The Social Origins of Plea Bargaining: Conflict and the Law in the Process of State Formation, 1830–1860

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One striking feature of American courts is the widespread practice of plea bargaining. Paradoxically, the practice rewards precisely those who appear guilty. Contrary to popular perception of plea bargaining as an innovation or corruption of the post–World War II years, this study shows the practice to have emerged early in the American republic. Amid social conflict wrought by industrialization, immigration, and urbanization during the Age of Jackson, politicians acutely realized the potential for revolution in Europe. Local political institutions being spare and fragmentary, the courts stepped forward as agents of the state to promote social order necessary for healthy market functioning, personal security, and economic growth. Plea bargaining arose during the 1830s and 1840s as part of a process of political stabilization and an effort to legitimate institutions of self-rule—accomplishments that were vital to Whig efforts to reconsolidate the political power of Boston's social and economic elite. To this end, the tradition of episodic leniency from British common law was recrafted into a new cultural form—plea bargaining—that drew conflicts into courts while maintaining elite discretion over sentencing policy.

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In a society where it is said that "law is what the courts do," one notable feature of American justice is the practice of plea bargaining. As we think about the origins of law and social ordering, too often we downplay human agency and choose instead to highlight the nation-state and powers of coercion (Arendt 1958; Meyer & Hannan 1979; Abrams 1982; Soysal 1994). State action from the top down has eclipsed the ways that the initiatives of civil society and social movements have shaped the state from the bottom up.[1] Only recently have stories of local voluntarism and contestation, along with their effects on state formation, been more widely told (Sewell 1980; Skocpol 1992; Somers 1996). This study examines one pathbreaking local transformation in the American courts—the rise of plea bargaining—that profoundly changed the nature of criminal justice. In exploring plea bargaining, I examine causal forces and dynamics of varied temporal rhythms and highlight the transformative power of events at crucial moments in history (Sewell 1996; Gramsci 1971). Focusing on social transformation, I present a layered dynamic account of how plea bargaining came into being. Theoretically, the account enriches our understanding of the relative institutional autonomy of the courts. By focusing on change as a complement to the social reproduction emphasized by the new institutionalism, it also deepens our knowledge about how institutions and culture adapt to contestation and disruptive events as part of a process of constitutive social change (Vogel 1988).

Though highly controversial, the origins of plea bargaining are surprisingly obscure. While often thought to be either an innovation or a corruption of the courts after World War II, it has much deeper historical roots.[2] Understanding these beginnings lends insight into the problems the practice presents today. My purpose here is to explain why plea bargaining arose when and where it did and why it took the cultural form that it did. This study shows that the social forces that produced plea bargaining are very different from those to which it is usually attributed. The significance of plea bargaining lies in the fact that, by the late

[1] Abrams (1982) highlights the interplay of agency and structure in shaping social life—a theme celebrated by William Sewell (1980) in his classic analysis of labor and revolution in France during the 19th century. It is precisely the relative lack of agency in the poststructural analyses of Foucault (1979) that often elicits critique.

[2] Plea bargaining is defined here as a defendant's entry of a guilty plea in anticipation of concessions from the prosecutor or judge. It may be implicit or explicit and need not yield concessions in every case. Early charge bargaining is demonstrated by occasional notations of charge reductions accompanying changes of plea in the dockets. However, the records of the Charles Street (Suffolk County) Jail show strong concordance between charges at arrest and those in the docket. Charge bargaining thus appears to have moved to prominence only after sentence bargaining was established.

19th century, most cases in the criminal courts were being resolved through this process. Although the popular image is one of jury trials with a presumption of innocence, a very different process has anchored the American courts.

To explain the rise of plea bargaining, I explore its beginnings in antebellum Boston—the first sustained instance of the practice known to exist.[3] Boston was a national center of legal innovation from which many legal ideas and practices spread to other cities through diffusion (Novak 1996). Plea bargaining very probably was one such distributed legal innovation. An urban political elite, seeking to maintain its position of power, played a key role in its establishment. This privileged group, responding to political challenge in a specific social and temporal context, shaped much of the imaginative construction of American legal ideas during this formative era. It was this elite's perception of crisis and threat, along with its effort to preserve social order, the legitimacy of self-rule and its own dominance, that produced in a single locale the practice of plea bargaining that would then become a national and, eventually, international phenomenon.

The story of plea bargaining involves both continuity and change. The continuity was that of republican ideology, already contested nationally by Democrats with the election of Andrew Jackson as President. Republicanism espoused a vision of political rule by an elite community of civic-spirited citizens who were guided by an holistic sense of society's interests. They saw themselves linked to those less advantaged through deference.[4] Within this continuity, however, crucial conditions, dynamics, and events brought change. Plea bargaining has its roots in those structural changes that gave rise to widespread conflict, crime, and a sense of crisis that called for state response under very new social constraints.

The antebellum years in Boston were a time of passage between two political cultures. The old Federalist framework re-

[3] Recognition that the rise of plea bargaining was as yet unexplained was affirmed as early as 1979, by Malcolm Feeley, as editor of a landmark special issue of *Law & Society Review* (1979a). Feeley observed that in the scholarly search to understand the practice, there were, as yet, "no definitive answers" (p. 204). Similarly, Samuel Walker (1980), in his classic history of criminal justice, *Popular Justice*, comments that "the historical origins of plea bargaining remain obscure" (p. 112). In his own book on plea bargaining, *The Process Is the Punishment*, Feeley observed that "the way we are framing the question may need to be reformulated" (1979b:148). My own study, by taking an historical and macro-social structural turn, does precisely that.

[4] Despite its rural origins, republicanism as an ideology so pervaded Boston during the early 19th century that it colored the discourse of [Democratic-]Republicans and, later, National-Republicans and Whigs alike. After the collapse of the Federalist party nationally by 1817, Federalists at the state and local level were challenged as the Democratic-Republicans moved to the center. Democrats, National-Republicans, and, later, Whigs—each with its own ideological accent—would soon differentiate themselves politically from the Democratic-Republican party. An artisanal and, subsequently, a working-class strand of republicanism also arose that can be traced through the 19th century to the mobilization of the Knights of Labor (Forbath 1991).

mained in place in the city into the 1830s, but splintering began both in it and in the political elite supporting it. In 1834, Democrats mounted a successful electoral challenge, and in a startling victory, Theodore Lyman was elected Boston's first Democratic mayor.[5] This partisan opposition, emerging just as the franchise was extended in the mid-1830s, weakened elite control and ended its domination of local electoral politics through the Federalist party. It is in this context that plea bargaining arose.

During the early 19th century, concern abounded in Boston about crime, rioting, and unrest. In the 1820s and 1830s, social conflict grew rife in Boston and much of the urban Northeast. Construction of mills and factories changed the organization of work and the class structure. Growth of cities created contact between strangers in local neighborhoods. The start of massive European immigration brought floodtides of persons seeking asylum or simply a better life. All combined to create a sense of massive change, social transformation, and crisis. The public, already apprehensive about the viability of self-rule, grew more vexed as political foment waxed in Europe and the revolutionary year of 1848 approached. A sense of the fragility of self-rule and its potential instability mounted. When the franchise was extended "universally" at just this point, it required that whatever solution to this situation might be devised should not jeopardize popular political support.

The Constitution was still relatively new, urban political institutions were spare and fragmentary, and local political parties were virtually nonexistent. Faced with these problems, the courts, which, along with tax collectors, were among the few public institutions in place, stepped forward as agents to reclaim order and to mold a practical working relationship between citizens and the fledgling state (Skocpol 1984). In doing so, the courts drew on a time-honored tradition of episodic leniency—frequent but irregular pardons and grants of clemency—from the British common law and adapted it into the practice of plea bargaining. In England, episodic leniency had traditionally eased tensions among social groups (Hay et al. 1975). Responding to this dilemma, the courts stepped in and tapped the common law tradition of leniency—hoping to revitalize order. This was done as one thrust of a much broader campaign to cultivate social and political stability.

To understand why plea bargaining arose in this way, one must consider the nature and timing of the crisis, the contours of the state apparatus, and the distinctive common law legal culture which provided a unique repertoire on which to draw.

[5] While it could not be known at the time, Lyman would, partly due to elite political mobilization, be Boston's only Democratic mayor of the antebellum period.

In telling the story of plea bargaining, this study develops three interlocking themes. First, relations of deference and dependence receded as crime, rioting, and unrest surged. Second, state response to these events transformed traditional legal mechanisms as court action shifted from a presumption of innocence to a form of compromise known as plea bargaining. Third, simultaneously, the courts became institutions of policymaking, while the political elite in Boston so adjusted to a new more inclusive electorate that it could remain at the summit of power in their "well-regulated society" long after their partisan brethren had been eclipsed in other cities (Novak 1996).[6]

The first section of this article explores the main explanations for plea bargaining advanced by others and critically assesses them. Building on that critique, I sketch the beginnings of an alternative hypothesized account. A second section briefly describes my methodological approach—both interpretive and causal analytic. Though strictly speaking a case study, my quest to explain five facets of plea bargaining creates a probabilistic basis for falsification. Next, a third section describes the contours of plea bargaining as it arose in Boston during the 1830s. I draw a composite picture of the emergent patterns of plea and concessions that took form to reveal that, for the first time, increasingly large numbers of guilty pleas were being entered and to show that, in contrast to the past, those who pled guilty fared better. Once we recognize that plea bargaining emerged during the 1830s, it becomes possible to see the shortfalls of old arguments and promising directions for the new.

The fourth section examines historical evidence of social structural and institutional context as a basis for a compelling alternative explanation for the rise of plea bargaining. I point to the timing of a crisis of rioting, crime, and unrest which occurs just as the franchise is extended "universally," the nature of the common law legal culture, and the particular contours of an American state of "courts and parties" in a nonetheless generally "well-regulated" society. I explore the social dynamics of the ascendant Whig political dynasty, the distinctive Federalist and, later, Whig influence on lawyers, and the micromotives that the criminal courts engendered as punishment was reconstructed under the canopy of the "rule of law" in a bid to nourish popular consent. In a fifth concluding section, I draw together what is known to argue that plea bargaining originated in 1830s Boston as part of a dynamic process of contestation wherein the republi-

[6] For a classic portrait of that "well-regulated" society, see Novak 1996. While William Novak challenges the claims of legal instrumentalism about change in the functioning of the court during the early 19th century, I argue that the project of policymaking shifted from a political base primarily in the electoral realm to one centered in the courts after the defeat of the Federalists in Boston in 1834. The judiciary, however, had long interpreted and administered social regulation prior to that time.

can and old Federalist elite worked to promote political stabilization and to reconsolidate their political power against emergent democratic, populist, and immigrant forces.[7]

Previous Historical Research on Plea Bargaining

Previous explanations of plea bargaining, both contemporary and historical, have been rich and diverse. My own work is indebted to much of that research by Albert Alschuler (1979), John Langbein (1979), Albert Reiss (1975), Lawrence Friedman and Robert Percival (1981), Allen Steinberg (1984), Charles Clark and Harry Shulman (1937), and others. My account, however, diverges to push backward in time the point at which we understand plea bargaining to have begun. Twenty-five years ago, several authors suggested that plea bargaining dated back to some point in the 19th century and probably not before (Friedman 1979, 1981; Friedman & Percival 1981; Alschuler 1979; Langbein 1978; Reiss 1975; Steinberg 1984; McDonald 1979).[8] This work, analyzing primarily appellate decisions, offered various historical explanations for the emergence of plea bargaining. Some historians linked plea bargaining to the expanding role of the public prosecutor and to prosecutorial discretion (Reiss 1975; Ferdinand 1992). Others suggested that the practice stemmed from establishment of a professional police force or from the corrupt police practice of compounding a felony (Alschuler 1979). A third line of thinking pointed to the growing complexity of the criminal trial and to caseload pressure (Feeley 1982; Alschuler 1979; Rothman 1980). Still a fourth argument contended that, by shifting the burden of decisionmaking from the courtroom and juries to lawyers and professionals, plea bargaining was part of a movement to rationalize and professionalize criminal justice (Friedman 1993; Friedman & Percival 1981).

Few of these authors, however, had systematically examined trial court dockets to test their causal arguments.[9] On historical

[7] Emphasis on stabilization during the 1830s does not imply that it is primary in shaping contemporary bargaining. Plea bargaining was transformed during the mid-19th century by patronage politics and again at the turn of that century by the rise of large-scale urban institutions, and at each of these points very different logics dominated.

[8] On the basis of historical works by Langbein (1978) and Alschuler (1979), it is generally agreed that plea bargaining—or widespread and routinized grants of concessions in exchange for the entry of a guilty plea—did not exist in England prior to the 18th century and that official reports of guilty plea cases remained quite rare until at least the last quarter of the 19th century. This is despite occasional instances of compromise documented by Alschuler (1979). Other practices bearing a resemblance to arbitration or civil settlement appeared briefly at various points (Clanchy 1982; Moglen 1983). However, while these practices involved compromise, they did not entail a guilty plea or grant of leniency from the state, so they are structurally quite different.

[9] Much scholarly reticence about the origins of plea bargaining is due to the difficulty of detecting and measuring the practice. Since the occurrence of plea bargaining is rarely noted explicitly in the court dockets, contours of the practice must be charted by inference. The methodology for making inferences using results of a nested probability

grounds a number of vulnerabilities were evident. The office of the prosecutor in New York long predated what we know to be the rise of guilty pleas there during the 1840s—undercutting a causal argument about the rise of the prosecutor's power (Reiss 1975; Moley 1929). Conversely, as we shall see, involvement of public prosecutors in the lower criminal court lagged the rise of plea bargaining in Boston, creating another problem of timing, although prosecutors do play a role later (Ferdinand 1992). Compounding of felonies dated back to precolonial England, preceded the establishment of a professional police force in the United States, and was practiced primarily by police detectives descended from the constabulary that had existed for more than a century before plea bargaining arose (Radzinowicz 1956: 313–18). Again, the timing was problematic. The third line of argument, attributing causality to the rise of a professional police force, founders on the fact that the police existed in London prior to their appearance in the United States; thus, if the presence of a professional police force alone were causal, the practice should have arisen first in Britain, which it did not. Further, a full-time paid police force was not established in Boston until after plea bargaining began. Though police do eventually begin to present some evidence in the lower court, newspaper stories and other vignettes do not suggest a major role for them in the early years (Gil 1837; Fenner 1858). For its part, caseload pressure had been decried as a problem by the American courts since colonial days so that it too long predated plea bargaining. Heumann (1981) has also shown that even present-day caseloads and complexity do not automatically lead new prosecutors to bargain; instead socialization into the process is required (see also Dimond 1975).[10] Finally, complexity was a relative latecomer to the lower criminal courts. Criminal trials there during the 1830s and 1840s were expeditious affairs that usually involved only the defendant and a judge without attorneys for prosecution or defense (McConville & Mirsky 1995). Only after midcentury did such trials become the more complex events that Friedman and Percival richly describe, but by then plea bargaining was already in place. Historical analysis thus showed each prior explanation to encounter stumbling blocks in terms of temporal sequence.

model is one major contribution of this study. Because bargaining is multifaceted and can take many forms as a case moves through the courts, delineating the patterns of plea bargaining is complex; it had stymied scholars for many years. Thus, most previous studies have relied on the partial information of the appellate courts, on the occasional explicit notations in the dockets, or, most hazardously, on guilty pleas alone with the assumption that leniency is always forthcoming.

[10] Court vignettes published by Thomas Gil of the *Boston Morning Post* (1837) provide additional support. Vignettes reveal trials in the lower court to be summary in nature and devoid of complexity that increasingly characterizes the higher courts by the late 19th century—a finding quite similar to those of McConville & Mirsky (1995) and of Roger Lane for 19th-century Philadelphia (Roger Lane to Albert W. Alschuler, 25 Oct. 1978, cited in Alschuler 1979).

Despite the limitations of that previous work, many scholars have been loath to move beyond those accounts to ask what other causes, such as social structures and events, may have produced this practice. With notable exceptions such as Friedman and Percival (1981), McConville and Mirsky (1995), and Steinberg (1984), court efficiency, work group cooperation, the prosecutor, the police, trial complexity, and crowding in the courts still dominate much of the research on plea bargaining.

By contrast, philosophers and, increasingly, sociologists of law and legal historians have emphasized the intimate relationship of law to politics and society (Friedman 1993; Garland 1990; Simon 1993; Skrentny 1996; Novak 1996; Forbath 1991). Their theorizing about law has highlighted its implications for processes of social ordering and for the role of the state. Among the earliest to emphasize these relationships were E. P. Thompson and scholars working in collaboration or dialogue with him (e.g., Hay et al. 1975; Hobsbawm 1974; Brewer & Styles 1980; Stone 1981). Thompson (1975) focused specifically on the role law plays in elaborating relations of power and political authority. He argued that law cannot be meaningfully understood apart from its social context, which shapes incentives and interests to which actors in the court respond. This article starts with that presumption of the societal embeddedness of the courts (Granovetter 1985).

Thus, early explanations of plea bargaining were notable for their lack of attention to two key points—its origination as an American phenomenon and how its emergence was causally shaped by changes in social structure, events, and culture beyond the courtroom. This study focuses on those omissions and explores how judges drew on a unique element of common law legal culture, "episodic leniency," to respond to a perceived crisis of social order. Social relationships, institutions, and discourse were transformed to produce a rescripting of legal practice—plea bargaining—to secure both social order and a new post-Revolutionary conception of political authority as well.

Historically what had been distinctive about the common law tradition of leniency was its capacity, through its use of practices such as pardons, character witnesses, and surety, to encourage informal social ties between elites and those of lower rank (Hay et al. 1975). This helped preserve and reproduce the existing structure of social rank with the inequalities it contained. By the late 17th century, ruling elites within England had moved beyond the age of monarchial absolutism and were confronted with the problem of maintaining control over a populace of which they were only a small minority (ibid.). As a solution, England enacted a series of extremely harsh laws (ibid.; Cottu 1822). Paradoxically, though, they often were not fully enforced. Instead, the cultural tradition of "episodic leniency" emerged, a custom

of frequently but irregularly granting pardons or deciding not to prosecute or not to convict (Hay et al. 1975). The sporadic quality meant that leniency could not be counted on.

