PLEA BARGAINING: THE NINETEENTH CENTURY CONTEXT

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Plea bargaining apparently arose independently in a number of urban criminal courts in the nineteenth century. These simultaneous developments were presumably related to a number of broad structural changes that characterized American criminal justice at the time. Chief among them were the creation of urban police departments for the arrest of criminals and the development of a prison system for punishment or rehabilitation. Other developments included the reduced role of the victim, the relative independence of criminal justice from legal norms, and the corruption and political manipulation of the criminal justice system. The paper explores ways that such developments may have provided the context for the institutionalization of plea bargaining as a method of case disposition.

In their papers, Albert Alschuler and Lawrence Friedman, despite their use of different sources and types of evidence, reach remarkably similar conclusions concerning the broad outlines of a history of plea bargaining. They 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 nineteenth century. 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 1960s, perhaps related to the growth of street crime.

The papers, in addition, are pioneering attempts to go beyond chronology and to begin explaining the context in which plea bargaining took place. The few existing treatments of the history of plea bargaining have traced the increased percentage of guilty pleas in a jurisdiction and have simply assumed that guilty pleas represented plea bargains. Friedman has gone well beyond this and for the first time has explored in an imaginative way the inducements offered by the prosecutor or judge in exchange for a plea of guilty, at least for one jurisdiction. His paper, then, provides a suggested sequence in which the predominance of certain types of plea bargaining gave way to the predominance of others. Alschuler, taking a quite different approach, has done a masterful job of sketching the legal context before, during, and after the emergence of plea bargaining and has shown how that context changed over nearly two centuries. Hereafter, all studies of the history of plea bargaining will need to take these two papers as models and as starting points.

At the same time, despite the agreement on chronology, the papers provide only a few hints to explain the broader structural factors that underlay the development of plea bargaining in a number of jurisdictions during the same period. The authors can hardly be blamed for this. For, in general, historians have not explored the history of local prosecutors and trial courts during the nineteenth century. As a result, scholars are in a position to do little more than suggest some tentative hypotheses concerning factors that might explain the concurrent rise of plea bargaining in widely separate jurisdictions. If plea bargaining developed relatively independently in a number of local jurisdictions at approximately the same time, however, the development was most likely related to broad structural changes in the role of the courts. What follows, then, are some hypotheses that outline the context within which plea bargaining arose and which may therefore be worth testing in future research.

One factor shaping the criminal courts in the nineteenth century, at least in the major cities, was that the courts lost their dominant position in criminal justice. Through the colonial period, the courts generally controlled their caseloads because they issued arrest warrants on complaint of aggrieved citizens and because the rudimentary enforcement officers, such as constables, were generally agents of the courts. By the 1840s and 1850s in the larger cities and by the 1870s in middlesized cities, however, modern police departments were created to exercise patrol and detective functions (Lane, 1967; Richardson, 1970). Concurrently, full-time prosecutorial staffs developed and often handled charging decisions, at least in serious cases. Although there were close relations between courts and police—indeed, the lower police justice courts were often located in the stationhouses—nevertheless the arrest rate increasingly reflected police department policies. Charging decisions often rested with the staffs of the prosecutors. As a result, the control that courts exercised over caseloads declined.

If changes occurred in caseloads, they also occurred in case dispositions. Before the nineteenth century, courts had available a number of dispositions, including an order for restitution to the victim (Nelson, 1978:168-69). The nature of the penalties placed almost no limits on the number of persons who might receive any particular sentence. But in the nineteenth 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 into sentencing. Although

prison advocates held out great hopes for the new institutions as a humane system for rehabilitation, prison populations soon exceeded the capacity of the facilities. Since it was often not possible to imprison all persons arrested for imprisonable offenses, the function of the courts presumably was one of determining which defendants would wind up in prison from among the many who were potentially eligible.

In short, two major changes in the criminal justice system in the nineteenth century were the creation of modern police systems for the apprehension of criminals, on the one hand, and the development of imprisonment as a standard disposition, on the other. It is reasonable to suspect that the concurrent rise of plea bargaining was in some way related. The courts lost their dominant position in the system and, instead, became processing agencies standing between an expanding caseload over which they exercised minimal control and a relatively rigid prison system that could not admit all who might be eligible. One response of the system was a high rate of dismissals, so that often the majority of arrests never came to court for trial or sentencing. Another response, conceivably, was plea bargaining.

The same factors that reduced the role of the courts also tended to reduce the role of crime victims. Although the victim was still important in instituting a case by reporting an incident to the police, he lost his functions as an investigator, no longer secured an arrest warrant from the court, and played little part in preparing a case for trial. Such roles were assumed by police and prosecutors. With the abolition of restitution as a standard penalty, the victim lost a direct interest in the outcome. 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. Presumably the reduced role of the victim created a situation in which the full-time actors—the police, prosecutors, and judges—could develop methods of case disposition more in keeping with the needs of the system and less responsive to the victims.

There was a second characteristic of the criminal justice system that may also have been relevant: courts, police, and prosecutors operated independently of forces that might have imposed a primarily legal orientation upon law enforcement. This is highlighted in Alschuler's article, for instance. He reports that during the decades after the Civil War—the period when plea bargaining was becoming institutionalized—appeals courts universally disapproved of the practice. In short, at the

time when plea bargaining was becoming the standard system of case disposition in the criminal courts of many localities, plea bargaining was illegal.

