the *Yale Law Journal* sent a questionnaire about sentencing to all federal district judges. Of those who answered, two-thirds said that the defendant's plea was a "relevant factor" in sentencing, but relevant only in one direction: a defendant who pleaded guilty received a "more lenient" sentence than the defendant who pleaded innocent (*Yale Law Journal*, 1956). In "Prairie City" in 1968, it was still the case that only defendants who pleaded guilty had a chance at probation (Neubauer, 1974:241-43).

Milton Heumann has argued that a high percentage of guilty pleas is a sure sign of plea bargaining, explicit or implicit. After all, why *should* a defendant plead guilty unless he expects to get something out of it? He has given up any chance to go free; even in an open-and-shut case there is always a

[13] The survey found explicit plea bargaining, too, in both urban and rural counties. About 25 percent of the urban defendants pleaded "not guilty," later changing their plea to "guilty" (of a lesser offense or "on the nose"); changed pleas amounted to only about 12 1/2 percent in rural counties.

[14] Governor C. C. Young, *Reprieves, Commutations, and Pardons, 1927-1928*, p. 34. Edward Henderson, the District Attorney of Ventura County, wrote that it had "always been the custom . . . to impose a life sentence upon a defendant pleading guilty to murder in the first degree." The trial judge, in his letter to the Governor, agreed: "if Sandoval had pleaded guilty, I am quite sure . . . I would have imposed a judgment of life imprisonment."

chance of acquittal. Some defendants plead guilty out of remorse, self-hate, or sheer hopelessness; or to get things over with without spending money; or to avoid the shame and humiliation of the process. But these reasons hardly explain the behavior of the great mass of defendants.

Guilty pleas have been extremely common in many parts of the country for more than a century. Raymond Moley summed up the available data in 1929. Guilty pleas in the 1920s accounted for many more convictions than did bench or jury trials: 88 percent in New York City, 85 percent in Chicago, 70 percent in Dallas, 86 percent in Cleveland, 79 percent in Des Moines. Nor was this only true in the cities: guilty pleas provided 91 percent of the convictions in rural New York counties, 74 percent in California, and 58 percent in Georgia. In New York State in 1839, one quarter of the cases ended in guilty pleas; by 1850, guilty pleas accounted for half of all convictions; and the percentage kept rising thereafter (Moley, 1929:159-64).

Evidence comes from other studies as well. High rates of guilty pleas mean *some* form of threat, force, promise or inducement, though the precise mix of carrot and stick varies from place to place. In Franklin County, Ohio, in the 1930s, 84.7 percent of the 450 convictions were the result of guilty pleas. Most defendants pleaded guilty "on the nose." What was their reason? Many were already in jail. Prosecutors promised to bring their cases up quickly—but only if they pleaded guilty; the others would be left "to consider their error at length." Young, inexperienced, underpaid lawyers, appointed by the court, served as defense attorneys. Their best strategy was to talk their clients into pleading guilty; this saved time and effort all around (Blackburn, 1935:77-79).

The line between different kinds of "bargaining" is not always easy to draw. We infer implicit plea bargaining when great masses of defendants plead guilty initially. We infer open plea bargaining when defendants change their pleas from not guilty to guilty of some lesser charge or fewer charges. But we know that "bargaining" can take place before any plea is entered; and it is also common for a defendant to change a plea of not guilty to one of guilty as charged. In contemporary studies we can interview, observe, and clear up some of the mysteries. Such techniques are not available for defendants long dead.

Arthur Train, writing about New York in 1906, told about "court officers" who tried to "win fame . . . as 'plea getters' " to make "as good a showing as possible in the number of cases disposed of." Every morning, some of the men visited the

"pens on the floor below the court-room" and haggled with the prisoners over pleas. They sometimes painted a picture of the prosecutors as "fierce and relentless," or described the jury as "a hardened, heartless crew who would convict their own mothers on the slightest pretext." As a result "the entire population of a prison pen" sometimes pleaded guilty "one after another under the persuasion of an eloquent bluecoat assisted by an opportune conviction." What happened to the first batch of prisoners was often decisive; if they got heavy sentences despite their cooperation, the flow of guilty pleas dried up (Train, 1906:223-25).[15]

To sum up: plea bargaining in the literal sense is at least a century old. Implicit plea bargaining may be even older. Implicit plea bargaining was probably more common than explicit in most places—until after the Second World War. In Alameda County, the percentage of *initial* guilty pleas rose dramatically until the 1930s. It then leveled off, and after the Second World War actually began to decline. In the 1970s, the first plea of most defendants was "not guilty;" they then bargained, usually through their lawyers. Wholesale overcharging is probably, in the main, fairly recent.