In political terms, the combination of severe legal codes coupled with leniency had powerful effects. It created strong incentives among the lower classes to forge bonds of reciprocity, loyal employment, and clientelism with members of the elite and the middling ranks (ibid.). This assured a store of political good will to cause a prosecution to be foregone or to produce a powerful advocate to plead for mercy on one's behalf if one ran afoul of the law (ibid.).[11] The result, as E. P. Thompson (1975) has noted, was a system of justice that reinforced continuity of the existing structure of social class. It also helped legitimate the political system of self-rule, despite material inequality, by conveying a message of universality (i.e., applicability of law to all) and formal equality (i.e., treatment of all defendants according to the same procedures) before the law.

Clearly, Hay et al. (1975) were describing a period of agricultural oligarchy in England almost a century before the era on which this work focuses. However, legal developments in early 19th-century America show episodic leniency, once again, to be at work—though having been adapted in a new way. Plea bargaining emerged as a widespread new mechanism of leniency when judges adapted for the American context of mass politics the idiom of leniency from common law legal culture. Leniency, once more, was used to promote political stability by fostering both cross-class social ties and relationships between citizens and the state.

As politics became a popular phenomenon, it grew impossible for law to uphold order by force alone.[12] It became vital for a regime to win popular consent to its governance. If such consent was won, a regime's chances of stabilizing political life and maintaining power were greatly enhanced.[13] If not, a period of political reaction or instability could ensue—in the extreme case, a

[11] This created an incentive to go beyond mere adherence to the basic terms of a labor contract to render "loyal service." Given the great frequency with which citizens appeared before the courts, the availability of a benign employer or patron was a significant asset.

[12] If the exercise of power in modern society were not to be a politically expensive show of naked force, then an approach was needed for stabilizing conflict and a rhetoric had to be articulated showing that things are as they should be. Law has historically played a key role in accomplishing both of these purposes. Weber (1978) highlights the centrality of legitimation to the persistence of political authority. Antonio Gramsci (1971) has distinguished two bases of political rule in modern society—coercion or rule by force, on the one hand, and hegemony, which refers to the role of ideology in cultivating and sustaining the consent of the governed, on the other. He points to the strength and durability of political regimes that succeed in establishing such acceptance.

[13] Alexis de Tocqueville (1970) illustrated such a rhetoric with his concept of the American philosophy of Self-Interest Properly Understood. Gramsci (1971) emphasized the tendency of such ideologies to depict existing social relationships as the "natural order" of things.

change of government might follow. Historically, regimes seeking to cultivate support have created ideologies to legitimate their power.[14] In virtually every society, the language of law has played a key role in such imagery by bolstering political legitimacy. By drawing conflicts into court, legal remedies also preempt extralegal and political solutions to conflict (Hindus 1980). The universality and formal equality of law reinforce a regime's claims to represent the interests of all (Thompson 1975).

The story of plea bargaining suggests that construction of political authority as a basis of popular support relies not only on legal codes per se but also on practical social arrangements for interpreting them that create relationships between citizen and state, shape action and thinking in ways that solidify popular support, and promote acceptance of authority as binding.[15] How episodic leniency, reworked into plea bargaining, helped to construct such acceptance and what social forces shaped this metamorphosis are the focus of what follows.

Layers of Causation: Structures, Temporality, Events

Before exploring this tapestry of explanation, we must examine the earliest contours of plea bargaining. First, though, a word about methodological approach. This study builds on critical analysis of prior explanations to develop a fresh interpretive account.[16] Although it is primarily a causal analysis of one society, this work is comparatively informed. Contrasts to England, also a common law country, are made throughout. Specific paired comparisons to other societies on individual analytic points are also drawn.

Analytically, the study involves two major steps: first, establishing the outcome to be explained, that is, discovering the patterns of plea and concession constitutive of plea bargaining; and, second, accounting for the emergence of plea bargaining in terms of the structures, conjunctural conditions, strategies, events, and culture that shaped it.[17] The events recounted in this article took

[14] As Patterson (1982:35) has succinctly put it, "All power strives for authority." In Weber's (1978:943) terms, a regime attempts to inculcate among a populace a sense of its legitimation—i.e., a belief in its "right to command" and in their "duty to obey."

[15] This holds particularly true for political authority of the rational-legal variety, which bases its legitimation in the enactment of its rules and the specification of its public offices in law.

[16] For an exceptionally lucid, programmatic introduction to sociological methods of comparative/historical research, see Abrams 1982; Skocpol 1984; and Bonnell 1980.

[17] In explaining the rise of plea bargaining I take the approach of "eventful temporality," which centers on the multiple rhythms of diverse causes and on the transformative power of events in history (Sewell 1996:262). This analysis focuses on structural (or relatively permanent) forces, conjunctural (shorter term) conditions, and volitional (relatively immediate and transitory) conditions at work; it also probes the "power of events" to reconfigure social life (ibid.). If one thinks of social life as consisting of innumerable interactions, these encounters are both "constrained and enabled" by the constitutive and constituted structures of society (ibid.; Thompson 1963). While most encounters simply

place between 1830 to 1860 in the city of Boston. In antebellum Boston, the lower court, the Boston Police Court, was founded in 1821.[18] The Police Court, the equivalent of a county district court, provides the arena we study here (Dimond 1975). The lower court was chosen because, in sheer numbers of cases, it was the locus of the primary experience most citizens had of courts and the law. Unlike many jurisdictions of the period, the Police Court in Boston (Suffolk County) had high-quality continuous records for the 19th century and a well-documented political history. The site also provided a good basis for later comparison to other locales.

Contours of plea bargaining are described by analyzing, and this is extremely important, guilty plea rates *and* attendant charge or sentencing concessions at 10-year intervals from 1830 to 1860.[19] Data were analyzed for approximately 400 randomly sampled cases from the court dockets. Computer-generated lists of random numbers were used to select 100 cases for each 10-year interval between 1830 and 1860 to create a representative picture of the composition of the court's caseload (see Table 1). That simple random sample was supplemented with another stratified random sample of about 800 cases, again selected at 10-year intervals, involving five selected offenses—larceny, assault and battery, common drunkard, drunkenness, and "nightwalking" (prostitution). Again lists of random numbers were used and case selection was also balanced by plea to assure cell sizes adequate for robust statistical analysis.[20] These offenses were cho-

reproduce the social structure and culture in which they occur, events may alternately transform them (Sewell 1996:263; Rubin 1976; Giddens 1984). Not only structures but logics can change. This event-focused approach, then, highlights, following Sewell (p. 262), the influence of human agency and "the [social] transformation of structures by events." Since sudden ruptures and events act on already existing structures, the patterns of relationship that emerge exhibit both continuity and difference. Perceived political crisis in Boston during the 1830s produced just such transformative events.

This article sets out to provide a multicausal analysis that explicates the emergence of plea bargaining as part of a broader process of legal change during the Jacksonian era. Focusing on what Skocpol (1979:320) has termed the "conjunctural, unfolding interactions of originally separately determined processes," this work weaves together historical strands of explanation into a vision akin to a tapestry's rendering of the connectedness and significance of a heatedly controversial legal practice. It works at multiple "registers of causation" to sort out causal processes of diverse rhythms (Sewell 1996:271).

[18] In 1866, the Boston Police Court was reorganized and its name changed to the Boston Municipal Court. At the same time, the court previously known as "Municipal Court" was renamed the Superior Court.

[19] Guilty plea rates are constructed here by taking guilty pleas as a percentage of all cases (not offenders) of a given type for a specific year. Where a case shows that multiple defendants enter the same plea, that plea is entered for the case. Where multiple defendants enter a mix of pleas (e.g., some guilty, others not), the plea is considered "mixed" and the case is treated as "other." Among the "other" cases, those mixed or left blank (due to failure to apprehend the defendant, case being "left open," etc.) are also common for some years.

[20] In a standard sampling procedure, I set targets for each type of offense of 20 cases involving guilty pleas or pleas changed to guilty plus 20 with not guilty pleas. If, in progressing through the random numbers, my target had been saturated, no further

sen because in most years they jointly made up over 60% of the caseload in the docket and provided a good mix for study of offenses against property, personal security, and the moral order. Guilty plea rates were constructed using both the simple random sample and, for 1830, 1840, and 1850, as well as for 1831 and 1835 (i.e., shoulder year and mid-decade), complete counts of all pleas in the docket. Once pleas were examined, attendant concessions were profiled using the stratified sample. Support for a clear trend of growth in the rate of guilty pleas over what is, historically speaking, a short time span was also marshaled from other sources (Ferdinand 1992; Moley 1929). Qualitative analysis of archival and secondary sources was then used to interpret and contextualize these findings. These patterns of plea bargaining are explained on the basis of social relationships, institutions, ways of acting and thinking, events, and discourse hypothesized to be causal.

Methodologically, this study employs both interpretation of contrasting variations and work toward limited, contextualized generalizations through causal analysis. Britain and the United States are contrasted in their uses of episodic leniency. This forms a basis for probing why plea bargaining arose in America but not in England, which shares the common law legal culture. Causal analysis specifies the complex configuration of factors that historically gave rise to plea bargaining as a new form of leniency in the United States. Methods of difference and of concomitant variation are used to test ideas about structural, conjunctural, and volitional causes and the transformative power of events at work. The method of difference is employed to explore why plea bargaining emerged when it did, the types of cases bargained, why it took the cultural form it did, and why it originated in the United States rather than in Britain. Concomitant variation probes how the practice varied over time.[21]

Prior to 1830, as we shall see, guilty pleas were rare in common law cases, and they had not been frequent any earlier in American colonial or British history (Alschuler 1979; Langbein

cases of that type were collected although a complete record of what is, in principle, a second random sample was kept.

[21] Despite its many paired comparisons, this study focuses primarily on a single society, the United States, and within it the city of Boston where plea bargaining first began. Much has been written about the practical methodological dilemmas of case studies (Campbell 1975; Lijphart 1971; Ragin 1981; Ragin & Becker 1992; Skocpol 1984). Most can be handled either by specific paired comparisons to other societies or by formulating multiple independent outcomes for study in the case at hand. Both safeguards are used in this study (Campbell 1975; Skocpol 1984). Multiple outcomes mean that, although in any single case study there is high probability of apparent association between an hypothesized cause and any *one* outcome simply by chance, the likelihood of this occurring across *multiple* outcomes contracts exponentially with the addition of each new outcome.

Table 1. Caseload Composition of the Boston Police Court, 1830–1860 (Simple Random Sample)

	1830	1840	1850	1860
Personal Safety				
Assault and battery (A&B)	32	24	17	19
A&B with glass tumbler	-	-	1	-
Assault	1	-	-	-
Assault with a knife	1	-	1	-
Threats and assault	1	-	-	1
Forcibly stealing	1	-	-	-
Threats	-	2	-	1
Assault/intent to rape	-	-	1	1
Attempt rescue prisoner	-	-	1	-
A&B on officer	-	-	2	-
False imprisonment	-	-	-	1
Common railer/brawler	-	-	-	1
A&B with an instrument	-	-	2	-
Property				
Forgery	-	-	1	1
Trespass	2	1	-	-
Emptying a vault	-	-	1	-
Larceny	9	16	16	19
Defamation	1	-	-	-
Breaks shop windows	1	-	1	4
Rescuing cows legally held	-	1	-	-
Embezzlement	-	-	-	1
Breaking and entering and stealing	-	2	-	4
Goods/false pretenses	-	1	-	-
Obtains stolen goods	-	-	1	-
Robbery	-	-	1	-
B&E/felony intent	-	-	3	1
Defacing building	-	-	-	1
Stealing/putting in fear	1	-	-	-
Setting fire to dwelling	-	1	-	-
Pilferer	1	-	-	-
Moral Order, Chastity, Decency				
Wanton and lascivious	1	1	-	-
Lewd and lascivious	7	2	-	-
Drunkenness	1	6	21	14
Common drunkard	18	21	11	15
Nightwalker	1	1	-	-
Common nightwalker	-	-	-	2
Vagrant and Disorderly				
Vagabond	4	2	-	-
Dangerous and disorderly	3	-	-	-
Contempt	1	-	-	-
Idle and dissolute	-	-	-	1
Idle and disorderly	-	-	-	1
Disturber of the peace	-	5	1	-
Brandy to prisoner	-	-	-	1
Nuisance	-	1	-	-
Vagrant	1	-	-	-
Ordinances/Regulatory				
Remaining open past 10 p.m.	-	1	-	-
Selling spirits w/o license	1	1	-	-
Removing house offal against by-laws	-	3	4	1
Humming tunes	-	1	-	-
Keeping swine in street	-	-	1	-

Table 1—Continued

	1830	1840	1850	1860
Rubbish on street 1 hr.	-	-	1	-
Retailing spirits on Sunday	1	-	-	-
Driving horse to left of center	1	-	-	-
Throwing straw in street	1	-	-	-
Cutting clothesline	1	-	-	-
Selling glass of gin w/o license	1	-	-	-
Keeping dog w/o license	1	-	-	-
Keeping gaming implements	-	1	-	-
Baggage wagon in street more than 1 hr.	-	1	-	-
Obstructing horse cars on metropolitan railroad	-	-	-	1
Knowingly selling corrupted meat	-	1	-	-
Horse at large	-	-	-	1
Keeping house of ill fame	-	-	1	-
Using wagon w/o license	-	-	1	-
Sidewalk iced more than 6 hrs.	-	-	1	-
Lighted cigar in street	-	-	1	-
Cellar door open more than 5 hrs.	-	-	1	-
Disobedient and stubborn child	1	-	-	-
Malicious mischief	-	-	1	-
Internal Police				
Secular business on Lord's Day	1	-	-	4
Insanity	1	4	5	2
Totals	98	100	102	98

1978). By my study's end, 1860, plea bargaining had been solidly established and institutionalized; it was spreading by diffusion to other cities. Though this explanation operates theoretically at the level of society, the social forces and events shaping law and political life required observation at the level of state and locality.

Patterns of Plea and Concession: Early Contours of Bargaining

When did plea bargaining begin? Prior to the 1830s, guilty pleas of any sort—apart from any evidence that they produced concessions—were rare (Alschuler 1979; Langbein 1978).[22] Friedman (1981) and Alschuler (1979) estimate that guilty pleas, whether bargained or not, composed no more than 10% to 15% of all convictions in the lower courts of the United States prior to

[22] Alschuler (1979:214) notes that while it has been possible since the earliest cases in common law for the accused to confess his or her guilt, such confessions were exceedingly rare in the medieval period (Hunnisett 1961, cited by Alschuler). Similarly, he shows that the common law treatises of the 17th century were slow to accept the plea of guilty and the plea of not guilty was viewed more favorably (Fulton 1609, cited by Alschuler). This same "backwardness of the courts in receiving a plea of guilty is again mentioned in *Blackstone's Commentaries on the Law of England* (1765, cited by Alschuler) and approved by Chitty (1816, cited by Alschuler). Speaking of judicial insistence on a presumption of innocence prior to 1830 in the *Rationale of Judicial Evidence,* Bentham declared, "it is grown into a sort of fashion when a prisoner has (confessed and pled guilty), for the judge to persuade him to withdraw it. . . . The wicked man repenting of his wickedness, the judge . . . bids him repent of his repentance and in place of the truth substitute a barefaced lie" (1827, cited by Alschuler).

that time.[23] Plea bargaining is also known not to have existed previously in England or any other country outside the United States (Langbein 1978; Alschuler 1979). In fact, official reports show that dockets rarely reveal guilty pleas on a sustained basis, whether bargained or not, either in England or elsewhere abroad until the last quarter of the 19th century (Langbein 1978; Alschuler 1979). Although leniency in the form of pardons and grants of clemency had a long history, such leniency was quite different from the plea bargain. Pardons and other early forms of leniency were granted after disposition, did not involve direct exchange, and never achieved the widespread, routine use that plea bargaining did (Vogel 1988).[24]

Yet, in Boston, beginning in the 1830s, the picture changed as judges' reticence in accepting guilty pleas was replaced by the beginnings of plea bargaining (Vogel 1988, forthcoming; Ferdinand 1992). Guilty pleas, the first element of bargaining, began to be entered in significant numbers in common law-based cases during the late 1830s and, by the 1840s, were widely accepted for virtually every sort of offense—a pattern that continued into the 20th century (see Fig. 1). According to this study's complete counts of *all* cases in the Police Court docket, guilty pleas surged from less than 15% of all pleas entered in the docket in 1830 to 28.6% in 1840. Guilty pleas then rose to 52% of all pleas in 1850, to 55.6% in 1860, and, as shown in Figure 1, to a high of 88% in 1880, after which they began to decline slightly (see Table 2;[25] see also Appendix A and note 26 for subsequent guilty plea rates after 1860 and supplementary data supporting a growth trend, respectively).[26]

[23] The reluctance of the court during the 19th century to accept a plea of guilty under any circumstances is evident in *Commonwealth v. Battis* (1804), where it was held that "the court does not receive the plea of guilty to an indictment for a capital offense, except on due advisement to the prisoner of its consequences, nor without satisfactory proof aliunde of its being made freely and in a sound state of mind." A similar point is made in *Green v. Commonwealth* (1860).

[24] In Boston's antebellum Municipal Court, the equivalent of the present Superior Court, pleas of nolo contendere negotiated by lawyers for clients were increasingly used as part of a growing deployment of leniency during this period. However, this was usually an explicitly contractual process negotiated by an attorney that, as my earlier work shows (Vogel 1988), differed from plea bargaining.

[25] In Table 2, col. (3)'s depiction of the ratio of not guilty to guilty pleas in the docket, which omits cases where no plea is entered such as those transferred to higher court, gives a particularly clear sense of the numerical balance between those pleading guilty and those entering other pleas.