This paradox can be understood only as part of a general lack of legal orientation of the criminal justice system in many urban jurisdictions. The new police departments recruited men from a blue-collar background, who were often immigrants and usually had no formal schooling beyond the age of 13 or 14. Such recruits were started on the street without a formal program of training, for even rudimentary police academies did not appear until the twentieth century. Clearly, then, policemen were not expected to know much law (Haller, 1976; Miller, 1975). Beyond this, in the lower courts, which held preliminary hearings in felony cases and decided the bulk of cases (misdemeanors and ordinance violations), the justices were mostly nonlawyers. Defendants, in turn, often appeared in court without attorneys, and even in felony cases a defendant might well be unrepresented. (Public defender offices did not arise until well into the twentieth century.) As a result, defendants were often in no position to offer a legal defense (Smith, 1924). Finally, and largely for the same reason, during the nineteenth century appellate review of criminal cases was rare (Friedman, 1973:505).

A specialized criminal bar, of course, had appeared in major cities by the late nineteenth century. But many of its members were more likely to advertise their political connections and court influence than their legal knowledge. Consistent with this, the criminal bar seems to have attracted a disproportionate number of attorneys who had low social status because of their ethnic backgrounds and attendance at less prestigious law schools. The elite bar, then, looked down upon the criminal bar and criminal courts, only rarely represented clients in routine criminal cases, and knew little about the realities of criminal practice. This is highlighted by the studies of the criminal courts sponsored by that elite in the 1920s. The studies discovered the reality that in the urban criminal justice systems most arrests resulted in dismissals of the charges, while most cases brought to court were disposed of by pleas of guilty, often to lesser charges. Although this had been standard for at least a generation, the elite bar reacted with surprise and shock (Pound and Frankfurter, 1922; Missouri Association for Criminal Justice, 1926; Illinois Association for Criminal Justice, 1929).

In short, plea bargaining was not an anomalous departure

of the courts from legality but part of a situation in which criminal justice was only minimally oriented toward legal norms. Criminal justice was, to a greater or lesser extent, outside the effective supervision of appellate courts, scorned by the elite bar, and dominated by actors neither trained in law nor oriented toward legality.

The relative lack of legal orientation was only part of the context within which plea bargaining developed. Despite wide variations between cities, the criminal justice system was more corrupt in the late nineteenth century than it is today—and perhaps more corrupt than it had been earlier. Moreover, late nineteenth-century cities were noted for the rise of local political organizations, often called political machines, organized from the grassroots up and based upon the exchange of favors for votes. Many of the positions in the criminal justice system were bestowed as rewards for political service, while politically influential fixers, saloonkeepers, bailbondsmen, and others influenced the outcome of cases to reward political activity or provide favors to constituents. In many cities, for instance, courts closed on election day while judges and court officials performed political duties in the neighborhoods; policemen sold tickets to political picnics and banquets, put up political posters, collected campaign money for local politicians, protected criminal activities linked to influential politicians, and accepted money from gamblers, prostitutes, and other lawbreakers; and prosecution officials were generally expected to protect the interests of their political sponsors (Haller, 1970; 1976; Fogelson, 1977: chap. 1).

As a result, the criminal justice system in many cities was not perceived by experienced criminals as a place for legal adjudication but rather as a system for bargaining and manipulation. A knowledgeable offender, once arrested, might start by attempting to bribe the arresting officer. If he failed, he could make further such attempts in the precinct station. Beyond that, a number of strategies remained. He or his friends might call on a politically influential attorney, saloonkeeper, or bailbondsman to approach the prosecutor or judge for a favor. Or a friend might offer the victim restitution in return for an agreement to drop the charges. Even if the defendant was eventually convicted and incarcerated, he was not likely to perceive this as the triumph of legal norms; rather, he would feel that he had somehow failed to find the right levers for manipulating the system. Plea bargaining, then, arose at a time when

the actors in the system perceived it as an arena for deals and favors.

If the factors outlined above provide important parts of the context within which plea bargaining emerged in the nineteenth century, then we should probably not commit the common historical error of reading back into the past the patterns of plea bargaining found today. It is reasonable to expect that at least two types of "plea bargaining" may have coexisted in the late nineteenth century. One stemmed from the fact that defendants were generally poor, sometimes foreign-born, and frequently unrepresented by an attorney. Their guilty pleas often reflected a railroading of the defendant by a variety of threats and promises that the defendant would be in no position to evaluate or resist. Another type, stemming from the political or corrupt nature of criminal justice in many cities, would reflect an agreement in which the exercise of political influence or the use of bribery would be part of the deal. There may also, of course, have been instances of plea bargaining more analogous to contemporary practice, in which a defendant, represented by an attorney, agreed to a plea of guilty with some reasonable understanding of the alternatives. Indeed, Friedman's article suggests that this was the case in Alameda County. It is not possible, at any rate, to understand plea bargaining in the past simply by counting the percentage of cases disposed of by guilty pleas. We will need to find other historical sources that can uncover the nature of the bargaining process and the mechanisms by which defendants were induced to plead guilty.

Modern studies of plea bargaining have generally shown that the location of bargaining in the system, the types of inducements offered, and the roles of the various actors are all embedded in the broader context of the formal and informal criminal justice system. Similarly, we must expect that the rise of plea bargaining in the nineteenth century was related to larger changes in the criminal justice system. Two major changes were crucial: the creation of modern police departments and full-time prosecutors to bring defendants into the system, and the development of incarceration as a standard penalty for crime. In the process, the courts became agencies for processing some, but not all, eligible defendants into prisons. Because crime victims became increasingly peripheral, the professionals could determine charges and sentences based upon the needs of the system rather than the interests of victims. The courts could also adopt informal procedures without

much specific concern for strict legalities—relatively independent of appellate review, outside the scrutiny of the elite bar, and under circumstances in which many of the key actors were unskilled in law. In some cities, in addition, the level of corruption in and political influence upon the courts imbued them with a pervasive ethic of deals, manipulation, and favors. Such a context would certainly be fertile soil for the growth of plea bargaining as a system for case disposition.

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