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THE PLEA BARGAIN IN HISTORICAL PERSPECTIVE

INTRODUCTION

A defendant's offer of a plea of guilty, in exchange for lenient treatment by the prosecuting attorney, is commonly referred to as a plea bargain.¹ The practice of plea bargaining, in its myriad forms,² presently accounts for 90 percent of all criminal convictions.³ However, it was not until 1921, when a detailed statistical study of the administration of criminal justice was completed,⁴ that the widespread use of plea bargaining and the decreasing role of jury trials in criminal convictions was discovered.⁵ Prior to 1921, there were virtually no records in existence in the United States to document the extent to which plea bargaining was a factor in the administration of criminal law.

A substantial quantity of legal literature has dissected and analyzed the function of plea bargaining within its contemporary social and constitutional context.⁶ Considerable emphasis has been placed on the increasing volume of criminal prosecutions as the primary reason for the prominence of plea bargaining.⁷ Yet, graphs prepared from the only significant data available for the preceding 80 years (1839-1926) conclusively indicate that there was a uniformly high rate of conviction from guilty pleas in both rural and urban New York.⁸ Furthermore, the absence of a substantial difference between the use of plea bargaining both in sparsely populated rural counties and in New York City illustrates the fallacy of ascribing the root causes of plea bargaining to crowded court calendars.

1. Gentile, *Fair Bargains and Accurate Pleas*, 49 B.U.L. REV. 514 (1969).

2. Moley, *The Vanishing Jury*, 2 SO. CALIF. L. REV. 96, 103 (1928).

3. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967) [hereinafter cited as PRESIDENT'S COMMISSION].

4. Moley, *supra* note 2, at 115.

5. *Id.* at 107.

6. See generally Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968); Note, *Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387 (1970).

7. See, e.g., Alschuler, *supra* note 6, at 51. Note, *The Role of Plea Negotiations in Modern Criminal Law*, 46 CHI-KENT L. REV. 116 (1969).

8. Moley, *supra* note 2, at 107, 109.

The prevalence of plea bargaining in 19th century New York suggests that it can not be adequately understood solely by an analysis of the current practice. Consequently, a study of the historical development of plea bargaining is necessary in order to demonstrate that the bargain is not just an aberration of the proper administration of criminal justice in the 20th century, but is instead a social and legal phenomenon with ancient antecedents.

To contribute to that end, I will attempt to isolate the salient forces and conditions within the criminal law that instigate bargaining, as well as the diametrically opposed forces that operate to prevent any bargaining. An exploration of this ceaseless tension between the rigidity of a structure embodied in custom or conceived by statute and the attempt at flexibility through bargaining is the objective of this paper.

I. THE ORIGINS

A. *The Bargain in Tribal Society*

The earliest view which we obtain of political society shows us in each case the same system prevailing for the redress of wrongs and punishment of offenses, namely, a system of private revenge and personal redress of injuries. Each person avenged, in whatever manner he thought right, a wrong done him by another, and the customs of the tribe sanctioned his doing so with impunity. The idea of retaliation is deeply rooted in man's nature.⁹

A peculiar aspect of this "system of private revenge and personal redress of injuries," which prevailed in tribal societies, was that it was on the one hand a method of punishing a wrongdoer and therefore a deterrent to harmful conduct, and on the other a virtual invitation to corresponding acts of violence. It occupied the unique position of being both a primitive solution to the problem of private injuries, and at the same time, a prime cause of the protracted violence of the blood feud. Moreover, there existed the potential for unrestrained brutality by those applying the sanctions.

A method of limiting the potential severity implicit in a system of private revenge was needed. The most fundamental way to restrict

9. R. CHERRY, LECTURES ON THE GROWTH OF CRIMINAL LAW IN ANCIENT COMMUNITIES 8 (1890) [hereinafter cited as CHERRY].

the devastating impact of this system would have been explicitly to forbid private revenge. However, tribal customs were formulated by an unconscious process, never enacted nor even enunciated, but developed over time by various authors. Therefore, unlike modern legislation, these customs could not be directly altered by fiat. In addition, no central authority was present to monitor the transition. Yet, the inflexible nature of the original system of private revenge necessitated the creation of a more rational and functional mechanism to maintain order and punish wrongdoers.¹⁰ Consequently, an alternative procedure became juxtaposed with the existing pattern of redress, thus permitting a choice of procedures and remedies.

The development began when an injured party exhibited a willingness to accept a monetary payment as a substitute for his right of revenge.¹¹ The wrongdoer thereby had an opportunity to avoid the revenge he feared by offering a payment to the aggrieved party.¹² Initially, this option was completely voluntary and imposed no obligations on either party.¹³ At its inception, this alternate "bargaining" procedure was protean, taking its character and shape from the adversaries.¹⁴

It lay entirely in the discretion of the injured person whether he would accept pecuniary satisfaction or wreak his vengeance on the wrongdoer. And the latter, if he were strong enough, could safely defy his enemy, and refuse to give any satisfaction. It was altogether a matter of private bargaining; the injured man . . . , according to the fierceness of his anger, exacting whatever sum he could from the wrongdoer.¹⁵

The virtues of the nascent bargaining process were appreciated by the tribal societies, and a desire to substitute this method of redress for the dreaded blood feud developed. Slowly, a more predictable pattern of compensation was established.¹⁶

10. See J. GOEBEL, *FELONY AND MISDEMEANOR: A STUDY IN THE HISTORY OF ENGLISH CRIMINAL PROCEDURE* 26 (1937).

11. CHERRY 10.

12. *Id.*

13. *Id.*

14. J. GOEBEL, *supra* note 10, at 29.

[T]his procedure was originally dominated by the will of the litigants; in short, like modern arbitration between sovereign states, it was utter bargain procedure. Each step . . . depended upon consensual agreement

15. CHERRY 10.

16. See *id.*

In tribal societies the bargaining process served to insulate the wrongdoer from the harshness of the revenge to which he might otherwise have been subject. Also, as in the typical plea bargain, the accused would admit his guilt. His admission was not merely a legal formality; it was the payment of the agreed compensation. Paying this negotiated compensation was the reduced penalty which supplanted the injured party's right to seek physical revenge. The coercive threat of private revenge inherent in this system is illuminated by the old English proverb: "Buy off the spear or bear it."¹⁷

This development in the mode of redress, from an accepted system vigorous in its sanctions and time-consuming in its operation, to a flexible and expedient bargain method of dispute settlement recurs throughout the development of societal controls.¹⁸ When the system of private revenge is replaced by a system of societal revenge, with limits prescribed by a detailed criminal code of behavior and punishments, the ends bargained for will correspondingly change. Therefore, when physical punishment, if utilized at all, takes the form of physical confinement in prison, the bargain itself will no longer be forged by brute force. Instead, the modern prosecutor will threaten the defendant with a long term of years to secure a plea of guilty to a less serious crime with an appreciably shorter sentence.¹⁹ The defendant, eager to reduce his potential liability, is receptive to the offer.²⁰ In this manner the bargain procedure assumes its goals from the elements of whatever system it is compromising.