[26] Available evidence from several sources reinforces my argument about a clear growth trend in plea bargaining during these years. In *Boston's Lower Criminal Courts, 1814–1850* (Table 3.8, "Selected Outcomes in Police Court, 1826–1850"), Ferdinand (1992) provides the following biennial counts of guilty plea rates for the Boston Police Court: 1826 (0.0%); 1828 (9.3%); 1832 (5.2%); 1834 (8.1%); 1836 (15.9%); 1838 (19.0%); 1840 (19.9%); 1842 (25.7%); 1844 (35.1%); 1846 (36.7%); 1848 (37.2%); and 1850 (37.1%). He concludes that "guilty pleas displayed a rising tendency during most of this period" (p. 83). Ferdinand also states that these rates are based on simple counts of various types of pleas in the docket. However, inconsistencies are evident when he cites total caseloads of 2,177 cases for 1840 and 4,377 for 1850, when the Police Court docket

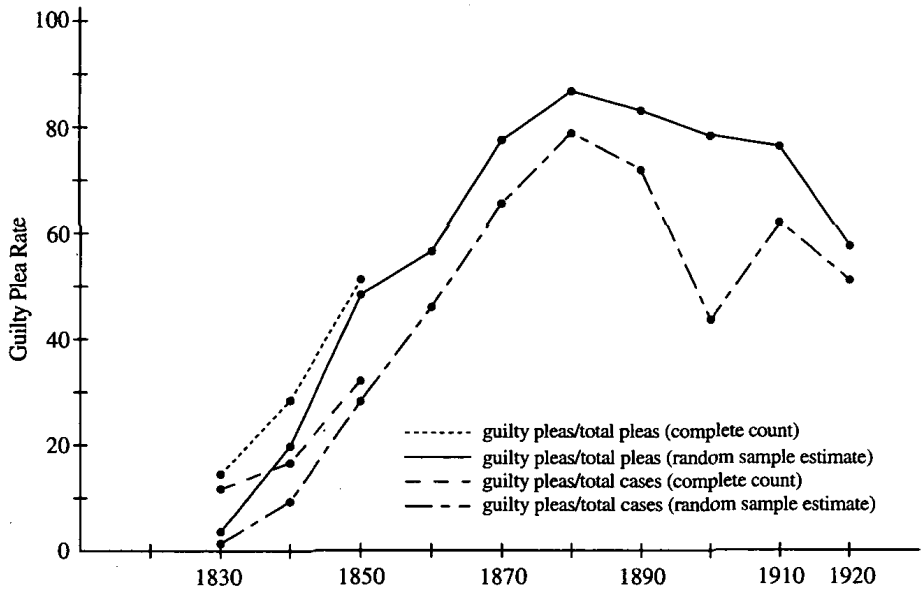

Fig. 1. Guilty plea rates, Boston Police Court, 1822–1866, and Boston Municipal Court, 1866 to Present

NOTE: Guilty plea rates for 1830, 1840, and 1850 were constructed from complete counts of *all* pleas entered in the Boston Police Court docket. Estimated guilty plea rates from the simple random sample for those years are also presented to illustrate the relation of the sample estimates to the population. Rates for 1860 through 1920 were estimated solely from the data in the same simple random sample constructed for this study. In each case, guilty plea rates are presented as a percentage of *both* total number of pleas and total number of cases—two of the most common ways of constructing such rates. Constructing guilt plea rates as a percentage of all convictions, while often bureaucratically easier to collect, tends to inflate the rates, since those not convicted almost universally plead not guilty.

Defendants' tendency to plead guilty varied among different types of offenses (see Table 3 for these offense-specific rates and Appendixes B and C for supplementary offense-specific trend data).[27] Offense-specific guilty plea rates computed from the ran-

shows 2,383 and 4,811 cases, respectively, for those years. Inconsistencies in the overall and offense-specific plea rates cited by Ferdinand for 1826 as well as the unexplained use in some tables but not others of guilty plea rates that include pleas of nolo contendere along with guilty pleas per se presents some additional problems (pp. 32, 90). Data for 1830 are completely absent for reasons unknown, though that docket exists. Ferdinand's study then relies heavily on those guilty plea rates in making claims about the plea bargaining they might represent. Criminal careers and seriousness of crime, among other things, are ignored.

The scenario of a surge of guilty pleas in Boston during the 1830s, which then spread by diffusion to other cities, notably New York, dovetails closely with Raymond Moley's (1929) finding that as of 1839, 15% of all felony *convictions* in Manhattan and Brooklyn were the product of guilty pleas. By 1869, he found that guilty pleas accounted for 75% of all convictions. While the courts are not strictly comparable because the jurisdiction of the Boston Police Court excluded felonies, Moley's data suggest that the rise of plea bargaining in New York lagged that in Boston, where, as we have seen, guilty pleas accounted for 29% of all *pleas* by 1840 (and 17% of all *cases*).

[27] In constructing the overall counts and plea rates for the aggregate of all offenses, cases with multiple defendants and diverse pleas were simply classified as "other" since no single plea could be isolated. In constructing the offense-specific counts, the cases involving multiple defendants and offenses were set aside as were those in which diverse pleas

Table 2. Aggregate Guilty Plea Rates for All Offenses, Boston Police Court, 1830–1860

	Complete Count of Docket						Sample (Estimates)	
	Guilty Pleas as % of All Cases (1)	Guilty Pleas as % of All Pleas (2)	Ratio of Not Guilty to Guilty Pleas (3)	Total Guilty Pleas (4)	Total Not Guilty Pleas (5)	Total Cases (6)	% of All Cases (7)	% of All Pleas (8)
1830	10.2	14.9	5.7 : 1	189	1,075	1,855	2.0	3.1
1840	16.8	28.6	2.5 : 1	400	1,001	2,383	9.9	18.2
1850	33.0	52.0	0.9 : 1	674	621	2,042	29.0	49.2
1860	N.A.	N.A.	0.8 : 1	45	36	99	45.5	55.5

NOTE: Data for cols. (1)–(6) for 1830, 1840, and 1850 are based on counts of all (for 1850 approximately half of) the cases in the Boston Police Court docket. Rates in col. (2), which are computed by taking guilty pleas as a percentage of all cases in which a plea of any kind is entered, are those used in this study. Figures in cols. (7) and (8) plus material in all columns for the year 1860 are estimates, unlike the earlier years' complete counts, and are based on the simple random sample drawn for this study.

dom sample for this study show them more than doubling for most offenses between the early 1830s and 1860.[28] Recent descriptions of the Police Court docket by Ferdinand (1992) reveal offense-specific patterns of plea that are, for the most part, closely comparable to those shown in Table 3. As one looks at differentials in guilty plea rates across offenses, one can see readily that, in part, the mounting guilty plea rate for offenses overall is a function of the changing mix in numbers of various kinds of cases in the docket—especially the large fluctuations in numbers of drunkenness cases with their high guilty plea rates (see Table 1 above).

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were entered for a single offense. Should such counts be redone, it might make sense to count offenders instead of cases. Comparison of the counts to the offense-specific component of cases in the simple random sample suggests that the effect of this decision rule was not significant.

[28] As shown in Appendix B, Ferdinand (1992) provides support for many of the findings reported in my study regarding trends in offense-specific guilty plea rates. Ferdinand too concludes that offense-specific guilty plea rates more than double between the early 1830s and the close of that decade for larceny, assault and battery, public drunkenness, and prostitution. Within that study, however, it is unclear exactly what kinds of cases are included in each offense category.

For the years 1840 and 1850, Ferdinand suggests a gradual increase in guilty pleas for public drunkenness and for prostitution—a pattern that generally supports my own findings on the common drunkard cases. The specific guilty plea rate Ferdinand presents for prostitution, however, is challenged by my data. Close scrutiny suggests why. Ferdinand cites a guilty plea rate of 27.2% for prostitution in 1840. However, the Police Court docket for 1840 contains only 20 cases of nightwalking and common nightwalking (i.e., prostitution), and only two of those cases show pleas of guilty entered. Given these raw numbers, computing guilty pleas as a percentage of either total number of pleas or total number of cases yields a guilty plea rate of 10.0%. These data raise important questions about the guilty plea rate of 27.2% for prostitution cited by Ferdinand (1992), as do references to the 113 prostitution cases cited by him for that docket that same year. Clearly, whatever boundaries Ferdinand's study is using for the category "prostitution" are highly inclusive and unspecified—providing results considerably different from those for prostitution per se. This is noteworthy because Ferdinand claims that plea bargaining begins precisely with these "vice" cases and with regulatory cases.

Guilty plea rates from my random sample for larceny and for assault and battery also present some challenges to Ferdinand's figures. As shown in Table 3 (my own data) and Appendix B (Ferdinand's data), my study shows a lower ratio of not guilty to guilty pleas for assault and battery in 1840 and in 1850. Since it is not clear exactly how Ferdinand is defining offenses, some discrepancy might be expected. However, consistency of the ratios for Ferdinand's figures and my own for the larceny cases suggests another explanation. The assault and battery category in Ferdinand's study appears to include everything from simple assault and battery (the sole focus of my own analysis) to "assault with a razor" or "with a revolver and intent to kill" or "on an officer with intent to free a prisoner." Some of these more serious cases are clearly heading on appeal for higher court and choice of a not guilty plea may become part of the appeal strategy. Including these more serious cases without distinguishing them from simple assault and battery, mixes noncomparables and may distort the plea ratio.

By apparently constructing guilty plea rates solely as a percentage of "total cases," Ferdinand may also allow them to be dominated by factors such as the rates at which different kinds of cases are eventually transferred to the Municipal Court—with high rates of transfer for certain types of cases prior to entry of any plea artificially dampening guilty pleas rates for those offenses due to a large group of inert cases in the total caseload. For instance for larceny in 1840 approximately 40% of defendants found that, upon the complaint being read, they were ordered to post surety to appear in Municipal Court—systematically deflating the guilty plea rate for larceny when computed as a percentage of total cases. Computing guilty pleas as a percentage of all pleas too along with use of plea ratios in my study attempts to adjust for that.

Table 3. Offense-Specific Guilty Plea Rates, Boston Police Court, 1830–1860

	Complete Count of Docket						Sample (Estimates)
	Guilty Pleas as % of All Cases (1)	Guilty Pleas as % of All Pleas (2)	Ratio of Docket Not Guilty to Guilty Pleas (3)	Guilty Pleas (*N*) (4)	Not Guilty Pleas (*N*) (5)	Total Cases (*N*) (6)	Guilty Pleas as % of All Pleas (7)
Larceny:							
1830	13.7	19.1	4.2 : 1	34	144	249	0.0
1840	12.6	27.5	2.6 : 1	38	100	302	20.0
1850	21.4	39.2	1.6 : 1	67	104	313	14.3
1860	47.4	50.0	1.0 : 1	9	9	19	50.0
Assault and battery:							
1830	6.7	10.6	8.5 : 1	31	262	293	0.0
1840	7.3	15.0	5.7 : 1	27	153	368	0.0
1850	15.5	35.3	1.8 : 1	53	97	343	12.5
1860	36.8	41.2	1.4 : 1	7	10	19	41.2
Common drunkard:							
1830	8.1	9.2	9.9 : 1	29	286	359	0.0
1840	13.6	15.3	5.6 : 1	67	372	491	0.0
1850	45.2	47.8	1.1 : 1	100	109	221	63.6
1860	53.3	53.3	0.9 : 1	8	7	15	53.3
Drunkenness:							
1830	9.1	75.0	3.0 : 1	1	3	11	N.A.
1840	49.7	58.3	0.7 : 1	80	57	161	100.0
1850	56.8	57.6	0.7 : 1	166	122	292	61.9
1860	85.7	85.7	0.2 : 1	12	2	14	85.7
Nightwalking:							
1830	25.0	26.7	2.8 : 1	4	11	16	0.0
1840	10.0	10.0	9.0 : 1	2	18	20	N.A.
1850	45.7	45.7	1.2 : 1	16	19	35	N.A.
1860	50.0	50.0	1.0 : 1	1	1	2	50.0

DATA SOURCES: Data for 1830, 1840, and 1850, except in col. (7), are based on counts of all cases in the docket of the Boston Police Court. Figures for col. (7) and all of 1860 are estimates based on data from the simple random sample drawn from that docket for this study.

What others tend to ignore, as they emphasize plea rates, is the concessions which, together with guilty pleas, constitute a plea bargain. Let us turn now to the issue of leniency. It is clear that the leniency involved took many forms and that it was initially evident only for certain kinds of cases. To describe this densely patterned fabric of concessions, I have used a nested probability model, described in what follows, to estimate the effect of plea on the likelihood of leniency in disposition and sentencing. (See Fig. 2 for a schematic diagram of that model for larceny cases in the year 1850.)[29] Probabilities were computed to assess the effects of plea on the ultimate probability of various final outcomes in each case, including likelihood of transfer to Municipal Court, chance of acquittal, and type of sentence imposed (see Table 4 for probabilities of these final outcomes). The stratified random sample was used to tabulate these probabilities both for the aggregate of all offenses and separately for each offense singled out for study—larceny, assault and battery, common drunkard, drunkenness, and nightwalking (i.e., prostitution).[30]

Separate linear regression models were then used to estimate, in cases where a sentence had been imposed, a plea's effect on the magnitude of that sentence (see Tables 5 and 6). Finally, consequences of a plea for the court costs one paid and for one's chances of winning special explicit postsentencing concessions (e.g., probation, early discharge, and suspension of sentence), as well as for one's risk of confinement for nonpayment of a fine, were also tallied.[31] This diverse array of interrelated forms of concession were then brought together with offense-specific guilty plea rates to construct a composite picture of the early contours of plea bargaining. In operational terms, the question asked was simply whether those who pled guilty fared better. Guilty pleas,

[29] This "model" decomposes the bargaining outcome analytically into a series of potential effects of plea on a sequence of dispositions and sentencing outcomes in each case. For a technical discussion of the properties of this model, see McFadden 1984. Because a linear regression model with a binary outcome and single binary independent variable essentially computes average probabilities, logit is not required and use of this approach is completely appropriate here. It also provides a convenient descriptive tool that can be expanded upon to include the effect of a criminal career. In that case, reestimates of coefficients using logit can be undertaken to assure accuracy and good form. However, the results of a logit analysis are foregone here because of greater accessibility to readers of the simple linear probability coefficients and because preliminary analysis provided no evidence of any significant difference in results.

[30] With regard to outcomes, in a day when the average daily wage for an unskilled laborer was $1.00 and when large numbers of families, particularly recent immigrants, lived at the financial brink without savings, extended committal for nonpayment of a fine could threaten financial disaster.

[31] Plea was entered as a dummy variable that assumed a value of 1 if the plea was initially guilty or changed to guilty and 0 if the plea of not guilty was entered. Only cases where a sentence had been imposed were included in this analysis.

Table 4. Probabilities for Final Case Dispositions (Stratified Random Sample)

	Larceny		Assault & Battery		Drunkenness		Common Drunkard		Nightwalking	
	Guilty	Not Guilty	Guilty	Not Guilty	Guilty	Not Guilty	Guilty	Not Guilty	Guilty	Not Guilty
1830:										
Other than G/NG	○ .6666	.5000	◑ .1112	.2000		No Cases	○ .3334	.0000	○ .4000	.0833
Not guilty	● .00003	.0833	● .1112	.2000			◑ .0000	.0000	◑ .0000	.0000
Other than fine/ imprisonment	● .1666	.2499	◑ .0000	.0000			◑ .0000	.0000	● .0001	.0834
Fine	◑ .0833	.0833	○ .8887	.6666			◑ .0000	.0000	◑ .0000	.0000
Imprisonment	◑ .0833	.0833	◑ .0000	.0000			● .6666	1.0000	● .5999	.8932
1840:										
Other than G/NG	● .0000	.1250	○ .3187	.0556	○ .2631	.0000	○ .3334	.0000	○ 1.0000	.0000
Not guilty	● .0000	.1190	● .0002	.1667	◑ .0000	.0000	◑ .0000	.0000	◑ .0000	.0000
Other than fine/ imprisonment	● .0000	.1250	◑ .0000	.0000	◑ .0000	.0000	◑ .0000	.0000	◑ .0000	.0000
Fine	○ .2000	.1875	● .6812	.7221	● .7369	1.0000	◑ .0000	.0000	◑ .0000	.0000
Imprisonment	○ .8000	.4374	● .0001	.0556	◑ .0000	.0000	● .6666	1.0000	● .0000	1.0000
1850:										
Other than G/NG	● .0000	.1000	◑ .0000	.0000	◑ .0000	.0000	◑ .0000	.0000	◑ .0000	.0000
Not guilty	● .0001	.1001	● .0000	.2174	◑ .0000	.0000	● .0001	.0834	● .0000	.1000
Other than fine/ imprisonment	◑ .0000	.0000	○ .1000	.0435	○ .0500	.0000	● .0001	.0834	◑ .0000	.0000
Fine	○ .6922	.4999	○ .8000	.6086	● .9000	1.0000	● .0000	.0833	● .0556	.1999
Imprisonment	○ .3077	.3000	● .0999	.1304	○ .0500	.0000	○ .9998	.7498	○ .9444	.7000
1860:										
Other than G/NG	○ .0769	.0000	● .0770	.0953	◑ .0000	.0000	◑ .0000	.0000	◑ .0000	.0000
Not guilty	● .0770	.2778	● .0001	.2381	◑ .0000	.0000	◑ .0000	.0000	◑ .0000	.0000
Other than fine/ imprisonment	◑ .0000	.0000	○ .0769	.0000	◑ .0000	.0000	◑ .0000	.0000	◑ .0000	.0000
Fine	○ .5383	.4444	○ .7690	.5713	● .9167	1.0000	○ .0667	.0001	◑ .0000	.0000
Imprisonment	○ .3078	.2778	● .0770	.0953	○ .0833	.0000	● .9333	.9999	◑ 1.0000	1.0000

NOTE: These estimates are final reduced form probabilities of five major case dispositions: other outcome (mainly transfer to municipal/higher court); acquittal; other penalty (not fine or imprisonment); fine; and a term of imprisonment. (These are the probabilities presented down the right-hand margin in Figure 2.)