It is hard to draw lines, but we can roughly divide the ninety years between 1880 and 1970 into three distinct periods. Until the first years of the twentieth century, there was a mixed system. Many defendants took a chance on trial by jury; others plea bargained; and still others pleaded guilty and claimed their "reward."

In the second period, lasting till about 1950, the guilty plea was much more dominant. It was plainly worthwhile to plead guilty. Trials became less common. Fewer cases were dismissed than before. The defendant had less (statistical) chance of acquittal if he went to trial. The guilty plea looked like the one chance for leniency; practically speaking, it was the only road to probation. In the most recent period, plea bargaining took center stage. Defendants, with lawyers at their sides, relied less on "understandings," more on outright negotiation. On the other hand, prosecutors tended to "overcharge" in order to strengthen their own bargaining position. Trial by

[15] Judges in Criminal Term, according to Train, readily accepted pleas of guilty to manslaughter, in murder cases. "The grand jury indict for murder in almost every homicide case on the theory that some evidence may possibly be given at the trial which will warrant such a verdict. A very large proportion of these defendants plead guilty to manslaughter, and are encouraged *in all legitimate ways to do so*" (emphasis added) (1906:224-25).

jury was chosen by a smaller percentage of defendants. The proportion of acquittals shrank.

There is reason to believe that the pattern of dispositions in Alameda County was far from unique. But in the late nineteenth century there were also places where the guilty plea was less common and almost all defendants went to trial. We have to ask, however: what kind of trial? Not the trial of song and story; a tense, dramatic, knockdown and drag-out battle of lawyers. The typical trial was cut-and-dried—and very short, perhaps half an hour at most. In some places, a hastily selected jury heard case after case. The complaining witness told his story; sometimes there was another witness or two; sometimes the defendant brought in witnesses, or made a statement; arguments were made; the jury was charged, retired, voted and returned; the court went immediately into the next case on its list.[16] There are cities today where plea bargaining is not common. But in *none*, apparently, is there a "high proportion of full-length trials." Mostly we find "brief informal trials" (Levin, 1977:86; compare the description of the felony process in Baltimore, in Eisenstein and Jacob, 1977:72).

Perhaps there never *was* a time when full-scale trial by jury was the norm. In any event, the rise of professional police and full-time prosecutors would have put an end to any such golden age. In a system run by amateurs (or part-time officials), without technology or police science—no fingerprints, blood tests, ballistics reports—the classical trial might be as good a way as any to filter out the innocent from the guilty. In the course of the nineteenth century, the center of gravity shifted away from amateurs and part-timers to professionals. As this change took place, society no longer *presumed* that trial was the normal way to deal with people accused of crime. After all, the defendant had already been "tried" by police and prosecutors long before the trial stage. Was this costly, inefficient stage needed at all? Part of the public must have thought that trials were a waste of time and money. Nor was trial by jury the right way to deal with the criminal class. Rules of evidence were too brittle and artificial. The process was too legalistic. The late nineteenth century turned to methods of handling deviants—probation, parole—that struck people as

[16] In the Circuit Court of Leon County, Florida (Tallahassee), which handled serious crimes, there were as many as 6 "trials" a day in the 1890s, complete from selection of a jury to verdict. Yet the court handled other business as well. These cases could not have averaged more than an hour apiece, and probably were even shorter. *Minute Book, Circuit Court*, Leon County, Volume 10.

better designed to find the reformable and reform them. As for "hardened criminals," the police had power everywhere—informally and unofficially—to shortcut many of the fripperies of "due process." The police could be direct, even brutal; and somehow this kind of misbehavior never seemed to evoke much wrath from the better class of citizen. Whatever the official line, people seemed to like toughness and efficiency in dealing with "hardened criminals." The beauty of the jury system was the way it prevented a despot, a King George, from using criminal justice for tyranny and oppression. In the 1890s, this danger seemed remote and archaic; but crime stalked the streets every day.

Plea bargaining does not stand by itself. It is part of a process. The process is not new. Some aspects of the history of plea bargaining are still quite obscure; but enough is known to see its connections with other well-known historical developments—the guilty plea, the routinization of criminal justice, the rise of professional control over crime and punishment. To look at plea bargaining this way does not mean we have to love it—it has grave faults, as everyone knows. But it does lead, I think, to a certain kind of understanding. The historical record supports those who doubt that plea bargaining can be "abolished" by decree.[17] The problems of criminal justice have deep roots, and reform will be difficult and slow.

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[17] On this point, see Church (1976); Heumann (1978:157-65) speaks of the "inevitability of plea bargaining."

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