B. *Anglo-Saxon England: Private Bargain to "Structured Bargain"*

The earliest records of the Anglo-Saxons place them at the stage of development where the right to pursue the blood feud was restricted. As Pollack and Maitland state:

In Alfred's day it was unlawful to begin a feud until an attempt had been made to exact [a] sum.²¹

The system of bargain and compensation had been so successful that

17. W. WINDEYER, LECTURES ON LEGAL HISTORY 17 (2d ed. rev. 1957).

18. See p. 525 *infra*.

19. PRESIDENT'S COMMISSION 10-11.

20. *Id.*

21. 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 450-51 (2d ed. 1968) [hereinafter cited as POLLOCK & MAITLAND].

it was no longer an alternative means of redress; it became the accepted and required mode of procedure.²²

Once established in the Anglo-Saxon community, the system's amorphous contours began to attain some structure. To expedite its functioning, a proper compensation payment was probably determined by arbitration.²³ Later, a detailed table of suggested compromises was established to aid the private bargainers to reach an agreement.²⁴ In this next stage

a scale of compensation [is] fixed by custom or enactment for death or minor injuries, which may be graduated according to the rank of the person injured. Such a scale may well exist for a time without any positive duty of the kindred to accept the composition it offers. It may serve only the purpose of saving disputes as to the proper amount to be paid when the parties are disposed to make peace.²⁵

A continuing struggle between flexibility and structure was apparent. This conflict was manifested by the manner in which the bargain system was being consumed within the customary framework of control. Although the bargain was still being consummated directly between the private parties, the burgeoning community interest in peaceable settlement of private disputes led to promulgation of guidelines to enhance the prospects of a peaceful resolution of the dispute.

Next, the early Anglo-Saxon sovereigns used their limited power and authority to implement and enforce the operation of this formerly optional system.²⁶ Ultimately, the option of pursuing the blood feud rather than accepting the proffered composition payment was withdrawn,²⁷ and the bargain was codified.

The most striking passages of Aethelberht . . . are those which consist of pre-ordained tariffs of payments which are deemed to be "compensation" (*bot*) for various sorts of wrongs A great many provisions . . . set out the compensation The list begins at C.33 and continues until C.72 with an astonishing catalogue of the various ways of causing grievous bodily harm. . . . [T]he appropriate

22. T. PLUCKNETT, *EDWARD I AND CRIMINAL LAW* 20 (1960) [hereinafter cited as PLUCKNETT].

23. 1 POLLOCK & MAITLAND 46.

24. *Id.*

25. *Id.*

26. PLUCKNETT 20.

27. 1 POLLOCK & MAITLAND 46.

sum of money is attached to every injury—"for each of the four first teeth, six shillings; for each of the teeth which stand next to them, 4 shillings. . . ."²⁸

The progression thus far had been an evolution from the blood feud, to purely private bargain and compensation, and then arbitration, followed by a standardized table of compensations. It appears that even a primitive society is repelled by *ad hoc* private bargaining in a penal system. This disfavor becomes more pronounced with the introduction of the state as a participant and merely ersatz victim.²⁹ Nevertheless, even without those considerations, an originally formless bargain process had become rigidly structured. Part of the utility of the bargain procedures had been its adaptability to the exigencies of the occasion, developing remedies consistent with a particular injury. It seems both logical and equitable to have attempted to devise the proper compensation to be paid for an injury only after it had been sustained.

When the private bargain became embodied in enactments, it was no longer private and no longer negotiated. The bargain was frozen into law³⁰ as statutory compensation supplanting the right to seek private revenge.³¹ The exact compensation to be paid for a multitude of injuries was pre-determined. Yet, the bargain cannot really be said to have been completely eliminated,³² for there was a "structured bargain": a schedule of statutory compensations to correspond to particular injuries rather than a system of private vengeance. Modern statutes, such as the Federal Kidnapping Act³³ are clearly descendants

28. PLUCKNETT 11.

29. See p. 506 *infra*.

30. PLUCKNETT 16.

31. 1 POLLOCK & MAITLAND 46.

32. *But see id.* Commenting on the Anglo-Saxons, Pollock and Maitland observed that

[o]nly by degrees did the modern principles prevail, that the members of the community must be content with remedies afforded them by law, and must not seek private vengeance, and that, on the other hand, public offenses cannot be remitted or compounded by private bargain.

Id. Perhaps on a theoretical level this statement is accurate; that is, confining its conclusions to principles. However, in terms of the practices that evolved, this statement is suspect, since the bargain was never really eliminated.

33. 18 U.S.C. § 1201(a) provides in pertinent part:

Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveighed, decoyed, kidnapped, abducted, or carried away . . . shall be punished (1) by death if the kidnapped person has not been liberated unharmed, and if the verdict of the jury shall

of this conception. Under that statute, a defendant can avoid a possible death sentence by either waiving his right to a jury trial or by entering a plea of guilty.³⁴ The concession or statutory bargain offered to each accused, is his life in exchange for a jury waiver or guilty plea.

II. ENGLAND AFTER THE CONQUEST

A. *The State and the Bargain*

The process of controlling the blood feud by bargain procedures and then by an elaborate system of tariffs was an integral part in the development of the Anglo-Saxon remedial system.³⁵ Yet, shortly after the conquest by William in 1066, emerging legal procedures would eradicate the traditional bargaining between private parties by interjecting a third party interest, the Crown.³⁶ From this point forward, the myriad and at times conflicting interests of the king, as an individual, and the nation, as the medium of the judicial process, would shape and alter the administration of justice.³⁷ But it is also important to note that moral and religious ideas contributed substantially to this evolution in legal procedures.³⁸

To alter the prior legal and customary arrangements that existed during the Anglo-Saxon period, the English sovereign needed a legal principle to attack the old order, and the notion of the "King's Peace"³⁹

so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

See *United States v. Jackson*, 390 U.S. 570 (1968).

34. *United States v. Jackson*, 390 U.S. 570, 571 (1968).

35. See p. 503 *supra*.

36. PLUCKNETT 24.

It was the intrusion of the crown into the field of public affairs, and especially the dogma that a crime was an offense against the state, that made it possible for us to unlearn a valuable lesson which a thousand years ago would never have been cast in doubt. Indeed, our earliest Anglo-Saxon laws seem innocent of what would have seemed later an elementary distinction . . . it was left for Glanville to announce dogmatically "pleas are either criminal or civil . . ."

Id.

37. CHERRY 97.

38. See p. 507 *infra*.

39. 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 47-49 (4th ed. 1936). The idea is that a wrong, if committed within the area which can be said to be under the protection of such a person, injures that person. It is an idea common to many primitive codes. To this idea we must look for one of the origins of what will become, with the growth of royal justice, an environment as necessary and as natural as the air we breathe—the King's Peace.