KEY: ● = Probability *less* for guilty pleas than for not guilty pleas; ◑ = No difference; ○ = Probability *greater* for guilty pleas

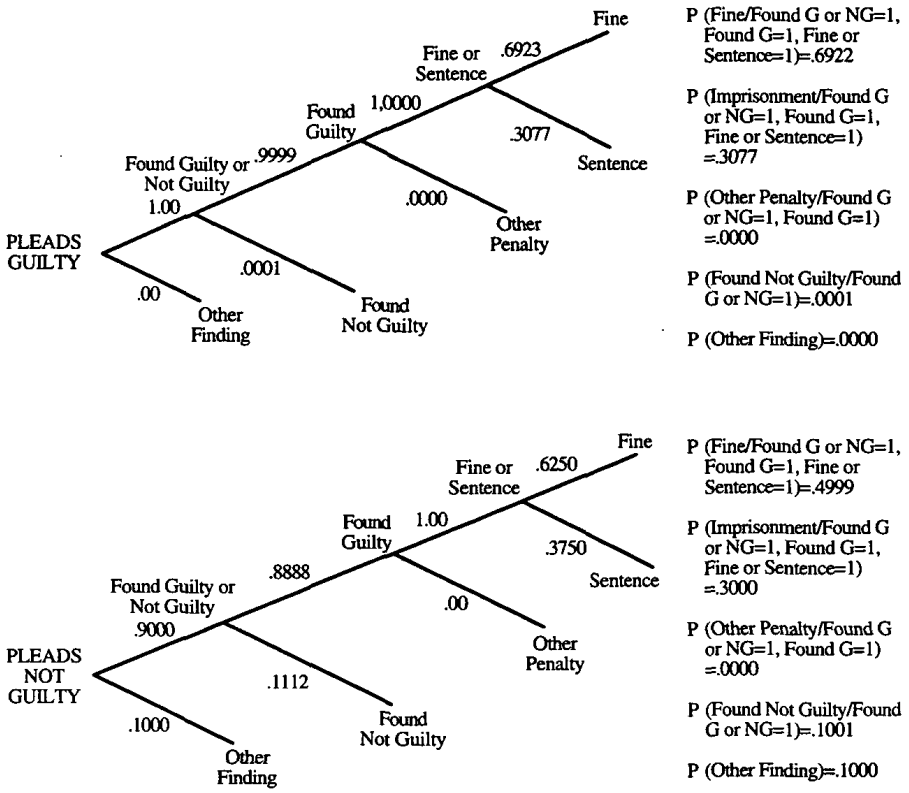

Fig. 2. Effects of plea on the probabilities of various intermediate and reduced form final outcomes (stratified sample for larceny offenses, 1850).

NOTE. Reduced form probabilities of five final outcomes (i.e., other than G or NG, acquittal, other penalty, fine, sentence) shown in the right margin are computed as the multiplicative product of all intermediate probabilities along the branch leading to that final disposition or sentence.

which have no consequence for sentencing or for some offenses systematically exact a premium, do not a plea bargain make.[32]

[32] As we shall see shortly, even though high guilty plea rates for vice and for minor breaches of city ordinances sometimes existed during the early 1830s, these pleas did not produce concessions—at least insofar as analysis of comparable drunkenness and nightwalking cases shows. Instead, these cases tended disproportionately to involve women, children, and servants, along with a few businessmen, and their treatment appears to have reflected the earlier Puritan fear of threat to social hierarchy, as well as practices such as admonition and reconciliation in the Puritan religious courts. That Puritan practice involved reconciliation but did not always abate harsh punishment. While such Puritan practice was part of the symbolic repertoire on which the common law drew, plea bargaining arose only after other elements came into play (Vogel 1988).

While breach of ordinances in the higher Municipal Court often involved proprietors selling liquor without a license, such cases in the Police Court were more likely to include "throwing house offal in the street," "leaving a cellar door open," or "humming tunes." The "perpetrators" were very often wives, minors, and servants who had no independent political identity and came under the governance of the male head of the household in which they lived. It was when those accused were of such potentially dependent status but not living "lawfully" under "household governance" that a case was treated in a way more akin to serious offenses against the common law.

Table 5. Effects of Plea on Duration of Imprisonment and Amount of Fine

	Imprisonment					Fines				
	Larceny	A&B	Drunkenness	Common Drunkard	Nightwalking	Larceny	A&B	Drunkenness	Common Drunkard	Nightwalking
1840:										
Constant	3.6250	Terms	All fines	4.4666	All pled	4.4545	3.5384	2.3333	All pled	All terms
Plea	−.0795	constant		.6242	not guilty	−1.0259	−.1748	.2380	not guilty	of
N	27			26		18	24	23		imprisonment
1850:										
Constant	2.3846	All	Terms	2.2500	3.1428	5.5000	4.1428	2.0769	All pled	11.5000
Plea	.0598	fines	constant	2.1500***	.5042	.0454	.5630	−.1324	not guilty	−6.5000
N	22			13	24	17	31	31	3	3
1860:										
Constant	2.4000	3.5000	Terms	4.2272	3.3333	9.5000	4.9166	3.0000	Fines are	All terms
Plea	1.6000	−1.5000	constant	.0941*	2.023**	−5.3571	2.4833	.0909	constant	of
N	6	3		50	23	15	22	32		imprisonment

NOTE: Coefficients were computed using primarily the stratified random sample. For 1840 and 1850, because the larceny and assault and battery cases are, as we shall see, integral to my argument, data from the simple random sample and the stratified random sample—both randomly selected offense-specific samples—were pooled for more robust estimates and small targeted but randomly drawn samples were added to the pool. These included: 32 larceny cases for 1840 (8 NG/Fine, 8 G/Fine, 8 NG/Imprisonment and 8 G/Imprisonment); 20 larceny cases for 1850 leading to imprisonment (10 plead guilty, 10 not guilty); and all assault and battery cases for 1850 that led imprisonment (none existed of simple A&B—only 2 cases of assault on an officer in discharge of his duty, which is a much more serious offense).

* $p<.10$ ** $p<.05$ *** $p<.01$

Table 6. Average Fines and Terms of Imprisonment

	Larceny		Assault & Battery		Drunkenness		Common Drunkard		Nightwalking	
	Guilty	Not Guilty	Guilty	Not Guilty	Guilty	Not Guilty	Guilty	Not Guilty	Guilty	Not Guilty
Fine ($):										
1840	● 3.6666	4.5833	● 3.364	3.538	○ 2.571	2.333	◑ No cases	1.6667	Imprisonment only	
1850	● 6.2500	6.3333	○ 4.7058	3.6250	● 1.9445	2.0769	◑ 1.000	1.000	● 5.000	11.5000
1860	● 4.6666	9.7142	○ 6.2000	4.4615	○ 3.0909	3.0000	◑ No cases	2.667	Imprisonment only	
Imprisonment (months):										
1840	● 3.5454	4.0000	◑ No cases	6.0000	Fines only		○ 5.0908	4.4666	◑ No cases	4.643
1850	● 2.4444	2.5000	Fines only		◑ 2.000	No cases	○ 4.4000	2.5000	○ 3.647	3.1428
1860	○ 4.0000	2.5000	● 2.000	3.500	◑ 2.000	2.000	○ 4.3213	4.2272	○ 5.356	3.333

NOTE: Averages were computed using the data described in the Note to Table 5.
KEY: ● = Amount of fine *less* for guilty pleas than for not guilty pleas; ◑ = No difference; ○ = Fine *greater* for guilty pleas

Sentencing magnitude was the next order of business. Effects of plea on the amount of fine and on duration of a term of imprisonment were estimated (see Table 5). I also computed average fines and terms of imprisonment produced by guilty and not guilty pleas (see Table 6). The coefficients were then reestimated controlling for a criminal career in the form of a prior conviction or of multiple counts or associated cases pending against the defendant (see Table 7 below).[33] By the 1830s the Commonwealth had passed a habitual offender statute mandating more severe sentencing for recidivists. Being a "career" offender was virtually always a powerful shaper of sentencing severity—sometimes by making a term of imprisonment more likely or, alternately, by boosting the size of a fine or the length of a confinement. Most often, though, as we shall see, a prior conviction meant transfer to Municipal Court. This diversity of impacts of a criminal career underscores the importance of detailed analysis of individual cases that can take such a factor into account.[34] Data from the Boston court revealed effects of plea on sentencing magnitude to be both widespread and consistent with substantial concessions for certain types of offenses and, interestingly, apparent premiums (despite what are sometimes high guilty plea rates) for others. Pleading guilty reduced the size of sentences and fines primarily for the offenses of larceny and assault and battery—especially in 1840. In common drunkard cases and, to a lesser extent, in drunkenness and nightwalking cases, it had the reverse effect—exacting a premium instead.

When we want to know whether one treatment or condition gives better (or, in this case, more positive) results than another, the "sign test" provides a standard technique for deciding (Mosteller, Fienberg, & Rourke 1994:475–77). In using this test, one replaces differences between measurements or other comparisons with plus (+) or minus (–) signs.[35] One then asks, what is

[33] As we shall see in Table 7, entry of prior record or other signs of a criminal career into the equation renders the effect of a guilty plea for larceny In 1840 and for drunkenness in 1850 positive (reversing the sign), and the effect for drunkenness in 1860 negative.

[34] Somewhat surprisingly, data from the stratified sample suggest that, in these cases, it was not primarily those with prior convictions who pled guilty. Recidivists were more likely to plead not guilty. This suggests a problem in a key assumption of other studies such as that of Ferdinand (1992). If "first time" offenders are more likely to plead guilty, this greatly increases the danger of inferences about the tendency of guilty pleas to generate sentencing reductions without taking criminal careers into account since their sentences would be lower because of habitual offender laws in any case. The pool of defendants pleading guilty appears, in this docket at least during the early to mid-19th century, to be low on habitual offenders.

[35] If two treatments, in this case guilty and not guilty pleas, produce about the same results, the number of plus signs assigned will be about half the total number of signs. If one treatment performs more strongly, the share of plus signs will increasingly differ from half. When it differs enough, one may conclude that one treatment is performing more successfully or effectively than another. To assign probabilities to the pattern of signs we use the binomial distribution. In doing so, p, which is the probability of a plus sign, is set equal to .5 to designate chance. The "sign test" then computes the probability, if the

Table 7. Effects of Plea on Imprisonment and Fine with Criminal Career Controlled for (Stratified Sample)

	Imprisonment					Fines				
	Larceny	A&B	Drunkenness	Common Drunkard	Nightwalking	Larceny	A&B	Drunkenness	Common Drunkard	Nightwalking
1840[a]										
Guilty pleas	−.1723	No cases	No cases	.6454	All pled	.5454	No cases	No cases	No cases	Imprisonment
Significance	(.7496)	with	with	(.0006)	not guilty	(.8657)	with	with	with	only
Career	2.0405***	careers	careers	.6454	2.0833	5.0000	careers	careers	careers	
Significance	(.0007)			(.1608)	(.0025)	(.3406)				
R^2	.0063			.4335		.1324				
N	9			26	14	14				
1850[b]										
Guilty Pleas	No cases	No cases	Terms	No cases	.4196	No cases	No cases	.1327	No cases	No cases
Significance	with	with	are	with	(.4215)	with	with	(.1693)	with	with
Career	careers	careers	constant	careers	1.4375	careers	careers	−.0114	careers	careers
Significance					(.2306)			(.9521)		
R^2					.1068			.0663		
N					24			31		
1860										
Guilty pleas	No cases	No cases	Terms	No cases	1.6428	No cases	No cases	−1.057**	No cases	Imprisonment
Significance	with	with	are	with	(.0139)	with	with	(-.-)	with	only
Career	careers	careers	constant	careers	−1.7142	careers	careers	2.0000	careers	
Significance					(.1199)			(-.-)		
R^2					.4381			1.0000		
N					23			32		

NOTE: Entry of prior record or other signs of a criminal career into the equation renders the effect of a guilty plea for drunkenness in 1850 positive and that for 1860 negative—the only reversals of sign, despite numerous changes in the magnitude of coefficients, created by that variable.

[a] Data were supplemented with a targeted sample of 32 randomly selected larceny cases balanced by plea and sentence to boost sample size for robust estimates.

[b] Data from the stratified sample was pooled with that from the simple random sample and with small targeted randomly drawn samples of 20 larceny cases (10 plead guilty, 10 plead not guilty) and of all assault cases in the docket for that year that led to imprisonment.

* $p<.10$ ** $p<.05$ *** $p<.01$

the probability that the existing pattern of signs would be observed if chance alone were operative? Based on this test, the probability that the pattern of effects that we observe for pleading guilty on duration of imprisonment (see Table 5) stems from chance alone is .0900 across all offense-specific coefficients.[36] While the larceny and assault and battery cases (two out of four negative coefficients showing reduced duration) varied over time, offenses against the moral order (five out of five positive coefficients showing a premium exacted) demonstrated clearly that concessions were not being granted there. Combining both groups of offenses, I found that the signs of seven of the nine coefficients are in the hypothesized direction. With a probability of only .0900 of occurring by chance, this is approximately equivalent to significance of the effect of plea on duration of imprisonment at a .10 level of confidence. In contrast, the fines show much less systematic effect. The probability that the pattern of fines for larceny and assault and battery (three out of six negative coefficients) would occur by chance is .6560 and that for the offenses against moral order (two of four coefficients showing a premium exacted) is .6880. Thus, we find fairly strong evidence that plea shapes magnitude of sentence—at least in terms of duration of imprisonment imposed though, not obviously from these results, for fines. That said, the probability of all three coefficients for larceny and for assault and battery in the crucial transition year of 1840 being negative due to chance alone is only .1250—again approaching significance at the .10 level of confidence.

When these coefficients were reestimated, controlling for the effect of a criminal career, two findings were striking (see Table 7). First, the almost complete absence of cases with criminal careers among those producing dispositions in the Police Court contrasts sharply with the many cases initially charged that showed prior convictions, other cases pending, or multiple counts charged. Table 7 reveals starkly the extent to which cases involving offenders with criminal careers were swept heavily to the Municipal (higher) Court. Second, when dispositions were reached in such cases, a criminal career, though frequently affecting the magnitude of the effect of plea on sentencing alone, reversed the sign of the coefficient for plea in only three instances—those of larceny cases for 1840 and of drunkenness cases for 1850 and 1860. In the former two instances, the effect of plea shifted from a discount to a premium while the reverse

chance of 1 "success" is .5, of the observed pattern of "successes" occurring on the basis of chance alone.

[36] Taking the signs of the coefficients for imprisonment in Table 5, we find 2 minuses (–'s) and 7 pluses (+'s). In the sign test, ties (or a finding of no effect of plea) are set aside. We then ask if this 7–2 split matters or differs significantly from what we'd be likely to find by chance.

was true for drunkenness in 1860. The fact that guilty pleas lost their capacity to evoke leniency for many such offenses in the hands of habitual offenders underscores both the seriousness with which repeat offending was viewed and the clarity of court policy in distinguishing between recidivists and those who could more readily be restored to productive living.

Beyond the effect of plea on magnitude of sentence, it might also affect the "type" of sentence imposed. Thus, I next explored the effect of plea on case disposition—especially on the nature of sentences imposed. Because disposition is a complex process with many branches, the nested probability model was used (refer back to Fig. 2 for a sample diagram). Visually, this model can be thought of as a family of decision trees, each showing the probability for one year, given a plea of guilty versus not guilty, that a defendant incurs each of a sequence of *intermediate* disposition and sentencing outcomes (i.e., nodes along the tree) as well as each of five *final* outcomes (i.e., the end points on the tree) as the case moves through the justice system. Probabilities were computed for each study year and type of offense. In this analysis, the five final outcomes (along the right margin) are the primary concern—the ultimate probabilities of fine, imprisonment, other sentence, acquittal and other outcome (i.e., outcome other than guilty or not guilty).[37] The intermediate outcomes (or branches) decompose those final outcomes to show, given a plea, what each step in the disposition and sentencing process contributed to producing the different end results. Consequences of pleading guilty for imposition of a fine relative to a harsher term of imprisonment, on the one hand, and for transfer to Municipal Court, on the other, are the crucial points here.[38] Thus, those steps in the process of disposition are broken out for special consideration.

Does pleading guilty increase one's chances of a more lenient disposition, especially a fine instead of imprisonment? Figures for the aggregate of all offenses indicate that it does—both in intermediate and final outcomes (see Table 8 and prior Table 4 above).[39] Aggregates can, however, be misleading be-

[37] One can read the intermediate probability on the uppermost right-hand branch of the top tree (.6923) as the probability of a defendant being fined, given that s/he pled guilty, had some finding of either guilty or not guilty, ultimately was found guilty, and was sentenced to a fine or term of imprisonment. One can read the topmost final outcome (.6922) as the probability that a defendant is fined, given that s/he pled guilty.

[38] Because the variables used here, plea and a succession of outcomes, are constructed as simple binary ones, the probabilities for each branch could alternatively be computed as simple average probabilities of each outcome for those pleading guilty versus not guilty and multiplied out along the sequence of branched paths to produce the ultimate reduced form estimates of the chance of a case ending in one of five end states.

[39] Here we focus, reading from left to right, in the branched tree diagram in Fig. 2, on the fourth (or right-most branch). We ask, given that a sentence in the form of either fine or imprisonment was imposed, what is the probability that it was a fine and what is the probability that it was a sentence.

Table 8. Conditional Probabilities of Intermediate Outcomes of Fine or Imprisonment, Given That a Fine or Sentence Was Imposed (Stratified Sample)

	Larceny[a]		Assault & Battery[a]		Drunkenness		Common Drunkard		Nightwalking	
	Guilty	Not Guilty	Guilty	Not Guilty	Guilty	Not Guilty	Guilty	Not Guilty	Guilty	Not Guilty
1830:										
Fine	◑ .5000	.5000	◑ 1.000	1.000	No Cases		◑ .0000	.0000	◑ .0000	.0000
Imprisonment	◑ .5000	.5000	◑ 1.000	1.000			◑ 1.0000	1.0000	◑ 1.0000	1.0000
1840:										
Fine	● .2000	.3000	○ .9999	.9285	◑ 1.0000	1.0000	◑ .0000	.0000	◑ .0000	.0000
Imprisonment	○ .8000	.7000	● .0001	.0715	◑ .0000	.0000	◑ 1.0000	1.0000	◑ 1.0000	1.0000
1850:										
Fine	○ .6923	.6250	○ .8889	.8235	● .9474	1.0000	● .0000	.1000	● .0556	.2222
Imprisonment	● .3077	.3750	● .1111	.1765	○ .0526	.0000	○ 1.0000	.9000	○ .9444	.7778
1860:										
Fine	○ .6362	.6153	○ .9090	.8571	● .9167	1.0000	○ .0667	.0001	◑ .0000	.0000
Imprisonment	● .3638	.3847	● .0910	.1429	○ .0833	.0000	● .9333	.9999	◑ 1.0000	1.0000

[a] Stratified random sample with pooling of stratified random sample and simple random sample for larceny and for assault and battery in 1850. In addition, small targeted random samples of larceny cases in 1840 and of larceny and assault and battery cases in 1850 were added per Note in Table 5.