Id.

was selected for this purpose. The "King's Peace" was a fiction devised to serve as the rationale for the expansion of the King's dominion, as well as the justification for usurping the jurisdiction of the local feudal courts. Initially, the concept was limited to an actual invasion of the King's rights.⁴⁰ However, as the legal practitioners gained more sophistication, they always alleged that there was a breach of the "King's Peace", although, in fact, there may not have been any such violation.⁴¹

It cannot be gainsaid that the technical injury to the state, in the person of the King, is of a dubious character. Yet, the inclusion of this third party into the judicial equation profoundly influenced the judicial process. In effect, any possibility of resolving a conflict between the accused and the injured party by direct discussion and agreement was threatened. Since the state had sustained no physical injury, it found the process of conciliation foreign and offensive to its dignity.⁴² The state, therefore, tended to be inflexible with its legislation designed to apply to future conflicts and not necessarily suited to present ones. When a law was actually broken, a disposition not wholly consistent with that standard would, from the state's point of view, impugn its authority. The state's injury thus was derived from the compromise of the enforcement of its rule, rather than the actual breach of its command. This pressure for conformity to the state's formula necessitated the development of an alternate procedure which could have approached congruity with reality. "It was laid down by Bracton that the King did not give wager of battle; and it was obviously still more beneath his dignity to make a bargain for the life of a malefactor."⁴³

The words of Bracton signaled the demise of any overt system of bargaining. The tone was one of moral rectitude, expressing personal and official resentment. The assertions Bracton made with certitude worked against the court's ability to incorporate supplementary practices. For when the bargain procedure develops with knowledge of judicial hostility to compromises, its settlements will be consummated directly between the aggrieved party and the alleged wrongdoer without any participation or supervision by the court. Thus, by not acknowledging the necessity for some flexibility through bargaining, the court sacrifices its control of the bargains.

40. CHERRY 94.

41. *Id.* at 96.

42. *Id.* at 98.

43. *Id.*

B. *Religious Ideas and the Bargain*

Basic to the system of bargain and reparation, whether negotiated by the parties or reduced to a structured bargain by enactment, was the avoidance of severe physical sanctions. Initially, relief was sought from private revenge and the blood feud. Now, there was a new threat based on religious ideas from the East which were brought to England by the crusaders.

[T]he Oriental code of the Jewish laws, the laws of physical retaliation, the eye for an eye and the tooth for a tooth, law closely related to the hideous conception of hell fire, dominated the moral sense of Western Europe, producing not only a distinction between acts of violence and breaches of social contract, but proposing physical penalties of horrible mutilation and death for the payments which among the Western peoples had hitherto satisfied all the wrongs and inconveniences of society.⁴⁴

What was formerly a bargain procedure and then a system of discounted penalties would assuredly be disfavored in such a retributive climate. A flexible system of dispute settlement and compensation asserting boldly a relativist position, bending its contours to utilitarian ends, stood as an affront to the emerging standards of justice. Sanctions premised upon ethical and moral evaluations of proper versus deviant conduct permitted no discretion. Compromise of the legal and moral standard was in essence a breach of a moral duty itself by the guardians of the commands. Human compassion or administrative convenience could not be substituted for the law of the state.

The reasons for the rejection of bargained settlements were inherent in this growing demand for severe punishments related to degree of blameworthiness. Because of these pressures, the flexible bargain procedure was excised from the accepted legal machinery. It was viewed as a primitive artifact, a residue of a remedial system that was not to be resurrected.

A combination of an inflexible system of redress with a potentially severe arsenal of punishments resulted in the same environment that had earlier spawned the bargain procedure in tribal society. If the pattern of development in tribal communities has any universal validity, it suggests that bargain procedures would covertly modify the impact of "royal" justice without necessitating a change in rhetoric.

44. J. JEUDWINE, *TORT, CRIME, AND POLICE IN MEDIEVAL BRITAIN* 87 (1917).

C. *English Courts and the Bargain*

In the 15th and 16th centuries a decided escalation appeared in the severity of punishments inflicted for crimes.⁴⁵ As might be expected from our observations of the movement from private revenge to a system of compromises, alternate bargaining procedures reemerged despite official reproach. A variety of compromises and bargains functioned as an outlet for the trial system and a positive force of justice and equity.

The English rule on agreements that interfere with criminal prosecutions was

that an agreement to stifle a prosecution is unlawful, and the earliest known variety of it goes back very far in the history of English law. Theft-bote, or the re-taking of one's chattel from a thief in order to favor and maintain him, was a heinous offense, and a judicial decision was needed to settle that the punishment for it was not capital.⁴⁶

Sir Stephen was in accord concerning the ancient offense of theft-bote, but uncertain as to the modern laws on agreements in restraint of misdemeanors.⁴⁷ He was, however, unable to determine if the agreements were illegal, void against public policy or permitted under specific circumstances. His confusion was justified in light of the meandering path taken by the courts in this area.⁴⁸ They struggled to reconcile legal theory with actual practice; for as the gap widened, it could no longer be intelligently ignored.

Logically, the bargains should either have been explained in terms of the accepted practices, or condemned with indignation. However, the courts proceeded along a middle path, developing a comprehensive set of somewhat contradictory rules in cases involving compromises of misdemeanors.⁴⁹ When dealing with matters of less gravity than felony offenses, the courts were more open and receptive to bargains. Instead of dogmatically applying legal rules, they examined the particular circumstances surrounding the bargain. The courts

45. J. HALL, *THEFT, LAW AND SOCIETY* 86 (1935).

46. P. WINFIELD, *THE PRESENT LAW OF ABUSE OF LEGAL PROCEDURE* 117 (1921).

47. 1 J. STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 501-02 (1883).

48. P. WINFIELD, *supra* note 46, at 117, 128-30.

49. *Id.*

ultimately carved out an area within which they could feel comfortable with a bargained settlement. The judicial rule-making process had classified enough factors by 1844 for the court in *Keir v. Leeman*⁵⁰ to formulate a standard:

The law will permit a compromise of all offenses though made the subject of a criminal prosecution, for which offenses the injured party might sue and recover the damage in action, this being the only manner in which he can obtain redress. But if the offense be of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it.⁵¹

The distinction is significant in its implicit recognition that the injury to the state in most cases is a fiction, and therefore the party actually sustaining the injury should have some latitude in seeking redress. However, such crimes as rioting or assaulting a public official clearly involve sufficient state interest for the court to refuse to allow a compromise.⁵² The distinction is both logical and practical and represents a positive step from the traditional position's of Glanville and Bracton. However, William Blackstone rejected even this niggardly concession, saying, "[n]ay, even a voluntary forgiveness, by the party injured, ought not in true policy intercept the stroke of justice."⁵³

But anyone familiar with modern plea bargaining practice knows that logical categories do not govern the market place. In the lower courts every character of offense is subject to compromise by the district attorney. The principles of reasoning and consistency dominate the judges, while the lure of a high conviction rate dictates administrative policy and practice.⁵⁴

D. Another "Structured Bargain"

The "*privilegium clericale*" or benefit of clergy, literally exempted members of the clergy from the temporal justice of the state.⁵⁵ The church reserved the prerogative to punish its own members in ecclesiastical courts. However, as circumstances developed at common law,

50. 6 Q.B. 308 (1844).

51. P. WINFIELD, *supra* note 46, at 134.

52. *Id.*

53. 4 W. BLACKSTONE, COMMENTARIES *364 [hereinafter cited as BLACKSTONE].

54. A. TRAIN, THE PRISONER AT THE BAR 223 (1925).

55. BLACKSTONE *365.

this closely defined class of persons was to be materially expanded to serve an additional function.