KEY: ● = Probability of this type of sentence is *less* for guilty pleas than for not guilty pleas; ◑ = No difference; ○ = Probability is *greater* for guilty pleas

cause they are shaped in part by the mix of cases they incorporate and by changes in that mix.[40] Offense-specific analysis, then, is crucial for decomposing an aggregate pattern into its meaningful components. As Table 8 shows, from 1840 on, for larceny and for assault and battery cases, those entering guilty pleas were consistently more likely to receive lenient treatment because such defendants had a greater chance, given that either a fine or a term of imprisonment was imposed, of receiving the less severe fine. The exception was 1840 when defendants in larceny cases who pled guilty were more likely to be confined to prison than those pleading not guilty. Even that is really an underlying concession of sorts, however, since the reason that terms of imprisonment were more prevalent for guilty pleas in that year is that an unusually large number of cases involving pleas of not guilty were transferred up to Municipal Court—a far more serious and expensive affair than the Police Court (see outcome "Other than G/NG" in Table 4). Previously, in 1830, it was those pleading guilty to larceny who were far more likely to be transferred than those pleading not guilty. Thus, one major facet of the leniency attending guilty pleas that emerges after 1850 appears here to be a reduced risk of transfer to higher court.

For common drunkard, drunkenness, and nightwalking cases, no direct intermediate effect, either positive or negative, of plea on sentence type was evident in 1840 (see Table 8). When we view final outcomes, however, we find systemic evidence of an actual premium exacted when defendants plead guilty to these offenses that can be seen in their more frequent transfer to Municipal Court. Referring to Table 4, we find that in 1840 all those transferred for these offenses pled guilty, while those pleading guilty to larceny were less likely to be transferred (see outcome "Other than G/NG" in Table 4). In drunkenness cases, pleading guilty was even riskier at that point since it increased both one's chances of transfer to Municipal Court and one's risk of receiving a term of imprisonment from the Police Court. By 1850, the risk of transfer in morals cases generally was greatly reduced. However, the tendency to exact a premium for guilty pleas in these cases continued (see Tables 4 and 8). Now, instead of a guilty plea producing greater likelihood of a fine and reducing the chance of a term of imprisonment in Police Court, the reverse was true. Probabilities of various final dispositions show that those pleading guilty to drunkenness, common drunkard, and nightwalking offenses were more likely to face terms of confine-

[40] For instance, what at first appears to be a negative effect of criminal career on sentencing magnitude for the aggregate of all cases in the sample in 1850 is, in fact, an illusory result of the fact that many offenders with prior records that year were arrested for simple drunkenness. Even after a premium is exacted for a criminal career, the sentences tend to be lower than for the common drunkard cases more prevalent previously. This gives a false impression that a criminal record reduces one's sentence that year when the cause of the statistical result is really the underlying mix of cases.

ment in prison than fines (refer back to Table 4). In 1850, probabilities of intermediate outcomes of a fine relative to imprisonment also underscore that premiums were being exacted when a guilty plea was entered by imposing a term of imprisonment (see Table 8).

Concessions may have been absent initially for these morals offenses and premiums exacted, despite the entry of guilty pleas, in part, because links to traditional morality restricted compromise.[41] It is also true that such offenses had fewer direct consequences for the "people's welfare" that was being shaped by economic growth. These breaches, especially nightwalking, require nuanced interpretation since many involved habitual offenders and ultimately were transferred to Municipal Court.[42] Provisions for recidivists have already been discussed. In addition, many lengthy sentences in Police Court were initially abated informally by suspending them for 24 hours—inviting defendants, sometimes explicitly, to leave town. Equally important, many of the drunkenness, common drunkard, and nightwalking cases involved women. Females raised a trenchant issue. In this "well-regulated society" in which markets and capitalism were expanding apace, women were imagined to be of two sorts—those living under "household governance" (usually indicated by "wife of . . .") and those making it on their own ("spinster," "singlewoman" or, sometimes, "widow"). In a society oriented to hierarchy that regarded every household as a "little commonwealth" and a training ground for governance, it was those living on their own who were thought to pose the greatest threat and who tended to be penalized for an infraction with particular severity. This is reflected in the social characteristics of defendants transferred, along with the most dangerous offenders, to Municipal Court in 1830. After I controlled for features such as plea and criminal career, which exerted a powerful influence, I found that women—including a large number of single women, spinsters, and widows—appear to have abounded among those defendants transferred to the higher court just as they appear to have been

[41] According to traditional Puritan practice, "admonition" brought leniency in the form of forgiveness and reconciliation but not necessarily an easing of punishment per se. In fact, incarceration was intended not primarily to resocialize and rehabilitate but to remove one from corrupting influences and through isolated reflection to come to reconnection with God's grace and penitence. Thus, especially for habitual offenders, an extended period of reflection, typically through confinement, is consonant with Puritan tradition.

[42] According to Barbara Hobson (1987), in her account of 19th-century prostitution in *Uneasy Virtue*, those charged with nightwalking sometimes closed their cases expeditiously with a guilty plea in the lower court and appealed them for a trial de novo to the Superior Court, which with its more affluent stance and emphasis primarily on violence and property, sometimes treated vice more indulgently despite its more substantial sentencing structure, but judges who recognized this strategy may have been reluctant to accord leniency.

among those being sentenced more harshly in the lower one (Tables 9 and 10).[43]

Table 9. Social Determinants of Transfer to Municipal (Superior) Court: All Offenses, 1830 (Stratified Sample)

Criminal career	.4185*
Guilty plea	.3192*
Value stolen	.1063**
Sex of defendant	1.1843***
Constant	−.3968

R^2 = .7948, N = 12

Significance of F-test = .0148

* $p<.10$ ** $p<.05$ *** $p<.01$

Table 10. Effects of Plea and Social Determinants on Duration of Imprisonment in Larceny Cases

Minor	−1.0708*
Sex of defendant	1.1599*
Guilty plea	−.4738
Value stolen	.0101
Career	2.1039***
Constant	2.5800

R^2=.7815, N=16

Significance of F-test =.0043

* $p<.15$ ** $p<.05$ *** $p<.01$

Leniency, by shaping type of sentence, then, was most common for the property-related offense of larceny and for assault and battery. Both were major concerns as threats to the security and predictability in daily affairs that were vital to healthy markets and growth (Horwitz 1977; Nedelsky 1990; Nelson 1981). Perhaps due to their secular nature, no lingering religious proscription appears to have inhibited bargaining in such cases. Significance, now of a plea's effect on type of sentence, was again assessed by applying the sign test to the probabilities presented in Tables 4 and 8. For larceny and assault and battery, the likelihood that the series of effects of plea on the simple intermediate probability, shown in Table 8, of a fine instead of imprisonment (5 out of 6 reduced probabilities of imprisonment when pleading guilty) could occur by chance alone is .1093. The comparable probability for offenses against the moral order (4 of 5 having greater probabilities of imprisonment when pleading guilty) is .1880. Combining these analyses, we find that the probability that 9 of 11 coefficients would exhibit the expected sign by chance alone is .0330—the functional equivalent of statistical signifi-

[43] It is important to distinguish these defendants from those who closed their cases quickly to appeal to the higher court. That was not the case here. Upon entering their pleas, most of these women were ordered to pay recognizance of $100 or more (either personally or through friends) to guarantee their appearance at a specified date in Municipal Court as well as their good behavior meanwhile.

cance at the .03 level of confidence. For the reduced form final (or summary) outcomes, the systemic effects of plea on type of sentence are less clear. The probability that the series of effects of plea (i.e., 3 of 6 negative effects) on final probability of imprisonment for the larceny and for assault and battery cases in 1840, 1850, and 1860 could occur by chance is .6560. For offenses against the moral order, the comparable probability of a reduced chance of a harsher term of imprisonment (i.e., 4 of 7 positive effects) is approximately .5000—not discernibly different from chance. Combining these analyses, the probability of 7 of 13 effects of plea occurring in the predicted direction is again .5000—the equivalent of chance pure and simple, suggesting absence of a systematic effect from this angle. In part because of the interplay between chance of transfer to Municipal Court and probability of imprisonment (i.e., reduced chance of transfer to Municipal Court produces greater imprisonment which, on the face of it, can appear harsh though in reality less severe than most higher court sentences), the effects of plea here are somewhat subtle. Generally, evidence suggests that plea leverages case disposition and type of sentence—primarily by shaping the direct intermediate probability of fine or imprisonment, given that a sentence of some type is imposed, and also by systematically shaping chances of transfer to Municipal Court.

If defendants are to benefit from pleading guilty, concessions must overcome the initial disadvantage that pleading guilty essentially eliminates one's chance of being acquitted. Not surprisingly, the data show that probability of acquittal was reduced virtually to zero by a guilty plea (refer back to Table 4). However, outcomes other than guilty or not guilty (e.g., "released" or "placed on file") were occasionally arrived at that did not involve transfer to Municipal Court—somewhat offsetting reduced chances of acquittal. Beyond what has been mentioned, several other types of concessions played a role in the 19th-century bargaining process. These primarily included cost savings, explicit concessions, and freedom from confinement for nonpayment of a fine as noted earlier. Of these, court costs and explicit concessions had especially powerful financial repercussions for defendants. Court costs, which fell when a defendant pled guilty, otherwise sometimes totaled more than the amount of a fine (Handlin 1969). Explicit concessions, such as probation or early discharge from jail or prison, restored valuable earnings otherwise lost—a vital concern for families living on the economic margins.

As study of bargaining's contours progressed, it became apparent that the process was rich with many adjustable elements. It was a massive and highly differentiated process that worked in different ways at different times. To summarize the variety of the process, composite charts show the types of concessions made (see Tables 11 and 12). Concessions that are stage-specific are

somewhat more abundant in 1840 and 1860, while systemic concessions are slightly more frequent in 1850. The frequent concessions for crimes against property and the person, and only later for crimes against the moral order, are also evident from these tables.

Table 11. Composite Chart of Concessions Accompanying Guilty Pleas: Boston Police Court

	Larceny	Assault and Battery	Common Drunkard	Drunkenness	Nightwalking
1840	PMC–, $–, T–, E–	PF/FS–, PI/FS–, $–	PI/FS–	None	None
1850	PMC–	PF/FS+, PI/FS–, T–		$–	$–
1860	$–, C–	PMC–, PF/FS+, PI/FS–, T–	None	C–	None

LEGEND:
PF/FS = conditional probability of fine as intermediate outcome (given that a fine or term of imprisonment is imposed)
PI/FS = conditional probability of imprisonment as intermediate outcome (given that a fine or term of imprisonment is imposed)
PMC = probability of transfer to Municipal (higher) Court
$ = amount of fine
T = duration of time of imprisonment
C = costs
E = explicit concessions (e.g., early discharge from House of Correction)
\+ = greater for a plea of guilty than of not guilty
– = less for a plea of guilty

Although patterns of plea and concession provide strong evidence of plea bargaining's emergence, one wonders how aware of it people were at the time. Here two points are of interest. First, fluctuations in concessions are mirrored, for some offenses, by parallel shifts in the tendency to plead guilty—among the cases sampled for this study, when concessions offered them were substantial, defendants more often pled guilty (see Table 13). This mirroring demonstrates that not only was a "bargaining" process in place by 1840 but also that institutionalization was underway whereby members of the public, aware of concessions being granted, varied the frequency with which they individually pled guilty.

Second, while inference is powerful, it is compelling to find that people of the day recognized the practice of plea bargaining explicitly and had some language for talking about it as well as acting "as if" they did. The origins of the term "plea bargaining," detailed later, show the public to have been acutely aware. An anecdote is also telling. In 1837, Thomas Gil, court reporter for

Table 12. Systemic Probabilities of Concessions as Final Outcomes Accompanying Guilty Pleas, Boston Police Court (Compiled from Table 4)

	Larceny	Assault and Battery	Common Drunkard	Drunkenness	Nightwalking
1840	PMC–	SPF+, SBI–	None	None	None
1850	PMC–, SPF+, SPI–	SPF+, SPI–	None	SPF+, SPI–	None
1860	SPF+, SPI–	SPF+, SPI– PMC–	None	None	None

LEGEND:
PMC = probability of transfer to Municipal (higher) Court
SPF = System's probability of fine as (reduced form) final outcome
SPI = final probability of imprisonment as (reduced form) final outcome
\+ = greater for a plea of guilty than not guilty
– = less for a plea of guilty

Table 13. Guilty Pleas and Concessions: The Process of Institutionalization (Stratified Sample)

	Larceny		Assault & Battery	
	Concessions	Guilty Plea Rate	Concessions	Guilty Plea Rate
1840	PMC–, T–, $–, E–	.20	PF/FS–, PI/FS–, $–	.00
1850	PMC–	.14	PF/FS+, PI/FS–, T–	.12
1860	$–, C–	.50	PMC–, PF/FS+, PI/FS–, T–	.41

LEGEND: See list for Table 11.

the *Boston Morning Post,* published his court vignettes. While not making too much of it, he uses the term "bargain" to describe this practice. As we shall see, the name "bargain" with which the public dubbed this practice provides important clues about the public skepticism the practice may have initially provoked.

Thus, in terms of our first two key outcomes, the emergence of plea bargaining and the types of offenses in which it was used, we see that bargaining emerged in the 1830s and 1840s and that it centered on offenses against property and security. It remains now to explain why plea bargaining should operate this way initially. It also remains to explain why concessions were most strikingly evident in 1840 and 1860, why plea bargaining took the particular cultural form that it did, and why it originated in the United States. To account for each feature, we turn to consider changes in the layered temporalities of structures, institutions,

strategies, and transformative events that gave rise to the practice and shaped it. In this venture, the focus is on: the timing of the emergence of plea bargaining; the distinctive imaginative constructions of the common law and of Puritanism that offered a unique cultural repertoire on which to draw; and the contours and strength of the state.

Timing of Crisis: Popular Politics in Law's Formative Era

By locating the beginnings of plea bargaining in the 1830s and 1840s, we observe that it arose amidst a period of perceived crisis of political instability in the American republic. This timing was crucial because the crisis converged with the extension of "universal" suffrage to evoke additional new forms of state response to social conflict.[44] As the voting public expanded, uncertainty ran high about whether self-rule would continue to prove viable and what directions politics might take.[45] At this unique moment, the need for a state response to the turmoil that would prove viable in a world of popular politics led to a rescripting of legal practices. Plea bargaining was one innovation from this period that achieved particular prominence. Plasticity of legal forms at this time, when judges were crafting legal institutions into their modern form, provided a unique opening for plea bargaining to emerge and then to achieve a permanence that might not otherwise have been possible.

Changing Class Structure and Challenge to Elite Control

During the 1830s and 1840s, Boston grew rapidly and experienced major structural changes. Although the class structure and occupational base of Boston bespoke the city's roots in commerce, its growth and stratification were shaped by the swift industrially based economic development underway in the state. Although factory construction began late, with the first modern American factory in Waltham in 1814, the Commonwealth had surpassed British levels of labor force conversion to factory work by the 1840s (Siracusa 1979).[46] By that point, the ranks of factory-based textile workers swelled noticeably in the state. The

[44] Nicos Poulantzas (1975) emphasizes the importance of timing in the convergence of social forces. Similarly Reinhard Bendix (1964) emphasizes the importance of the sequencing of industrialization and democratization in defining the nature of politics in a society and the nature of the political issues that arise. Other works that highlight the effect of historical timing are Binder et al. (1971) and Bridges (1984, 1988).

[45] This public concern also spawned the movement for "common schooling" in Boston under the leadership of Horace Mann. Educators worked to establish schools in every municipality that were open to all children to attend. Mann sought to advance the intelligence and habits of mind needed to produce informed citizens and industrious workers so as to assure the future of the republic (Kaestle 1983).

[46] By the 1840s industrial output in Massachusetts ranked first in total output among all states and continued to do so throughout the antebellum period. It remained

port of Boston grew into a bustling hub of trade and finance, craft workshops, and construction projects (Handlin 1979:9).

After the War of 1812, prosperity returned and production skyrocketed in the textile centers at Lowell, Fall River, and the mill towns of the Merrimac River. This long-awaited restoration of growth was financed primarily by the wealth garnered by Boston merchants and shipping companies during the Federal period in the China trade. As textile production turned profits, the proceeds flooded back into the city. Bankers used these resources to underwrite the city's sensational rise to rival New York as a finance capital through the antebellum years. What industry existed in the city of Boston itself, however, remained small in scale. In 1845, the occupational structure of the city produced growing inequality—with small traders, proprietors, petty artisans and handicraftsmen toiling for a modest livelihood while the vast enterprises of the "merchant princes" flourished in shipping, trade, finance, and manufacturing (ibid. pp. 11–12). Into Boston flooded products from the Merrimac's factories and the shoemakers of Lynn bound for distant parts of the country or cities abroad (ibid., p. 7). Though industrial workers were few in the city, unskilled laborers, often immigrants working as seamen or in construction, multiplied apace (Handlin 1969).

As prosperity blossomed, missionary, reform, and benevolent associations poised for "conquest" of the growing middling ranks and laboring classes. A national temperance movement joined in to imbue an ethic of self-disciplined effort at work (Sellers 1991:237). Entrepreneurs motivated both themselves and their workers by enshrining class as a "[quasi-] moral category" and touting the promise of mobility (ibid.). Disdaining both the "idle rich" and the "dissolute poor," these traders, shopkeepers and small manufacturers envisioned a "virtuous middle class" of the industrious (ibid.). In a market-based society promising reward proportionate to effort, middle-class imagery both motivated and justified prosperity to overcome simmering discontent at inequity (ibid.).