To fully comprehend this proliferation, it is necessary graphically to review the severity of the punishments that became the staple of the criminal justice system. The previously discussed Eastern influences which followed the Crusades, adumbrated this trend.⁵⁶

Moreover, it seems to be well established that this increased severity in punishment was not merely a statutory threat. The actual administration of the law was, judged by both earlier and later standards, severe. Thus, it is believed that Henry VIII executed 72,000 offenders during his reign During the same reign boiling to death was legalized by statutes passed in 1531.⁵⁷

As a result of these barbarous practices there was a desperate necessity for a means to avert or mitigate the effects. Having seen the system of compensation and bargain that arose at an earlier time to moderate the wrath of blood feuds we would anticipate that an alternate means of procedure would be found⁵⁸ in Tudor England.

The benefit of clergy could be asserted by the accused directly after arraignment, confession, or conviction.⁵⁹ When it was accepted, it served to remove the accused from the King's courts to an ecclesiastical trial.⁶⁰ The reason the defendant would plead the benefit of clergy was so that he could avail himself of the procedures utilized in the courts of the church. The trials were conducted by compurgation and routinely resulted in swift acquittals.⁶¹ The potential for this

56. See p. 507 *supra*.

57. J. HALL, *supra* note 45, at 84-85.

58. See *id.* at 87. Many of the methods devised are not within the scope of this paper, but it is important to note their existence in passing. They further illustrate that whenever the official mode of procedure becomes too harsh, it fosters the growth of counter practices to mitigate the severity of the law.

The juries made their contribution by bringing in verdicts which were palpably not findings of fact, but deliberate misstatements of facts. . . . The judges developed a long series of technicalities in which they effectively submerged statutory provisions of capital penalization.

Id. at 87.

59. BLACKSTONE *366.

60. *Id.* at *368.

61. 2 POLLOCK & MAITLAND 443. The oldest of all modes of proof is compurgation which hardly survived the Norman Conquest in criminal cases. Misuse by the accused and empty appeals to the gods contributed to its demise. The method is explained by Pollock and Maitland.

The swearer satisfies human justice by taking the oath. If he has sworn falsely,

system to function as a buffer against the harsh secular tribunals was obvious, and the category of persons entitled to assert the *privilegium clericale* began to swell.

Originally the law held that no man should be admitted to the privilege of clergy, but such as had the *habitum et tonsuram clericalem*. But in the process of time a much wider and more comprehensive criterion was established: every one that could read (a mark of great learning in those days of ignorance and her sister superstition) being accounted a clerk, and allowed benefit of clergy, though neither initiated in holy orders, nor trimmed with the clerical tonsure. But when learning, by means of invention of the printing press, and other concurrent causes, began to be more generally disseminated than formerly, it was found that as many laymen as divine were admitted to the *privilegium clericale*.⁶²

The benefit of clergy operated as a "structured bargain," analogous to the scale of tariffs that were enacted in Anglo-Saxon times. By pleading the benefit of clergy, the accused received the benefit of the pre-arranged bargain: removal to the ecclesiastic courts in exchange for his plea.

There has thus been a pattern of action and reaction. The parliamentary policy of harsh penalties for criminal offenders embodied in its legislation had its real world consequences modified by a form of plea bargaining. Initially the expansion of the bargain procedures was tolerated, since their operations were limited in scope and maintained a low profile. But it should be evident that eventually the authorities would determine that the process of subversion had become too blatant. When the overt functioning of the bargain mechanism began to have a significant impact on the formal workings of the legitimate system, pressure developed within parliament to create measures to curtail these practices. In fact, the identical social and moral judgments that formed

he is exposed to the wrath of God . . . but in the meantime he has . . . given the requisite proof. In some rare cases a defendant was allowed to swear away a charge by his own oath; usually what was required of him was an oath supported by the oaths of oath-helpers.

2 *id.* at 600.

Ironically, this least-favored method of proof, considered undesirable in the 12th and 13th centuries has not disappeared. Compurgation now exists in the guise of our modern guilty plea which can be more accurately described as a "negative oath of purgation. . . . Though a negative of the oath the plea is in all likelihood its lineal descendant." H. SILVING, *ESSAYS OF CRIMINAL PROCEDURE* 249 (1964).

62. BLACKSTONE *366-67.

the backbone of the original legislation became the basis of an attempt to destroy the practices that were diluting the royal mandate.⁶³

III. AMERICAN DECISIONS: 1804-1927

"In theory there should be no compromises of criminal cases In practice, however, the condonation and compromise of criminal cases is frequent and the methods of evading the clear purpose of the written law are varied."⁶⁴

This third part of the history of plea bargaining will review the opinions of American appellate courts that were confronted directly or indirectly by the plea bargaining process between 1804-1927.⁶⁵ The views expressed by the American judges will reveal whether they have adopted the English doctrines that were opposed to bargained compromises, or whether they have acknowledged plea bargaining as a necessity and have shaped legal theory to reflect that reality. If the decisions of the American courts exhibit disdain for most plea bargaining arrangements, the legislature might eventually be forced to reconcile legal theory and legal practice. The concluding section of this paper will discuss that type of response. Unfortunately, the American decisions on plea bargaining do not fall into a neat chronological pattern. For purpose of analysis, therefore, the opinions will be divided into three groups: those against any compromise or inducement, those giving tacit approval, and those affirming specific practices.

A. Decisions Forbidding Plea Bargaining

The earliest case in the United States which deals with the guilty plea is *Commonwealth v. Battis*.⁶⁶ Though technically reviewing a guilty plea without mention of any bargaining, the court's sincere concern for the quality of the plea and the possibility that it might have been tainted by either a confused or coerced defendant, clearly demonstrates a judicial attitude reminiscent of the policies enunciated by Bracton and Glanville,⁶⁷ an attitude which in principle banished bar-

63. *Id.* at *367. "[A]nd therefore by statute 4 Hem. VIII c.13, a distinction was once more drawn between mere lay scholars and clerks that were really in orders." *Id.*

64. Miller, *The Compromise of Criminal Cases*, 1 SO. CALIF. L. REV. 1, 1-2 (1927).

65. See p. 499-500 *supra*.

66. 1 Mass. 94 (1804).

67. See p. 506 *supra*.

gains from criminal proceedings. The court's deliberate and meticulous investigation puts their opposition to compromises of the criminal process by bargained pleas, beyond cavil and provides an example of a determined effort to enforce a judicial ban on plea bargaining.

In the afternoon of the same day, the prisoner was again brought to the bar, and the indictment for murder was once more read to him. He again pleaded *guilty*. Upon which the Court examined, under oath, the sheriff, the jailer, and the justice . . . as to the *sanity* of the prisoner; and whether there had not been tampering with him, either by promises, persuasion or hopes of pardon, if he would plead guilty. On a very full inquiry, nothing of that kind was appearing . . . the clerk was directed to record the plea on both indictments.⁶⁸

The comprehensive nature of this court's review of the guilty plea in the *Battis* case provides a vivid contrast to the cursory examinations conducted or permitted by other courts. It is evident from the specific questions asked by the court, that any inducements offered to secure a guilty plea would be forbidden.

Two Michigan cases, *Edwards v. People*⁶⁹ and *People v. Lepper*,⁷⁰ interpreted the same statute,⁷¹ and can therefore be examined together. The court in *Edwards* took judicial notice of the circumstances that moved the state legislature of 1875 to action, especially the legislature's desire to prevent prosecutors from utilizing improper means to procure guilty pleas.⁷² Next, the "public policy" doctrine, which demands a clear showing of guilt,⁷³ was cited by the court to supplement its reading of the statute. This doctrine specifically prohibits

68. 1 Mass. at 95 (emphasis in original).

69. 39 Mich. 760 (1878).

70. 51 Mich. 196, 16 N.W. 377 (1883).

71.

The statute referred to says: "That whenever any person shall plead guilty to any information filed against him in any circuit court, it shall be the duty of the judge of such court, before pronouncing judgment or sentence upon such plea, to become satisfied, after such investigation as he may deem necessary for that purpose . . . that said plea was made freely, with full knowledge of the nature of the accusation, and without undue influence. And whenever said judge shall have reasons to doubt the truth of such plea of guilty, it shall be his duty to vacate the same, direct a plea of not guilty to be entered, and order a trial of the issue thus formed." Pub. Acts, 1875, p. 140.

Id. at 197, 16 N.W. at 377.

72. 39 Mich. at 762.

73. *Id.*

bargaining for the substitution of some innocuous charge in place of the original crime that led to the arrest of the accused.

The court's decision in *Lepper*, concerning the necessity to re-view pleas, espoused a policy similar to that evinced in *Battis*. This policy can be characterized as an "affirmative action" program by the court; that is, taking a detached and skeptical view of the guilty plea and subjecting it to strict scrutiny. This procedure was implicit in the Michigan statute, which was enacted to protect the rights of the prisoner as well as the interests of the public.⁷⁴ Of paramount importance to the court was preventing the acceptance of a guilty plea from a prisoner who might otherwise have been vindicated at trial. To attain this end, the Michigan court expected trial judges to protect the defendants by freely exercising their discretionary powers to adjust any unfair results where any doubt existed as to the veracity or voluntariness of the guilty plea. Lastly, as a precautionary measure to insulate their investigation from interference, the *Edwards* court suggested that the trial judge should not rely on the prosecutor's statements concerning the validity of a guilty plea, or even permit him to appear when the defendant was questioned.⁷⁵

Following the rigid posture of the preceding decisions was *Saunders v. State* in 1881.⁷⁶ This case reflected the idea, prevalent when the notion of the "King's Peace" was first postulated, that it is beneath the dignity of the king or the state to bargain. Bargaining was thought to be reserved exclusively for civil litigants. The opinion of the court referred to the Code of Criminal Procedure for the proper standards by which to judge the guilty plea. The statute clearly repudiated bargained pleas, stating:

[N]o such plea shall be received unless it plainly appears that [the defendant] is sane and is uninfluenced by any consideration of fear, by any persuasion or delusive hope of pardon, prompting him to confess.⁷⁷

Despite this unambiguous statutory command, there remained ways for a court to subvert its intent. However, in *Saunders*, the court did not merely pay homage to the statute, honoring form over sub-

74. 51 Mich. at 198, 16 N.W. at 377.

75. 39 Mich. at 763.

76. 10 Tex. Crim. 336 (1881).

77. *Id.* at 338.

stance in order to allow the covert continuance of bargaining. It cited *Battis* as an example of affirmative action without statutory directive, and decided *a fortiori* that its burden was even higher. To accomplish its task the court rejected the "presumption of regularity" that was routinely afforded officials performing their respective duties⁷⁸ thus permitting a careful examination of the actual circumstances that preceded the guilty plea.

Frequently a prosecutor makes promises that he cannot legally guarantee, but which nevertheless induce the defendant to plead guilty.⁷⁹ It is precisely these arrangements that the courts in *Meyers v. State*⁸⁰ and *Mounts v. Commonwealth*⁸¹ attack. The prosecutor may promise to recommend leniency, or simply refrain from making any recommendation—an action which sometimes will be a signal to a trial judge familiar with customary practices. Technically, all is proper, since the judge pronounces sentence on the crime for which the accused was arrested. But in fact, the prosecutor exerts an invisible control over the ultimate sentence.

In *Meyers*, the court boldly asserted a truism: "The agreement by the prosecuting attorney was not sufficient to bar or cut off any right of the state for the reason that the officer has no authority to bind the state by such an agreement."⁸² Although the proposition is self-evident, the decision is significant because the court proceeded to admonish the prosecutor for his actions and allowed the misbegotten guilty plea to be withdrawn. In addition, the court expressed its concern for defendants whose reliance on such promises would prove detrimental should a judge later assert his independence in the sentencing process.

In a similar manner, the court in *Mounts* was worried about prosecutors who are imprudently zealous in their efforts to obtain convictions, and overreach the boundaries of propriety.⁸³ The prosecutor's offer of a lenient sentence to induce a plea of guilty presented the court with a *prima facie* case that justified a withdrawal of the guilty plea.

78. *Id.* at 339-40.

79. PRESIDENT'S COMMISSION 9.

80. 115 Ind. 554, 18 N.E. 42 (1888).

81. 89 Ky. 274, 12 S.W. 311 (1889).

82. 115 Ind. at 557, 18 N.E. at 43.

83. 89 Ky. at 277, 12 S.W. at 311-12.

A particular variety of plea bargaining is involved when a reduced plea is based upon extrinsic factors such as the need for the defendant to appear as a witness or give information about a more important suspect. Here, the state's offer of a reduced charge is contingent upon the defendant's performance in accordance with the plea negotiation. An analagous arrangement occurs when the defendant proposes a guilty plea, but joins that offer with a condition consistent with his interest in a light sentence. For example, in the case of *Cornelison v. Commonwealth*,⁸⁴ the accused pleaded guilty with the intention of avoiding certain standard sentence recommendations by the state prosecutor at the sentencing hearing. The *Cornelison* court repudiated the attempt to enter a plea "special in its character,"⁸⁵ and required either a plea of not guilty or a guilty plea devoid of any special conditions or limitations. The decision is consistent with the ideal conception of criminal justice: impartial and uncompromising, operating in conformity with statutory mandate and making exceptions for no one.

A more sophisticated plea bargain was before the court in *Wolfe v. State*.⁸⁶ The condition upon which the guilty plea rested was "that the court would impose a fine under the plea only in the event that the defendant violated the terms of the agreement."⁸⁷ As in *Cornelison*, the court could find no basis to accept this conditional plea of guilty. To support its decision, the court declared: "[T]he law does not authorize any such agreements as here entered into with the prosecuting attorney, and pleas of guilty can not be accepted on condition"⁸⁸

Enforcement of the positions taken by these decisions required the formulation of a strict standard of review, so that guilty pleas could be effectively supervised by appellate courts. The court's opinion in *Scott v. State*⁸⁹ proposed a comprehensive test:

[T]hat the defendant is sane, and he is uninfluenced in making his plea by any consideration of fear, or by any persuasion, or delusive hope of pardon, prompting him to confess his guilt Over and

84. 84 Ky. 583, 2 S.W. 235 (1886).

85. *Id.* at 592, 2 S.W. at 236.

86. 102 Ark. 295, 144 S.W. 208 (1912).

87. *Id.* at 300, 144 S.W. at 210.

88. *Id.* at 301, 144 S.W. at 210.

89. 29 Tex. App. 217, 15 S.W. 814 (1890).

above the guilty plea the evidence, as we find it in the record, must establish his guilt beyond all question. . . .⁹⁰

Thus in addition to the attempt to eliminate the bargained plea, the *Scott* court exhibited an interest in protecting the integrity of the guilty plea itself, by insisting upon, and closely observing the factual basis of the plea.