The reality was that Boston afforded little chance for mobility unless one possessed the dual advantages of "birth and capital" (Handlin 1979:12). Young men seeking better prospects steadily left the city. Population nonetheless expanded but far less than in other urban centers. Between 1820 and 1840, immigrants arrived, not so much from Europe as from rural New England until the great floodtides of Irish began (ibid.). The financial and mercantile, but nonindustrial, role played by the city generated great increases in wealth but sharp inequities in its distribution. Bostonians of the 1820s and 1830s lived through the sharpest in-

first in per capita output until late in the 19th century. This productivity caused the "commonwealth" to be termed "the most thoroughly industrialized state."

crease in the permanent inequality of conditions in American history (Sellers 1991:238). The share of wealth held by the richest tenth of families rose, primarily after 1820, from 49.6% in 1774 to 73% in 1860 (ibid.). Wealth was concentrated in the cities. Nor were the largest fortunes the fruits of effort by self-made men. Of the 2,000 wealthiest citizens between 1828 and 1848, 94% in Boston had been born to rich or eminent families, as were 92% in Philadelphia and 95% in New York (ibid., p. 239). Strain induced by this growing inequality and the atomization of "market society" was exacerbated by constant geographic movement and turnover in communities. Of the families listed in the 1830 Boston census, less than half remained by 1840. An identifiable Irish immigrant community began to emerge out of those who stayed.

By the late 1820s the early moral reform societies had failed. Why they failed says much about the dilemmas of social control in that day. The Reverend John Chester noted that "armed with statutes and followed by officers," moral reformers were viewed as threatening "to abridge the liberties and destroy the rights of the community" (ibid., p. 263). Voicing prescient words, Chester concluded that "you can not coerce a free people that are jealous to fastidiousness of their rights" (ibid.). Instead, he exhorted, one must persuade them in order to win their consent.

Harmonious consent would not be readily forthcoming. Instead generalized unrest, social conflict and violence would. Deference to one's "betters" in politics had faded. Spurred on by the democratic turn in national politics with the election of Andrew Jackson to the Presidency, a rash of strikes by the Workingmen's movement swept the urban northeast between 1833 and 1836 (ibid., p. 338). Their quest was the crusade for a 10-hour working day—a goal that, by 1836, had essentially been achieved (ibid.). Yet their discourse endured. It decried the fact that "capital divided society into two classes—the producing many and the exploiting few—by expropriating the fruits of labor" (ibid.).[47] Workingmen had questioned rampant inequality. Even more ominously, labor unrest began to contest the ethos of unremitting industrious work for a wage. Recognizing that a privileged few flourished at expense of the many, resentment simmered. By the 1830s, public concern was palpable about potentially explo-

[47] Taking aim at the mill owners of the Merrimac Valley, workers' pamphlets claimed America's "young [industrial] Nobility" to be more exploitative than England's landed gentry and urged resistance through Workingmen's politics and unions (Sellers 1991:338). In the words of Boston strike organizers A. H. Wood and Seth Luther, "Capital which can only be made productive by labor is endeavoring to crush labor, the only source of wealth" (Schlesinger 1945:166–67). Depicting the strikes as "neither more nor less than a contest between Money and LABOR" (emphasis in original), Wood acknowledged that mobilization of working men was "arraying the poor against the principles of the rich, and if this be arraying the poor against the rich, I say go on with tenfold fury" (ibid.).

sive tremors in the fragile system of republican self-rule. Workers began to use the language of republicanism in new ways that interpreted the holistic interests of the community in a new modestly socialist vein (Forbath 1991). Social disorder, riots, and strikes preoccupied elected state and city officials. To defuse resentment and reassert control, public officials drew, as we shall see in more detail in a moment, on the ideology of a "rule of law."

By this point, social conflict had gripped the public imagination. Ethnic diversity and, with it, contentiousness also soared as did perceptions of the Irish as causing the disruptive turmoil. Data from the House of Corrections, at first glance, appeared to support this view. In 1834 Irish-born persons made up 35% of its inmates—a far greater share than they yet constituted of the city's population (City of Boston Documents, no. 13, 1834, p. 14; no. 23, 1837, p. 19). Yet, whether this is due to the fact that they were victims of selective law enforcement or were penalized for drinking in public houses rather than, in Yankee style, at home it is not possible to say.

Adding to these tensions was an extraordinary public fear of crime—especially violence.[48] Addressing the Boston city council on 18 September 1837, Mayor Eliot decried the threat posed by "the incendiary, burglar and the lawlessly violent" which was "increasing at a ratio faster than that of the population" (cited in Lane 1971:34).[49] Probably the best indicator of public apprehension is that the Mayor requested and obtained funds to establish a paid police force for the city. Pointing to the "spirit of violence abroad," Eliot argued that appropriate steps had to be taken to protect the city.

Whether disorder and crime actually were rising or were merely perceived as more threatening, it is clear that violence was pervasive. Witness the remarkable spate of riots and routs that occurred during the 1830s. Two events, in particular, brought public distress to a fever pitch—the burning of an Ursuline Convent in Charlestown in a flare-up of anti-Irish sentiment in 1834 and the famed Broad Street riot of 1837.[50] After the

[48] Recently Monkkonnen (1997) has presented data for New York City showing that during the 1820s the city experienced not just heightened fear but a very real increase in homicide, a trend that peaked nationally during the 1850s (Gurr 1981).

[49] Arrest data in Boston are available only for 1831 and 1850; thus, questions of the relation of arrests to offenses actually committed aside, detailed analysis of arrests over this period is not possible. However, commitments of those convicted to the Boston jail show a 45% increase in just four years between 1830 and 1834—the only early 19th-century years for which data are available—as compared with only a 25% increase in the population of the city of Boston for the entire decade 1830 to 1840 (Council of the Massachusetts Temperance Society, 1834, cited in Handlin 1979:239). However, since court caseload grew far less than 45% in those years, this increase probably reflected greater use of incarceration. This was a period when Enlightenment ideas about the potential for human improvement prompted a turn to imprisonment as a vehicle for resocialization.

[50] Sparked by a clash between a volunteer fire company and an Irish funeral procession, the Broad Street riot involved 15,000 persons or one-sixth the population of Boston

"Mount Benedict Outrage," as the convent fire was known, public agitation soared. It was seen as "a riot with social, even political, implications" (Lane 1971:30). Further, by the mid-1830s, city officials, well aware of political events in England and the Continent, were acutely "aware of the potential for political riot" (ibid.).[51] In 1836 and 1837 the strain was aggravated when a severe economic downturn, followed by a financial panic, further agitated fears about the fragility of the new order. Unease created by encounters at close hand with persons of diverse ranks in daily life enhanced angst as the lifestyles of the poor impinged ever more intimately on the affluent (ibid.).

As labor and ethnic conflict mounted, shockwaves were amplified by erosion of both religious values and cultural consensus (Wiebe 1966). Massachusetts had always been a contentious and litigious society—a practice some attribute to its use of litigation to define social rules in changing times (Konig 1979). Religion had, however, traditionally provided binding elements of commonality. By the 1830s, that had changed. Separation of church and state, culminating with disestablishment in 1833, speeded the spread of secular outlooks. Cultural consensus rooted in the small "island communities" of village life and, with it, shared norms and bonds of reciprocal obligation had declined (Nelson 1975; Zuckerman 1978; Lockridge 1981).[52] Thus, during the 1830s, social conflict in a setting of weakened cultural consensus produced a heightened sense of crisis in the new order.

Much of the explanation for the nature of political and legal response to this crisis lies in timing that caused state response to be devised during a time of two other key happenings (Poulantzas 1975). The franchise was extended which made it likely that state response would take a form attuned to sustaining the popular consent that was crucial to self-rule. There also evolved a new conscious focus on social policy in law under what was already a heavily regulated society in which judges attuned decisionmaking, including sentencing, to the policies of the state and

at the time and took 800 horsemen to quiet. Not all riots of the day were anti-Irish in origin. In 1835, a mob attacked abolitionist William Lloyd Garrison at the offices of the *Liberator* and then stormed the mayor's office at City Hall.

[51] Terry DeFilippo (1973:239–51) notes:

> The 18th and 19th century are punctuated by riot occasioned by bread prices, turnpikes and tolls, excise, "rescue," strikes, new machinery, enclosures, press-gangs and a score of other grievances. Direct action on particular grievances merges on the one hand into the great political risings of the "mob"—the Wilkes agitation of the 1760s and 1770s, the Gordon Riots (1780), the mobbing of the king in the London streets (1795 and 1820), the Bristol Riots (1831), and the Birmingham Bull Ring Riots (1839). On the other hand it merges with organized forms of sustained illegal action of quasi-insurrection—Luddism (1811-13), the East-Anglian Riots (1816), and the "Last Labourer's Revolt" (1830), the Rebecca Riots (1839 and 1842) and the Plug Riots (1842).

[52] Primary sources of this weakening included differentiation of churches that bred conflict among sects and increasing diversity of cultural values and styles due to immigration (Nelson 1975).

assumed a new activism that edged into policymaking as they considered cases in light of their broader implications (Horwitz 1977). The fact that crisis emerged during a formative period of unique plasticity in American law created a special window of opportunity for cultural codification of this change.

Extension of the Franchise and the Politics of Consent

By the end of Jackson's second presidential term in the mid-1830s, politics was being reconstituted by "universal" suffrage. By easing restrictions, such as property ownership and the poll tax, Massachusetts, like other states, extended the franchise, already widely shared among the middling ranks, to previously untapped segments of the laboring classes. Artisans and workers could now produce more representative assemblies. Elected leaders, in turn, faced new constraints as they shaped state action. Decisions increasingly required some modicum of broad-based popular consent. This strengthened a move already underway to challenge the city's Federalist elite (Lane 1971). It also aroused worries about what other forms contestation would take. According to Elizabeth Mensch (1982:20), "the universal principle that . . . [received] the most zealous protection was the sanctity of private property."[53] Joseph Story opined in those years that the lawyer's most "glorious and not infrequently perilous" responsibility was to protect the "sacred rights of property" from the "rapacity" of the "majority" (Story 1829; cited in Mensch 1982). While proprietors complained that social conflict impaired quality of life, the city's leaders grew wary of further reaching consequences of unrest (Lane 1971).

Well aware of rioting and revolt in Britain and the European Continent during the 1830s, Boston's politicians worked feverishly to restore order, reconsolidate their partisan base, and cement popular commitment to the institutions of the republic. Because the franchise created pressure to restore order without jeopardizing voter support, responses had to be devised anew not only to violence, property crime, and riot but also to growing political tensions. The courts, which provided Americans' most common experience of the state before local political parties formed in the 1840s, now assumed a key role (Skowronek 1982). Beginning in the 1820s, just after the panic of 1817, a first wave of court reform had been undertaken to stem perennial criticisms that universality and fairness were lacking. Among other things, it established the Boston Police Court. This had been done as part of a program of conscious social reform

[53] She points out that "American jurists [believed] . . . with something approaching paranoia . . . that the redistributive passions of the majority, if . . . allowed to overrun . . . legal principle, would sweep away the nation's whole social and economic foundation [in the institution of property]" (Mensch 1982:20).

spearheaded by Boston's leading citizens. The goal had been to reestablish the courts as a respected and heavily used forum for resolving conflict (Hindus 1980; Dimond 1975). These initiatives had responded both to the demands of the propertied for security and, even more, to the "claims [for a just forum for dispute resolution on the part] of a [lower] class [whom they felt it] unsafe to deny" (Lane 1971:23). Change was begun.

By the 1830s Boston's local officials were "no longer so firmly united by ties of class and [state level] party [affiliation] as their predecessors [had been]" (ibid. p. 46). The city remained a one-party Whig city where "candidates labelled Democrat or [later] Locofoco had [virtually] no chance of local success" (ibid., p. 47). However, the times were creating intractable dilemmas for these beleaguered municipal authorities (ibid.). In a tense political atmosphere, "hopes for the material future were [increasingly] balanced by fear for the political" (ibid., p. 60). Under pressure, elite Bostonians experimented with new alternatives. Far from generous in their willingness to spend public monies on those bypassed by economic opportunity, Bostonians seized on social order and not just any order but order as it had been. To take one step "backward" to reconsolidate elite power, this city with its tradition of single-party Federalist/Whig control was forced to rethink the logic of its dominance and to take numerous small steps forward in the service of consensus building and reform.[54]

Strategies to restore social order were conceived, then, precisely at a time that precluded politics as usual. The Whigs feared threats not only to property per se but to the stability in day-to-day affairs that investment and growth required.[55] While the republic and its markets were thought generally robust, uncertainty that introduced unusual risk could be nearly as deleterious to commerce as a change of regime. Risk was something these seafaring merchants and financiers well understood. Fearing for the future, leading Bostonians worked to nurture order and predictability in public life and to cultivate consent of the city's newly enfranchised citizens to both institutions for self-rule and the

[54] Italian theorist Antonio Gramsci (1971:178) has noted: "A crisis occurs, sometimes lasting for decades. This exceptional duration [often] means that incurable structural contradictions have . . . [matured], and that, despite this, the political forces which are struggling to conserve and defend the existing structure itself are making every effort to cure them, within certain limits, and to overcome them. These incessant and persistent efforts (since no social formation will ever admit that it has been superseded) form the terrain of the "conjunctural," and it is upon this terrain that the forces of opposition organize. . . . [I]n the immediate, . . . [contestation] is developed in a series of ideological, religious, philosophical, political and juridical polemics."

[55] Adam Smith, in *The Wealth of Nations* (1776), cited the task of providing the security and predictability needed for commerce as one of two essential roles of the postmercantilist state. Insurance companies were working at precisely the time of this study to rationalize and diminish risk (Allen Steinberg, personal communication with the author, 1997).

stewardship of their party. To this end, they approached social control not through overtly coercive means but, as the Reverend John Chester had presciently understood, in ways that underscored the party's claim to serve the will of the people. This meant adopting lines of action that were beyond reproach in the eyes of the voting public.

City officials and elite civic leaders accomplished this by appealing to the preeminent social discourse of the day—that of a "rule of law." By common agreement, they argued, social life must proceed according to a body of rules specified in advance and oriented to fairness. Such rules, they contended, apply universally to every citizen and prescribe equal treatment for each accused person in court. Then, in a gesture ripe with political drama, it was argued that even when such rules depart from popular opinion of the moment, they must unceasingly be observed. Only through adherence to legal principles and procedures, leaders argued, could the new project of self-rule be sustained. By appealing to the language of the widely revered "rule of law" as a basis for order, they hoped to bolster both social order and the legitimacy and authority of republican institutions. With a basis of order restored, they believed they could resecure their hold on power.

The language in which the reforms were introduced reveals something of how officials viewed them. When, in 1822, the Police Court had been established, where trial judges replaced the much maligned system of Justices of the Peace, Mayor Josiah Quincy (1822:7–8) unveiled his plan by denouncing the potential for social conflict inherent in the previous system. Quincy argued that "whenever confidence . . . [lapses] in the lower tribunals, there is no justice . . . [for] the poor, who cannot afford to carry their causes to the higher." Such unjust circumstances, he cried, corrupt the morality and political commitment of citizens. Quincy's reference was to the prior fee structure whereby magistrates had prospered more the greater the number of cases heard. Anticipating a point later made by Max Weber, Quincy argued that where political authority has the basis of its legitimation in legal rules and specification of offices in law, it presents a particular danger when law is perceived as unjust. The risk is that laws, so viewed, may come to be treated as no law at all and that political authority itself will be undercut. Following quickly upon the court, other new institutions, including prisons and reformatories, a House of Industry, and a professional police force were also constructed.

As new institutions were founded, a transformation of judicial decisionmaking and court procedure also began to occur—although more informally. This key event would profoundly alter the role of the court and contribute to one distinctive feature of American democratic state formation—the primacy of the judici-

ary. This primacy centered on judicial independence, power of judicial review of legislative enactments, and the role of the courts in articulating and inculcating the obligations of citizenship. Specifically, judges' decisions took on a policy focus (Horwitz 1977). In the criminal courts, pardons, the nolle prosequi, the plea of nolo contendere, and grants of immunity had already begun to be used in new, more explicitly conditional ways to further specific policy goals. Plea bargaining now made its debut in the courts. Here Max Weber's insights into legal change are again helpful. Weber argues that development of new legal norms and practices has always been the product of innovation, or the construction of new lines of action, in settings where an existing repertoire does not suffice (Weber 1978:753–84). Typically these changes are initiated, Weber contends, by status groups acting on the basis of interest. As time goes on, the innovations first acquire the power of habit, then of norms, and finally are formalized in law. Plea bargaining developed very much in such a progression. Although the practice arose during a period of reform, it was not advanced as a unitary plan or formal initiative. Instead, it emerged as an informal and pragmatic accretion of small changes in the customary practice of the courts that was only then culturally codified.[56]

Law as Instrument of Social Policy

During the "formative era," judges began to reconceptualize American law as an instrument of social policy. This transformation in law, combined with state structure, made it likely that political response to current crisis would come through the courts. While the courts had long interpreted and administered the socially "regulated" society of the commonwealth in pursuit of the "people's welfare," judges' role changed as they increasingly crafted their decisions with an eye not just to sound implementation but to policy implications beyond the case at hand (Horwitz 1977). In private law, case decisions facilitated healthy markets and economic growth (ibid.). What my own work shows is that a policy orientation arose in the criminal courts too. Concentration of plea bargaining in offenses against property and the person (noted above) and the distinct pattern of variation in bargaining found over time (explored in what follows) both indicate that the criminal courts sought to assure behavior that would uphold social order and, especially, foster the security and predictability needed for development.

The early 1800s had been a "disruptive and potentially radical period" (Mensch 1982:19). It was a time when "elite Ameri-

[56] In light of the small gradual shifts in court practice through which plea bargaining emerged, the origin of this practice resembles other key legal developments such as the rise of the prosecutor that John Langbein (1973) has described.

can jurists devoted themselves to reestablishing [post-independence] political authority" (ibid.). Many states had, after the American Revolution, at first adopted much of British common law. Public views of that tradition had been positive. After turn of the century, however, things changed (Horwitz 1977:5). Previously the common law had been viewed as a fixed, customary standard and judges envisioned their task as discovery and application of preexisting legal rules (ibid., p. 8–9). This produced a strict conception of precedent and a popular view of law as, if not always fair, at least known.