The judicial philosophy expressed in these opinions exposing and extinguishing the bargained plea was tersely articulated in *Pope v. State*⁹¹ when the court stated that "[t]he law favors trials on the merits."⁹² Also sustaining this position is *People v. Bonheim*⁹³ decided in the 1920's when the first truly extensive documents and articles appeared illustrating the ubiquitousness of plea bargaining in the courts.⁹⁴ The court asserted that whenever any defense exists, or substantial justice requires a trial, the judge should allow the guilty plea to be withdrawn.⁹⁵ Although the rigid position taken by the courts in this section in opposition to plea bargaining conformed with the legal doctrines inherited from England, it was at variance with the common practice of the prosecuting attorneys. The dilemma presented by this conflict between rules and reality was beyond the ability of the courts to ameliorate, as the cases discussed in the next section indicate. Limited by English precedent and American progeny, the courts could not bridge the gap by judicial construction or interpretation.

B. *Decisions Tacitly Approving Plea Bargaining*

In a corresponding span of years there was a second line of American cases faced with similar bargained compromises of the criminal justice process. Instead of isolating the relevant issues and discussing the conflicting policies, these decisions evaded, obscured or ignored the pertinent questions. Employing diversionary tactics instead of analysis, these courts glossed over coercion, and substituted maxims for reasoning. They were plainly caught between the demands of legal theory and common prosecutorial practices, and valiantly attempted to affirm the former, while not interfering with the latter.

90. *Id.* at 219, 15 S.W. at 815.

91. 56 Fla. 81, 47 So. 487 (1908).

92. *Id.* at 85, 47 So. at 488.

93. 307 Ill. 316, 138 N.E. 627 (1923).

94. *See, e.g.,* R. SMITH, *THE CRIMINAL COURTS* 13 (1921).

95. 307 Ill. at 320, 138 N.E. at 628.

The manner in which the court in *People v. Brown*⁹⁶ viewed the problem of coercion, a central element in the plea bargain, is symptomatic of positions taken by the opinions in this group. Confronted with a situation in which a prisoner pleaded guilty following a conference with the judge, the court summarily dismissed the probable effect of the judge's remarks upon the defendant's decision. It blamed the defendant and excused the trial judge's indiscretion: the trial judge was characterized as being "imprudent enough to intimate he would impose a lighter sentence in case of conviction upon a plea" and the defendant was reprimanded for his "importunities" in approaching the judge.⁹⁷ These opinions demonstrate the propensity of the courts to articulate lofty standards which are then emasculated when individual infractions are declared to fall outside the perimeters of review, or are manipulated to appear consistent with professed policy.

Another well established means of protecting a bargained plea, is to conduct a careful investigation in a manner assured to inhibit complete candor. This technique was utilized and approved in *Bayliss v. People*.⁹⁸ To make its task less arduous, the court accepted a formulation of voluntariness that retreated from the absolute standards applied in *Saunders* thereby carving some room for a "fairly bargained plea" that does not exert "undue influence" on the defendant.⁹⁹ To enforce this elastic measuring rod, the court examined the accused in open court with the prosecuting attorney and other court officers in attendance. In evaluating the effectiveness of this procedure, the court declared that the presence of the prosecutor at the open court examination of the defendant was not sufficient grounds to invalidate the plea.¹⁰⁰ Their conclusion is in marked contrast to the decision in *Edwards*, which determined that a meaningful conference with the defendant could only be attained by excluding the prosecuting attorney. It seems that differing judgments concerning the proper status of a bargaining plea are determinative in a court's approach to a dispute over the validity of such plea. By diluting the standards applied to a review of guilty pleas, the court tacitly approved the extensive use of plea bargaining, and permitted the process to continue unhampered by extensive judicial intervention.

96. 54 Mich. 15, 19 N.W. 571 (1884).

97. *Id.* at 29, 19 N.W. at 579.

98. 46 Mich. 221, 9 N.W. 257 (1881).

99. *Id.* at 223, 9 N.W. at 257.

100. *Id.*

A court seeking to avoid directly addressing the phenomenon of the bargained plea, neither approving nor attacking its use or abuse, is well supplied with legal maxims and presumptions that can be adapted for that purpose. The courts in both *People v. Ferguson*¹⁰¹ and *People v. Coveyou*¹⁰² invoked a presumption of regularity to prevent a careful examination of a guilty plea. In each of these decisions it is difficult to deduce whether there had been a bargain or the plea was in fact voluntary and uninfluenced. All the officials involved in the trial were lauded for their presumed performance and the lower court's determination was upheld. A district attorney cognizant of this relaxed judicial attitude would in the future have considerable latitude within which to conduct his plea bargaining provided that he did not flaunt his procedures and refrained from inordinate charge reductions certain to raise suspicion.

A less subtle means of achieving similar results would be simply to review the factual circumstances, and then either deny that they are as they appear, or transparently explain how influence or coercion is not influence or coercion. This alternative was adopted in *State v. Reininghaus*¹⁰³ where the court was faced with a defendant who claimed he had made an agreement with the district attorney to limit the possible fine to 50 dollars if he pleaded guilty. The testimony showed that the prosecutor intimated there would be a nominal fine, and then the defendant entered a guilty plea. In deciding whether the defendant could withdraw his plea, the court characterized the district attorney's statements as "a mere expression of opinion . . . upon which the defendant had no right to rely, and by which the action of the court cannot be governed."¹⁰⁴ Only by ignoring the tremendous influence and discretionary power of the prosecutor, as well as the omnipotent image he displays to public, could the court minimize the significance of his utterances. Anyone involved in the actual workings of the criminal justice system would not so lightly dismiss the statements of a district attorney. But secure in his position vis-à-vis the prosecutor, the judge glibly expressed amazement at the defendant's naiveté.

Similarly, in *State v. Wyckoff*¹⁰⁵ a defendant pleaded guilty based on a prediction by the prosecutor that a minimum fine be imposed.

101. 48 Mich. 41, 11 N.W. 777 (1882).

102. 48 Mich. 353, 12 N.W. 200 (1882).

103. 43 Iowa 149 (1876).

104. *Id.* at 151.

105. 107 N.W. 420 (Iowa 1906).

The defendant sought to withdraw his plea when a substantial fine was imposed instead. Rather than discussing the propriety of the bargain or the inducement, the court stated that the defendant was not justified in believing that the judge would follow the prosecutor's recommendation, because sentencing is within the legitimate discretion of the court.¹⁰⁶ As a consequence of this insubstantial review, not only were plea negotiations unfettered, but the defendant could become trapped: unable to withdraw what he thought to be a bargained plea he would be forced to accept whatever punishment the court meted out. By not taking a decisive position, the courts permitted the pre-trial period to become a treacherous occasion for the unwary.¹⁰⁷

This policy of equivocation by the judiciary only succeeds in masking serious questions, promoting deceitful practices by the district attorney and virtually leaving the defendant devoid of protection. Instead of curtailing plea bargaining, or sanctioning its use and then openly supervising its operation, the courts in this second group of decisions opt for a third alternative: they extend tacit approval to the arrangements and deny any responsibility for the unfortunate results.

C. *Decisions Approving Plea Bargaining*

Having seen one series of judicial opinions that attempted to eliminate the plea bargain, and a second group embarrassed by plea bargains but equivocal, we will now review opinions which in part affirm the propriety of the bargain procedure. Some of the cases struggle to free themselves from earlier decisions that tended to limit the use of bargain procedure; others create special justifications to support its continued existence. In general, these courts focus upon the quality of the bargain.

1. *General Approval.* In *Green v. Commonwealth*¹⁰⁸ counsel for the defendant argued that "a man has no more right to waive his legal privileges in a capital case than he has to commit suicide; for a plea of guilty is suicide, committed under the color of law."¹⁰⁹ Sixty years after the decision in *Battis*, and in the same jurisdiction, a court might

106. *Id.*

107. *Accord*, *Beatty v. Roberts*, 125 Iowa 619, 101 N.W. 462 (1904).

108. 94 Mass. 155 (1866).

109. *Id.* at 158.

be expected to accept this line of reasoning. However, the court in *Green* cited the common law to justify an acceptance of a voluntary plea of guilty for all crimes, thereby waiving a jury trial. It stressed the right to plead guilty rather than the circumstances surrounding the plea. By shifting its emphasis, the court was preparing a retreat from the strict scrutiny practiced by the Massachusetts high court at the beginning of the 19th century.

In a similar manner, the Indiana court in *Monahan v. State*¹¹⁰ desired to distinguish the facts before it from those in *Meyers*, decided five years earlier. Although there was no trial on the merits, it determined that the defendant was "clearly guilty,"¹¹¹ and had not been the victim of a "fraudulent inducement."¹¹² The court's purpose was to narrow the holding in *Meyers* to its precise facts, and thereby avoid interfering with pleas that had not been induced by a deceptive promise. Since the earlier decision had criticized bargains by prosecutors which purported to predict the maximum sentence imposed upon a guilty plea, the prosecutor would now be able to accept a plea to a lesser charge. He would then be acting within his discretion, and could be confident of the court's support.

This rapid change in position is curious, but a close reading of the opinion reveals a factor that appears to have precipitated the reversal. The court opines that

if the defendants therein are displeased with the punishment, and may, for slight cause or false claim, set aside the judgments, the only final disposition of such cases will be trials upon pleas of not guilty.¹¹³

Clearly, the justices were worried about the burgeoning trial calendars and the ability to process the cases without the use of plea bargaining. They were fearful of the impact of the *Meyers* decision on the administration of criminal justice at the trial level. In order to alleviate congestion, *Monahan* leaves the prosecutor free to influence the defendant's plea with the official tools of his office, provided there is no overt attempt to infringe upon the sentencing discretion of the trial court after conviction on a plea.

110. 135 Ind. 216, 34 N.E. 967 (1893).

111. *Id.* at 219, 34 N.E. at 968.

112. *Id.*

113. *Id.*

In addition to the courts which sought to unshackle themselves from previous decisions, other tribunals not so encumbered directed their attention towards the bargain. They wanted to assure themselves that the defendant received the benefit of his bargain. The expectations of the respective parties, rather than an inflexible conception of the trial as the only correct procedure, became the standard for appraising plea bargains.

Applying the philosophy of the economic market to the courtroom can be harsh, although it is expedient. In *State v. Richardson*,¹¹⁴ the accused received unsympathetic treatment. After a brief conversation with the circuit attorney, the defendant agreed to a vaguely worded offer. He accepted the dismissal of one count, and the attorney's estimate concerning the sentence to be imposed on the second, but, on pleading guilty, received a more severe sentence than he had anticipated. Ignoring the issue of inducement, the court proceeded to explain that a previous conviction should have alerted the defendant to the hazards of plea negotiations. He was presumed to have known the difference between an opinion and a promise and was left to make this difficult legal distinction at his own peril. Thus a principle analogous to "caveat emptor" was to replace judicial scrutiny.

An analogous situation came before the court in *State v. Stephens*,¹¹⁵ where the opinion relied upon was that of a special judge rather than a district attorney. The court exhibited more compassion for the defendant whose rights were compromised by a broken promise, and permitted the withdrawal of the plea. Since the defendant was misled, the court felt constrained to act, attacking the lack of consideration for his plea of guilty, but not the plea bargain itself.

2. "*Special Circumstances.*" Securing evidence about major crime personalities is an onerous assignment, and virtually all the artillery in the prosecutor's arsenal is needed to obtain indictments and convictions. An efficient technique is to offer a plea reduction to organized crime underlings for information regarding their superiors. Courts reviewing these bargains must consider plea bargaining on its merits, balancing the assets and liabilities.

In *Camron v. State*,¹¹⁶ the defendant supplied evidence against his confederates. Instead of the anticipated dismissal of the charges

114. 98 Mo. 564, 12 S.W. 245 (1889).

115. 71 Mo. 535 (1880).

116. 32 Tex. Crim. 180, 22 S.W. 682 (1893).

against him, the defendant was sentenced to two years of confinement. On appeal the court examined the "special circumstances"—the urgent and persistent need for this type of information. It concluded that "public policy" supported this type of agreement, and relied upon contract principles to evaluate the bargain.¹¹⁷

We have witnessed a progression from the close scrutiny of guilty pleas, and the court's rejection of any compromise of bargain in *Battis*, to a court justifying a particular bargain upon public policy grounds. The very willingness of courts to weigh and balance the policies surrounding plea bargaining signalled a fundamental change in judicial attitude. The obiter dictum in *Camron* gives an indication of the extent of this change. In its concluding remarks, the court indicated that it would be prepared to imply a binding agreement from the "mere fact that an accomplice testifies as a witness for the government and fully acknowledges his own participation in the offense."¹¹⁸

The defendant in *People v. Bogolowski*¹¹⁹ changed his plea to guilty and provided essential testimony for the prosecution. The plea bargain was consummated just prior to trial in the casual manner common to these arrangements, but the prosecutor did not keep his word. Citing numerous authorities, including Wharton, Greenleaf and *Camron*, the court was able to find that "judicial necessity and public policy"¹²⁰ justified the bargain. Though not willing to reconstruct the broken bargain, the court permitted the defendant to withdraw his plea, establishing a precedent for the recognition of the plea bargain.

Another situation that can be termed "special" involves violations of the internal revenue laws. Here, rapid and efficient settlements fill the treasury, and not the courts. Although there is admittedly a criminal prosecution instituted against the tax evader, the suit is in many ways akin to a civil action for debt, with the major difference being the identity of the creditor. To provide flexibility, the rigid trial structure must be abandoned.

In *United States v. Bayaud*,¹²¹ a federal court responded to this pressing demand. The court reviewed a bargain initiated by the accused

117. *Id.* at 183, 22 S.W. at 683. "We think where the court sees the contract was made and the defendant acted in perfect good faith, it should be recognized by the court." *Id.*

118. *Id.*

119. 317 Ill. 460, 148 N.E. 260 (1925).

120. *Id.* at 465, 148 N.E. at 261.