In the closing years of the 18th century, however, signs appeared of a breakdown in this view—in both criminal and civil spheres (Horwitz 1977). The roots of this change were two. The first was states' rights constitutional theories which depicted lawfinding based on precedent as a form of *ex post facto* law. The second was new conceptions of the basis of legitimation of political authority which depicted the customary approach of common law as outdated in light of political forms that now emphasized popular sovereignty.[57] The codification movement sought to recognize primacy of the legislature and to replace customary law with enacted statutes. Yet, judges, who were overwhelmingly Whig-appointed, and political leaders resisted the move to statute precisely because of the power it would have given to legislatures dominated by the middling and lower classes (Horwitz 1997:21). Instead, officials and the Whig elite fought to maintain judicial discretion by preserving reliance on the common law (ibid.). Although the codification movement ultimately failed, it signaled public interest in reducing the discretion exercised by judges and in clarifying law, before the fact, by communicating legal rules and procedures to the citizenry.

It was the effort to reconcile their discretion with popular will that brought about what Horwitz has called the "transformation of American law." Judges increasingly bridged the gap by envisioning themselves as reflecting popular sovereignty. Nor was this stance in contradiction with the multifarious regulations of the day, for they came to view their role as that of activist and innovator functioning, amid the many levers of public power, on behalf of the "common good" (Horwitz 1977:30). As a result, judges began to view law as a policy instrument. Their task became a process of making, not just discovering, law. Now judges articulated decisions and used law as a tool to shape the path of social change. In Mark De Wolfe Howe's words, during the antebellum

[57] The constitutional challenge argued that if judges could impose criminal penalties without laws being enacted in statute, the application of precedent after an act had occurred constituted ex post facto law. It punished a person left in ignorance at time of the act of precisely what the law prohibited and, thus, breached constitutional limits on state power (Horwitz 1977:11, 14). As ideas about the basis of political authority changed, it meant that the common law, with its roots in custom, increasingly came into tension with authority based on laws reflecting popular sovereignty.

period "it was as clear to laymen as it was to lawyers that the nature of American institutions . . . was largely to be determined by the judges . . . [and that] questions of . . . law were . . . considered as questions of social policy" (Howe 1947–1950; cited in Horwitz 1977). Howe's words bespoke a conscious turn by political leaders to the courts, among other institutions, to promote state policies.[58] How do we know that plea bargaining constituted such a policy instrument?

Judicial discretion in sentencing was strengthened by plea bargaining. Mayor Josiah Quincy emphasized the existence of such discretion in his address to the Grand Jury of Suffolk County when he observed, "There is, indeed, a discretion invested in judges" (1822:12). That he believed such discretion should be informed by social policy in shaping sentencing Quincy left no doubt. He proclaimed: "The utility of a concentrated system of penal and criminal law in which punishment shall be graduated by the nature and aggravation of crimes, and *adapted to the actual state of society and public sentiment*, . . . [is] appreciated" (p. 14; emphasis mine). That the judges' discretion centered mainly on sentencing policy Quincy also emphasized. He noted that a judge's discretion included selecting "time and place [of imprisonment]" as well as other aspects of the severity of sanction (p. 12). Plea bargaining, by enhancing discretion in judicial decisions, expanded judges' capacity for policy initiatives.

Concentration of plea bargaining in crimes against property and the person, mentioned above, provides an indication of how the policy focus of the practice was used because these offenses threatened the security of the goods, buildings, and facilities crucial for growth. Another lies in patterns of plea bargaining over time—specifically in the relation of concessions to social unrest. As will be seen in more detail in a moment, plea bargaining emerged at a time when virtually all forms of common law leniency were being reworked into more explicit and formally structured vehicles for deterring crime and eliciting desired behavior. Public knowledge of such policy uses of sentencing was widespread and the practice met with public approval (House Report, Massachusetts Legislature, No. 4, January 1845).

Patterns of variation in bargaining over time—specifically in the relation of bargaining frequency to unrest and party cohesion—reveal significant changes by decade (refer back to Table 13). In larceny and assault cases, where bargaining primarily occurred, concessions oscillated somewhat over the course of the

[58] While it often overstates the case to impute to elites conscious collaboration in politics, such was not the case in Boston during the 1830s. Recognizing their position of leadership to be in jeopardy, the city's elite worked in a conscious and comprehensive fashion across the economic, political, educational, religious, cultural, and philanthropic spheres to inculcate industriousness and harmony and to reconsolidate their power (Formisano 1984).

antebellum years. While crime rates are available for only a few of the antebellum years, it is known that those decades were marked by powerful economic cycles of boom and bust. Major downturns occurred in the late 1810s, 1830s and 1850s. Most severe was the close of the 1830s, which constituted a major economic depression.[59] Currently the best evidence suggests that social unrest peaked during prosperous years, such as the mid-1830s and the 1850s, when rising expectations surged (Wilentz 1984; Sellers 1991).[60] Crimes of violence peaked during the 1850s nationally with a lesser peak during the 1820s and early to mid-1830s (Gurr 1981). However, the 1850s were complicated by the disintegration of the Whig party nationally and in Massachusetts. By the late 1840s, the Whigs had been eclipsed in Boston. While they lingered in the statehouse until the mid-1850s, the early years of that decade were not a high point of party cohesion.

Analysis of concomitants of bargaining suggests that concessions were somewhat less readily granted in good years economically, probably not because of financial conditions but rather because they were restive years as expectations rose. This finding is consistent with those of Brewer and Styles (1980), Hay et al. (1975), and Thompson (1975), who found that the British state, whence episodic leniency originated, responded to riots and unrest with moderation unless a serious direct threat to political authority was involved, in which case the full force of law was brought to bear. In Boston, concessions appear stronger just after the lean years of the late 1830s and 1850s—suggesting that "bargained" leniency too may have been granted primarily during more quiescent or, at least, institutionally mobilized years, when the public could be indulged to nurture good will and forge ties with constituencies through modulated exercise of state power. Much of the conflict of the 1850s was channeled into partisan contestation in a context of active political membership. Thus, concessions appear strong and multifaceted in 1840 and 1860 but distinctly weaker in 1850. While at first appearing counterintuitive, these data suggest that the Boston courts, like those in England, applied coercion when threatened but conciliation and leniency, where possible, otherwise. What is absolutely clear is that defendants among those sampled pled guilty in greater numbers when concessions were made available.

[59] For a discussion of this facet of American economic history, see Friedman & Schwartz 1963.

[60] The relation of labor unrest to prevailing economic conditions is treated in some detail in Montgomery 1979, 1981; Wilentz 1984; and Ware 1964.

Social Policy in the Whig Ascendancy: Elite Power and Private Property

If the structure and language of 19th-century Boston provided the terms in which its citizens interpreted their world, the politics of the city shaped both the dynamics of its creation and the strategy for their response to crisis. By deconstructing these politics, we unearth the micromotives and mechanisms driving this process of legal change. Specifically, we find a small elite that was conscious of its power and committed to its identity as the core of Boston's civic-spirited political leadership. This elite was embarked on a quest for social order and political stability, on the one hand, and, on the other, reconsolidation of its partisan power in the face of Democratic contestation.

This urban elite, privately and through the incumbent Whig party, adopted a self-conscious and comprehensive approach in pursuing what it believed to be the holistic interests of the community. It focused the resources of employment, philanthropy, and the city's public institutions on the crisis at hand. Believing that the solution lay in imbuing citizens with character, industriousness, and attention to the consequences of one's acts, the city's leaders enlisted reformers, churchmen, educators, and judges alike in their campaign to nurture order. Since virtually all lawyers in the state were initially Federalists and later Whigs, most members of the bar shared a commitment to these goals. In Massachusetts also, all judges were appointed by the governor. This meant that the elite-sponsored Federalist and later Whig parties that occupied the antebellum Statehouse almost continuously controlled all judicial appointments.

As in most coastal cities, the early national period had brought an "urban patriciate" to prominence in Boston (Jaher 1984:59). While it had much in common with those in other cities, it was "the most notable and long-lived of this species" (ibid.). From the 1780s until the early 20th century, the social circle known as "the Boston Brahmins"[61] exercised vast influence in both the public and private life of the city (ibid.). Unlike other cities, it is correct to say that in Boston the Brahmins operated consciously as a ruling elite (ibid.). The longevity of their preeminence stemmed from the fact that this was not solely a political elite. In their cultural, philanthropic, and, especially, economic ventures, these families established a multifaceted power. Dominance in municipal and state government was used to enhance control over other facets of urban life, and power in other realms

[61] A parallel between the Boston "Brahmins" and the uppermost social strata of India is reflected both by the nature of this group as a status community and the absence of opportunities for mobility either in or out once this circle had been established by the 1820s. Wealth was reinforced by social honor to create a multifunctional upper class that, some argued, effectively constituted a caste.

reinforced political position—producing a unified elite with a self-reflexive sense of mastery (ibid., p. 60).[62] This multifaceted "hegemony"[63] consolidated the Brahmins as an elite status enclave within the upper class and distinguished them from more narrowly based elites elsewhere (ibid.).[64]

Beginning in the 1820s, the Brahmin circle realized with alarm that the city of Boston was inhabited by large numbers of poor families. They began to doubt the adequacy of traditional forms of charity (ibid., p. 64). Destitution was feared as not only morally problematic but also socially dangerous. Poverty, city leaders believed, "led to delinquency and, enflamed by Jacksonian democracy, . . . [immigration], local riots, and rising rates of [crime] . . ., could . . . [ignite] a conflagration that might consume the propertied" (ibid.). Along with an economically based desire for order, worry about potential class conflict mixed with moral angst "to stimulat[e] public and private efforts to reform the [lives of the] poor and improve the quality of relief" (ibid.).[65] In this venture, the Brahmins brought their multidimensional power to bear.

It was in politics that Brahmin dominance was consolidated. In the decades after the American Revolution, Boston had been well known as "the center of New England Federalism and the party directorate, known as the Essex Junto, came mostly from . . . [its] mercantile clans" (ibid., p. 66). Progeny of these clans served as governors, senators, congressmen, mayors, city council members, state legislators, and judges (ibid.). After the state Federalist party collapsed in 1823, Boston's elite turned briefly to Democratic-Republicanism en route to National-Republicanism and then to the Whig party.

Despite its seeming invulnerability, the Boston patriciate had endured an extended economic and political setback that reoriented it and changed the logic of its relationship to those less privileged in the city. It began with Jefferson's presidency in 1800 and the devastation for overseas traders of his Embargo and later

[62] Such multilayered politics resonated through the world of banking and finance that was so central to Brahmin fortunes. Brahmin political connections also contributed an advantage in urban real estate development where "[b]uilding permits, incorporation charters, location of public improvements, low property assessments, rights of way and purchase of property [from the state on favorable terms]" hung in the balance (Jaher 1984:69).

[63] Antonio Gramsci (1971) defines hegemony as the system of beliefs, attitudes, values, and morality that pervades civil society and that justifies, in one way or another, the existing social order and the relations of power that it upholds.

[64] For instance, Brahmin efforts to win approval of the U.S. Constitution in Massachusetts "gained them considerable national political currency which they [then] used . . . to foster . . . Bay State interests nationally and to reinforce their status at home" (Jaher 1984:67).

[65] In 1821, Mayor Josiah Quincy chaired the General Court Committee on Pauper Laws that publicized the problem of poverty and reorganized assistance to those in need (Jaher 1984:64).

the War of 1812. This dark period extended through to the demise of the state Federalist party and, while it lasted, the city's "merchant princes" combatted extraordinary losses (ibid., p. 69). What enabled the enclave to weather this situation was its younger generation's swift turn to manufacturing (ibid., p. 70). Moving quickly, they introduced mechanized textile production to outlying areas of Boston. By the 1820s the economic logic of Brahmin dominance had changed and these elite families were operating America's first modern factories along with a railroad to move goods from mill to port (ibid.). Such rail facilities enabled strict price control and assured competitiveness in other regions and abroad. Incorporating next the capital and ability of leading entrepreneurs like Amos and Abbott Lawrence, the Brahmins had averted collapse. The laboring ranks of the state became, then, no longer simply their servants and builders of their cities but their paid labor force in whose outlook and living conditions the Brahmins had a direct personal stake (ibid.).

Initially this turn created intra-elite friction as "the old patrician merchants reacted to the [new] textile titans with bitterness" (ibid.). Tension mounted between "the mill and the mast" or between "the archaic and progressive wings" of Boston's gentry (ibid.). Eventually, when, in the 1820s, shipping recovered, "the maritime . . . [clans had grown sufficiently persuaded of the merits of industry to continue] inves[ting] in textile mills and . . . participat[ing] in cotton manufacturing and railroad enterprises" (ibid.). Almost immediately after resolving these internal rifts, however, this beleaguered elite then faced the onslaught of Andrew Jackson's campaign and a surge of crime, rioting, and unrest.

Intra-elite tensions between traditionalists and progressives also appeared in politics. As in finance, the wounds healed during the 1820s. First in John Adams's foreign policy and then in Jefferson's election, Boston's urban elite had sensed a weakening of its national influence—an apprehension that was then magnified with Jackson's presidential candidacy in 1824. Voicing their concern, the patriciate had initially denounced popular rule, attributing their denouement to "the insurgence of unrestrained democracy, which [, they believed,] . . . could destroy the nation" (ibid., p. 71). Yet even collapse of the state Federalist party did not end Brahmin political dominance. Scion of leading families showed the same resourcefulness in politics as in their turn to manufacturing. They briefly embraced the Democratic-Republicans, the leading political party of the early 1820s (ibid.). As they did, older members of the maritime elite again erupted in protests of opportunism. There was no turning back, however, and by the time President James Monroe visited Massachusetts in 1817, he was told with not a little irony that "We are now all

Republicans, even the Essex Junto."[66] Due to intensity of the outcry, many forget that Democratic-Republicans governed the Commonwealth for only two years, from 1823 to 1825, whereafter the elite-sponsored National-Republicans and then the Whigs presided as governors, largely uninterrupted, until 1855. Such continuity lent Boston's elite, whose reconsolidating partisan power dominated those parties, enormous impact on the policy orientation of the courts through, among other things, control of judicial appointments.

As intra-elite rifts over the rescripting of old ways healed, the language and imagery of the day reflected this change. Initial bitterness and rage over the waning exclusivity of Brahmin influence was gradually replaced by a discourse of popular rule. In 1801, Harrison Gray Otis typified the former when he pronounced that "[t]he follies and confusion, . . . the strife and licentiousness incident to all popular governments . . . [are present in] ours in a most eminent degree."[67] By 1830, as the last Federalist Mayor of Boston, the same Otis sounded a very different tone as he celebrated the fact that "[m]any" in the municipal government's "first rank rose from humble beginnings." This "equality," he opined, resulted from the enfranchisement of the "great majority" (Otis 1830). Similarly, Mayor Josiah Quincy had acceded to defeat in his bid for reelection in 1829 by bowing to "the sound principles of a republican constitution, by which the will of . . . [the] majority . . . [was] expressed" (Quincy [1829]: 101). Their newfound tolerance can be explained partly by the extensive influence the elite retained through the legislature, the governorship and the judiciary. Seats in "[t]he state Senate remained apportioned according to property . . . [which ensured] an over-representation of Boston in that body . . . [and] the judiciary retained its [gubernatorially appointed] power [as well]" (Jaher 1984:72–73). In its quest to reconsolidate power, Massachusetts Whiggery became the primary instrument of Brahmin leadership even as the middling ranks and labor registered gains in some wards of the city of Boston.

Brahmin power centered in Boston where its financial interests and property were concentrated and where its men often served in city office. Of Boston's first 7 mayors beginning in 1822, 5 were from this elite status group. When wealthy Brahmin families did not occupy the mayor's office directly, the Federalist, National-Republican, and Whig parties in which they were so influential typically did. Of the 39 mayoral terms in Boston between 1822 and 1860, Federalist, National-Republican, or Whig mayors were elected for 29 of them or three-fourths of those

[66] H. Lee to P. Remsen and Co., 8 July 1817, in Porter, *Jacksons and Lees,* II, 1257; cited in Jaher 1984:72.

[67] H. G. Otis to S. F. Otis, 15 Feb. 1801, in Morison, *Life and Letters of Harrison Gray Otis,* I, 208; cited in Jaher 1984:72.

terms (see Table 14). Another 3 terms were presided over by mayors who were Republicans, the party of choice for this elite after the collapse of the Whigs, or who had won the Republican endorsement. This yields a hefty total of 82% of the city's mayors who were candidates supported by the patriciate.[68] While mayors of Boston were most often merchants, lawyers were the occupation next most heavily represented. Fully one-third of Boston's mayors were drawn from the bar (Jaher 1984:73).

Table 14. Mayors of the City of Boston

Term	Name	Party Affiliation
1822	John Phillips	Federalist
1823–28	Josiah P. Quincy	Federalist
1829–30	Harrison G. Otis	Federalist
1832–33	Charles B. Wells	National-Republican
1834–35	Theodore Lyman, Jr.	Democrat
1836	Samuel A. Armstrong	Whig
1837–39	Samuel A. Eliot	Whig
1840–42	Jonathan Chapman	Whig
1843–44	Martin Brimmer	Whig
1845	Thomas A. Davis	Native American Party
1846–48	Josiah Quincy, Jr.	Whig
1849–51	John P. Bigelow	Whig
1852–53	Benjamin Seaver	Whig
1854–55	Jerome V. Smith	Native American Party
1856–57	Alexander Rice	Republican (earlier a Whig)
1858–60	Frederic W. Lincoln, Jr.	Citizens Party (won Republican endorsement in 1859)

Whig control at the state level, whence judicial appointments were made, was equally strong. From 1820 to 1850, except for two years, the Whig Party or its predecessors (including the Democratic-Republicans after 1823) controlled the governorship, and, except for one year, both houses of the legislature (Table 15). Every single U.S. Senator and just under nine-tenths of the state's Congressmen were Whigs (ibid., p. 75). Of the Whigs, it was said, "The Party dominated Massachusetts and the Brahmins controlled the Party" (ibid., p. 76).

The focus of Brahmin rule during this tumultuous period, as enunciated by its elected officials, was order. Their program was "to prevent disorder, improve the business district and adjacent exclusive neighborhoods and [to] rationalize public services [in order] to maintain low taxes" (ibid., p. 78). "Public policy, therefore, reflected the interests and values of proper Boston—the [small] group [of families] whose members . . . dominated local government" (ibid.).