121. 23 F. 721 (S.D.N.Y. 1883).

and accepted by the district attorney. The plea bargain consisted of the prosecutor's offer to drop two counts in consideration for the defendants' plea of guilty to another count, and his willingness to allow the defendants to negotiate directly with the bureau in Washington.¹²² When their prospects in Washington proved worthless, the defendants attempted to withdraw their guilty plea. The court, refusing to sustain the motion to withdraw the plea referred to the pertinent statute which encouraged the compromise of criminal cases brought by the Commissioner of Internal Revenue.¹²³

Looking back across a spectrum of divergent opinions, the only constant appears to be the presence of the plea bargain. Yet, it seems that in a span of more than one hundred years only a few courts could affirm an overtly bargained conviction, and those courts only did so because of "special circumstances." The rhetoric of the legal system had triumphed at the expense of the defendant who was forced to confront the reality of the system which included plea bargains. With the failure of the courts either to eliminate or satisfactorily control plea bargaining, only a carefully drafted legislative solution seems workable.

CONCLUSION

Still Another "Structured Bargain"

Thieving is bad, say they, therefore, we will kill all the thieves. This, no doubt, would be an effective remedy if carried out; but, somehow it never was, and never could be, carried out.¹²⁴

Beginning with the most basic legal or quasi-legal system, the system of private revenge common to all tribal societies, there seems to have been a natural proclivity towards the creation of a bargain procedure to mollify the strictures of customary law. The major thrust of this evolution resulted from two defects inherent in the system of private revenge. First, it could precipitate a chain of events stemming

122. *Id.*

123. *Id.* at 723. "The statute (Rev. St. § 3229) permits a compromise of criminal cases of this character to be made by the commissioner of internal revenue"
Id.

124. J. SPENCE, *THE CONSCIENCE OF THE KING* 9 (1889).

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from an initial injury without clearly definable limits, except as determined by the degree of animosity between the parties. Second, it countenanced severe sanctions which were subject to no central authority, and therefore not limited by enforceable restrictions.

To mitigate the potential and actual severity of the penalties, a system of private bargaining introduced the idea of monetary compensation for the aggrieved party in lieu of the traditional right of revenge. The amount of compensation was a function of the anger of the injured party and the wrongdoer's ability to pay. In addition, the consummation of the private bargain itself established that at a particular moment a debt was literally paid, thereby circumscribing the cycle of killings that had plagued primitive communities. In essence, this private compromise represented the definitive and timely decision which is the necessary cornerstone of any legal system and provides the basis for a civil society.

In a similar manner, the development of a comprehensive criminal law and elaborate procedural safeguards, both in England and the United States, resulted in the same weaknesses characteristic of the system of private revenge and personal redress of injuries. Crowded court calendars delayed the rapid conclusion of prosecutions, while legislative sanctions became more severe. These circumstances once again created the conditions precedent to widespread resort to plea bargaining.

Although the early American decisions exhibited judicial disdain for plea bargaining, the New York legislature in 1974 should not cling to the same dogma. Yet, as part of a package of tough drug control legislation,¹²⁵ the State of New York in 1973 mounted a counter attack upon the seemingly inevitable practice of plea bargaining. Governor Rockefeller, after withdrawing his original proposal to eliminate plea bargaining,¹²⁶ proposed a "limited form of plea bargaining."¹²⁷ The manifest intent of this legislation is to restrict the plea negotiations between the prosecutor and defendant by establishing the legal

125. *NEWSWEEK*, Sept. 10, 1973, at 46.

126. *See* N.Y. Times, Jan. 11, 1973, § 1, at 24, col. 4.

The bill would . . . provide that a person who is convicted of selling . . . any quantity of a narcotic drug . . . shall be guilty of criminally selling a dangerous drug in the first degree. Persons indicted for this crime would not be eligible to plead guilty to a lesser offense . . .

Id.

127. N.Y. Times, Apr. 13, 1973, § 1, at 1, col. 7 (city ed.).

boundaries of the prosecutor's compromises. The amended statute requires that

[w]here the indictment charges one of the class A felonies defined in . . . the penal law . . . then any plea of guilty entered . . . *must* include at least a plea of guilty of a class A felony.¹²⁸

In form, the New York law on plea bargaining is a type of "structured bargain" directly related to the Anglo-Saxon tariff system and the practical operation of the benefit of clergy. However, in substance it is materially different. Despite its rigidity, the Anglo-Saxon tariff system embodied the monetary payments bargained for in order to avert the suffering which attended private revenge. The structured bargain had incorporated the compromises achieved through private bargaining; the potentially severe sanctions were not reintroduced. In an analogous manner the benefit of clergy had provided a clearly defined procedure to circumvent the imposition of barbaric punishments devised in England. The historical development of plea bargaining therefore illustrates the role Draconian penalties have had in instigating an alternate bargain procedure. However, this fact appears to have been ignored both by the Governor's rhetoric and his critics' arguments.¹²⁹ While Governor Rockefeller retains a medieval belief in the inflexible nature of statutory sanctions, his critics respond by cataloging the administrative inconveniences that would result from either eliminating or stultifying plea bargaining and fail to stress the historical necessity of bargaining to demonstrate the futility of the Governor's approach.¹³⁰

Under the New York law, the plea bargain is utilized solely as a means of maximizing the state's interest in harsh punishments. This statutory structured bargain offers an illusory compromise, since even a plea to an A-III felony can result in an eight-year minimum term of imprisonment.¹³¹ The problem with New York's structured bargain

128. N.Y. Sess. Laws 1973, ch. 276 § 23 (6) (a).

129. N.Y. Times, May 2, 1973, § 1, at 23, col. 1.

130. *Id.*

[C]ritics . . . have said it would severely aggravate Court congestion, favor the major drug trafficker, and never prevent the police from turning defendants into informants, who offer the best means of getting behind the scenes to major drug traffickers.

Id.

131. N.Y. Sess. Laws 1973, ch. 276 § 9 (3) (a) (iii).

is that it responds too narrowly to society's illusion and politicians' election conscious praise of uncompromising justice,¹³² and gives insufficient attention to the reality of justice through compromise and plea bargaining. The statutory threat of severe sanctions has historically created irresistible pressure for plea bargaining—independent of the volume of criminal cases—which New York's structured bargain is not flexible enough to accommodate.¹³³

Therefore, the only real question for the legislature is to determine how to insure the beneficial employment of plea bargaining. Unless more reasonable sanctions and less stringent structural limits are designed to confine the scope of plea bargaining, the pressures to compromise will be brought to bear on more vulnerable and less visible stages of the criminal process.¹³⁴ The ubiquitous bargain procedure remains an unavoidable by-product of our criminal justice system; an intelligent legislative response must recognize its necessary societal function.

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132. See NEWSWEEK, Sept. 10, 1973, at 46.

133. N.Y. Times, Mar. 9, 1973, § 2, at 42, col. 6. "The consensus of more than 100 witnesses who testified on Governor Rockefeller's controversial penalties for narcotics offenses is that they are too rigid and severe . . ." *Id.*

134. See NEWSWEEK, Sept. 10, 1973, at 46.

[Governor Rockefeller's] plan may also be a corrupt-a-cop program; drug traffickers now have more motivation to strike a deal with narcotics agents, who in turn have more leverage to extort fatter bribes for not making an arrest.

Id. See also N.Y. Times, Oct. 1, 1973, § 1, at 1, col. 4 (city ed.).

Only one-quarter as many felony drug arrests were made in the city in September—the first month under the state's new drug laws—as in the average month of 1972, according to police statistics.

Id.