[68] Of the 79 (30.4%) "wealthiest residents of the city in 1835, twenty-four were common councillors, aldermen, judges, mayors, state legislators, U.S. Congressmen, senators . . . [or] cabinet members" (ibid., pp. 74–75). After the 1830s, the capacity of the Brahmins to elect the sons of prominent families to municipal offices other than that of mayor began to wane, as ethnic strength in many city wards increased, and Brahmin candidates there often ran almost exclusively for mayor (ibid., p. 73).

Table 15. Governors of Massachusetts

Term	Name	Party Affiliation
1816–23	John Brook	Federalist
1823–25	William Eustis	Democratic-Republican
1825	Marcus Morton	Democratic-Republican
1825–34	Levi Lincoln, Jr.	National-Republican
1834–35	John Davis	National-Republican
1835–36	Samuel T. Armstrong	Whig
1836–40	Edward Everett	Whig
1840–41	Marcus Morton	Democrat
1841–43	John Davis	Whig
1843–44	Marcus Morton	Democrat
1844–51	George N. Briggs	Whig
1851–53	George S. Boutwell	Democrat
1853–54	John H. Clifford	Whig
1854–55	Emory Washburn	Whig
1855–58	Henry J. Gardner	American
1858–61	Nathaniel T. Banks	Republican

The Legal Establishment and Legacy of Post-Revolutionary Federalism

Almost without exception, the Massachusetts bar consisted of, first, Federalists and, then, Whigs (Warren 1931:174, 178). During the "formative era," they had achieved new influence after post-Revolutionary disrepute. This political cast of the bar, together with Federalist and later Whig control of judicial appointments, ensured that the courts were presided over by judges in step with the policies of these elite-dominated parties.

Early in the 1800s, the Federalists had retreated to their power base in the statehouse after losing national power with Jefferson's election.[69] They were certain that the only hope of preserving the social order and property itself lay with their party.[70] Animus escalated between Massachusetts Federalists-National

[69] With Jefferson's election, the Federalists grieved the passing at the national level of an entire social order that they had cherished. As Henry Cabot Lodge noted in his *Life and Letters of George Cabot:*

> The Federalists hated Jefferson [and the Democratic-Republicans] with no common hatred, but rather with the vindictiveness of men toward a deadly foe, who, as they firmly believed, sought the ruin of all they most prized and cherished. They sincerely believed Jefferson to be . . . the embodiment of French democracy, and advocate and promoter of principles which [, as had been the case in France's Revolution,] menaced with destruction all the rights and customs which alone made life worth living. (Lodge 1877, cited in Warren 1931:155)

When Federalist dominance was lost nationally, Ames exhorted his partisan brethren to "entrench themselves in the State Governments and endeavor to make State justice and the State power a shelter of the wise, and good, and rich, from the wild destroying rage of the Southern Jacobins" (Fisher Ames to Timothy Dwight, 16 April 1802; to Gore, 13 Dec. 1802; to J. Smith, 14 Dec. 1802, cited in Warren 1931:160–61).

[70] Jefferson's election evoked such despair that Federalist Fisher Ames wrote: "All fears now will be for the safety of all the Government has yet erected. Stocks have fallen and rich men have begun to find out that they ought to bestir themselves" (Warren 1931:159). Ames continued to exhort:

Republicans-Whigs, on the one hand, and Democratic-Republicans and later Democrats, on the other.[71] In the quest to preserve order and guard against "jacobinism," two groups of Federalists initially rose to prominence. The first was the coterie known as the "Essex Junto." The second was the "law craft," or "pettifoggers," as Nathaniel Ames, a Democratic-Republican, termed the legal profession.

The "Junto," as we have seen, had been dominant in both national and state politics for decades (Warren 1931:163). Ideologically, Democratic-Republicans viewed the Junto, its members, and their champion Alexander Hamilton as openly hostile to popular rule. The Junto, in turn, saw in their own leadership the only true hope for self-rule. In speeches and letters, the Junto voiced skepticism about the prospects of democracy and fear about what political future it would bring.[72] Although a more tolerant rhetoric eventually developed, this informal political directorate sensed that society's prospects and, perhaps, social order itself hinged on their capacity to devise forward-looking policies and to inculcate character and consent to their leadership among the masses.

Even as the Junto and its associates were widely criticized, another group of Federalists provoked, if anything, more bitter contempt from Democratic-Republicans. This was the "law craft." Antagonism toward lawyers, arising after the American Revolution, had its wellspring in their role in pressing postwar debt foreclosures.[73] Republicans had, however, another reason too for de-

> To encourage Mr. Jefferson to act right, and to aid him against his violent Jacobin adherents, we must make it manifest that we act on principle, and that we are deeply alarmed for the public good; that we are identified with the public. We must speak in the name and with the voice of the good and the wise, the lovers of liberty and the owners of property. . . . An ardent spirit must be roused in every town to check the incessant proselytizing arts of the Jacobins. (Fisher Ames to Timothy Dwight [later President of Yale University], 19 March 1801, cited in Warren 1931:160)

[71] Fisher Ames then voiced his belief that the Federalist party contained the only great [remaining] hope for the country saying, "The only chance of safety lies in the revival of the Federalists who alone will or can preserve liberty, property . . . [and] Constitution" (Warren 1931:160). Ames voiced fear that "[t]he next thing will be, as in France, anarchy: then Jacobinism" (Warren 1931:160).

[72] In 1803, Fisher Ames of the Junto wrote to Timothy Dwight of his belief that "Our country is too big for union, too sordid for patriotism, too democratic for liberty." He continued, "Its vice will govern it, by practicing upon its folly. [Perhaps] [t]his is ordained for democracies" (Ames to Dwight, 26 Oct. 1803, cited in Warren 1931:172). Referring to Jefferson's accession to the Presidency, Ames wrote "Let us . . . be just to this man. Is he not a good chief for us? Would any man, who was free from the lowest passions and prejudices of the lowest mob, manage our affairs with success?" (Ames to Quincy, 11 Dec. 1806, cited in Warren 1931:172). Writing to Timothy Pickering, George Cabot of the Junto observed "We are democratic altogether, and I hold democracy, in its natural operation, to be the government of the worst. . . . If no man in New England could vote for legislators, who was not possessed in his own right of two thousand dollars value in land, we could do something better" (Cabot to Pickering, 14 Feb. 1804 in Lodge, 1877, cited in Warren 1931:173).

[73] Debt, both public and private, was widespread and burdensome. Outraged by foreclosures, litigation, and the burden of fees and court costs, the people "mistook ef-

nouncing the "law craft." This was the political one that "the bar of Massachusetts was almost exclusively Federalist" (ibid., p. 178).[74] Concern about lawyers' allegiance was aggravated by the extensive part they were playing in state government. Nathaniel Ames argued that separation of powers was breached as lawyers wrought their influence simultaneously by their votes, their courtroom activities, and their candidacies (ibid., p. 179).

This fear had some basis because "lawyers constituted the mainstay [and often the candidates for office] of the Federalist party" (ibid.). Denouncing the lawyers' influence in colorful terms, Nathaniel Ames wrote: "[H]e that is not now a Lawyer, or tool of a Lawyer, is considered only fit to carry guts to a bear in New England" (Ames, *Columbian Minerva,* 6 Sept. 1803, cited in Warren 1931:180). Thus, the "law craft," as bastion of Federalism, possessed a distinctive ideological stance. As lawyers' status improved and they moved between careers in the bar, the judiciary and politics, they carried with them the unique political outlook of the Federalist/Whig elite and, with it, a clear conviction about what policies might best serve the "public good." As criminal courts innovated in their policy efforts to contain conflict, protect property, and dampen the violence and rioting so destructive to prosperity, first Federalist and later Whig ideas colored the thinking of judges about the need for order and how it might be achieved.

Market Society and the Early Victorian Reconstruction of Punishment

In their quest for political consent, the strategy of Boston's elite for preserving order and property centered, not simply on vigorous policing, but, proactively too, on building character, creating social homogeneity conducive to harmony, and inculcating a sense of the consequences of one's actions. This was attempted in part by changes in the courts and in punishment. Fears for security stemmed from apprehension that the rise of markets, with their emphasis on acquisitive self-interest, would free a willful "natural man" of passion and license. Traditional

fects for causes and attributed all their evils to the existence of lawyers in the community" (Warren 1931:174). Indignation toward lawyers grew to the point that the town of Braintree, home of John Adams, approved the proposal that "there may be such laws compiled as may crush, or at least put a proper check or restraint upon, that order of Gentlemen denominated Lawyers, the completion of whose modern conduct appears to us to tend rather to the destruction than to the preservation of the town" (Warren 1931:175).

[74] Joseph Story, one rare Democratic [Republican] member of the Essex County Bar in Massachusetts, wrote: "At the time of my admission [to the bar], I was the only lawyer within its pale who was either openly or secretly a Democrat" (Warren 1931:178). Story continues, "All the lawyers and all the Judges in the County of Essex [also home of the Essex Junto] were Federalists and I was not a little discouraged." Similarly, James Sullivan, Republican [Democratic] and Attorney General of Massachusetts, wrote in 1804: "I have in the day of the cockade tyranny, suffered every abuse that Dana, Thacher and Parsons [great Federalist lawyers and jurists all] and the greatest part of the Bar could give."

restraints of "habit, custom and 'morality'" were, it was feared, losing their sway (Wiener 1993; Appleby 1992). Thus, early Victorians, both in England and America, viewed markets ambivalently, seeing, on the one hand, a "'civilizing force' . . . [that] reward[ed] self discipline" but, on the other, a phenomenon that "encourag[ed] impulsive, willful behavior" (Tomlins 1993; Wiener 1993:137; Sellers 1992). To address this situation, reformers shifted attention to "emotions, the will, rather than the mind" (Wiener 1993:139–40).[75] Views of the child as inherently "depraved" arose and nudged aside Enlightenment emphasis on reason.

Given these incipient fears about human nature and fragility of the social order, it is not surprising that crime and punishment were a prime focus of discourse and policy. That citizens saw in the "crime wave" of the early to mid-19th century a severe moral threat is certain.[76] More deliberate measures than previously taken seemed required (Sellers 1992). In every quarter, the discourse of the state, churches, schools, voluntary associations, and philanthropists, along with the language of everyday life, centered on how to develop "character." The quest was not so much for "fixed and externa[l] . . . standards of behavior." Instead a "psychological state [was sought] in which the passions were . . . mastered by reflection, the pressures of the present controlled by the perspective of the future" (Wiener 1993:144).[77]

Criminal law figured prominently in this project. Discourse about the cultivation of character reoriented the nature of punishment. Law had already been accorded a role that was interventionist; now, informed by Enlightenment notions of the capacity for reason, it was seen as instrumental in building the capacity for reflection to reconnect with God's grace, arrive at penitence, and deter future misdeeds. By compelling acknowledgment of guilt and attention to long-run fruits of one's actions, consequentialists believed law would nurture the capacity to defer gratification and thus deter crime.

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75 In contrast with the Enlightenment vision of mankind as reasoning and benign, a leading medical manual observed at mid-century that "there is a latent devil in the heart of the best of men; and when the restraints of religious feeling, of prudence and self-esteem, are weakened or removed . . ., the fiend breaks loose, and the whole character of the man seems to undergo a sudden and complete transformation" (Bucknill & Tuke 1858:273, cited in Wiener 1993).

76 In England, where crime also rose, "Tories, Whigs and Radicals agreed that the age was witnessing a 'constant and uninterrupted increase in crime' against both property and person" (*Blackwood's Edinburgh Magazine*, 1844, p. 533, cited in Wiener 1993:141). We now know this perception was exaggerated somewhat due to improved recordkeeping, strengthened law enforcement, and changes in law that expanded the range of criminal liability (ibid., p. 141).

77 The secular form of this discourse during this period was Utilitarian "consequentialism," which instilled a focus on the long term consequences of action. Such a habit of mind, J. S. Mill argued, would lead one automatically "to defer gratification . . . [and to] gain mastery over his 'animal nature'" (ibid., p. 145).

To contravene this tendency, criminal proceedings were rescripted to imbue habits of mind dictating care and attention to consequences (Walker 1980; Sellers 1992). Swiftness and certainty of punishment were emphasized. In both criminal and civil law, "the principle of fault . . . and the notion of intent [were enlarged]" (Wiener 1993:148). By criminalizing intentions, preparations and failure to exercise "reasonable care," the state partook to build character by requiring more "farsightedness" and, thus, consideration of the consequences of one's deeds (ibid., p. 149).[78] By mid-century, judges expected greater care, prudence, and self-control (Tomlins 1993:289).[79] As plea bargaining arose, its acknowledgment of culpability and calibrated participatory calculation of penalties was ideally suited to this framework. By depersonalizing and demystifying sentencing, plea bargaining communicated a clear customary menu of payments to be exacted by society for various offenses. It drew the citizenry into an understanding of them and collaboration in imposing them. Yet unlike the proposed and defeated move for codification, this was achieved without sacrificing judicial discretion.

Courts, like the prisons, became schools of "moral discipline" operated by invariant schedule and regime. To nurture the ability to reflect on consequences, "the future had to be made as foreseeable as possible" (Walker 1980). To this end, rationalization and impersonality were sought. As bureaucratic procedures budded, "power had [now] come to be seen as most legitimate and most effective when [exercised] least personally, most 'humane' when least 'human'" (Wiener 1993:157). Thus, customary practices such as plea bargaining, with its market-like dispassionate regularity, were favored by the court in large part because of a belief in their capacity to socialize citizens. Paradoxically, though the system was market-like, the role of intercessors still preserved a traditional elite perquisite and the power of informal social hierarchies where the patriciate held sway.

The Micropolitics of Consent

Besides providing advantages to city officials, to Boston's social elite, and to defendants, plea bargaining, once established, held out specific advantages for judges, prosecutors, and defense attorneys. While not presented here as causes, these advantages explain "bargaining's" acceptance by the court. For judges, the practice provided a rejoinder to criticisms of court discretion and reliance on precedent. While the codification movement, which

[78] John Stuart Mill went so far as to argue that, in a case at law, drunkenness should not be seen as a mitigating factor or excuse; instead, it should, he claimed, be seen as an aggravating factor because its adverse effects on behavior were foreseeable (ibid., p. 150).

[79] Accused offenders were more and more expected, for example, to resist taunting language; inspect tobacco, milk, and other goods for adulteration; and exercise modulation in their consumption of alcohol if they were to be acquitted.

had sought to restrict judicial discretion by moving to legislative statutes, had failed, the threat posed by its underlying sentiment remained. For judges, plea bargaining offered a new, more conciliatory, customary means of maintaining discretion—yet in a depersonalized, knowable, and relatively predictable market-like form that was more palatable to the masses.

Justices in the lower courts, whose salaries were annually appropriated, also had reason to believe, rightly or not, that they faced subtle pressure for consonance with the policies of governor and legislature because of legislative initiatives proposed to examine the performance of judges individually during the appropriation process—an abortive attempt at political review of the judiciary. Politically motivated court reorganizations that turned out all sitting judges and appointed new ones had also historically been common during the early 19th century.[80] In this context, plea bargaining provided a low profile and implicit form of discretion that facilitated sentencing cognizant of prevailing policies and purposes of punishment.

In addition to Whig influence through judicial appointments and social policy, there existed by 1840 a tradition of judges, justices of the peace, and district attorneys who had careers that mixed judicial and political life. Eventually, after 1858, district attorneys were elected and prosecutors were linked to politics directly. This heightened the value of discretion that plea bargaining accorded judges and prosecutors in cases that could color their political prospects. This is not to say that judges and prosecutors crafted positions with an eye to political gain. Reliance on plea bargaining, however, did accord them latitude in high-profile situations of consequence. This connection between judges and prosecutors, on the one hand, and elected office, on the other, is not one that existed in England.

Plea bargaining also had other bureaucratic consequences that served prosecutors and defense attorneys well. Cases in the lower courts were usually expeditiously handled by a judge alone with public prosecutors rarely involved before 1850. While district attorneys were salaried and so had no financial interest in case outcomes, the 1830s saw the legislature first require annual reports detailing court caseloads and dispositions. This appears to have been part of the court reform movement to establish impersonal and regularized justice. Such rationalized reporting meant that a process which inherently produced a high conviction rate grew desirable as the century wore on and public prose-

[80] While judges were appointed by the governor for life subject to good behavior, the early decades of the 19th century repeatedly saw court reorganizations, at both federal and state levels, motivated at least in part by politics, in which entire benches of sitting judges were turned out and new ones appointed.

cutors handled more lower court cases.[81] Perhaps most salient, bargaining provided a daily power resource for the prosecutor. For defense attorneys, criminal cases were not particularly lucrative, and so they stood to lose little in fees as a result of expeditious bargaining. Though attorneys often defended serious criminal cases, most lower court cases, before mid-century, were resolved without defense counsel so that the attorneys lost virtually nothing at all. When defense attorneys did appear, plea bargaining enhanced their discretion as it did that of the prosecutor. Bargaining thus closely safeguarded the prerogatives of judges and, to the extent that they gradually came to serve in the lower courts, of prosecutors and defense attorneys too. Because plea bargaining served each actor well, it was variously embraced or tolerated, rather than opposed, within the courthouse.

Interestingly, while delay was a constant criticism in the higher courts, all signs are that cases moved quickly through the lower court—almost always reaching trial before a judge within one day in the early part of the century (Gil 1837). This challenges the popular view that caseload pressure in the courts may have given rise to plea bargaining. Findings of this analysis provide clear evidence that the surge of guilty pleas, which heralded the rise of plea bargaining during the 1830s, 1840s, and 1850s, preceded rather than followed the marked increase in caseload seen after the 1840s. (See Fig. 3, which shows trends in guilty pleas—as one indicator of bargaining—relative to caseload during the 19th century.) The fact that caseload increased steadily over the last half of the 19th century, while concessions attendant to bargaining fluctuated, further challenges the power of caseload as a cause.

Popular Skepticism: A Language of Protest

Deference, which had led the laboring and middling ranks to support political campaigns of their "betters" early in the 19th century, contributed mightily in the years leading up to 1848 to images of popular consciousness as distorted, or false, and conducive to actions counter to one's own interests (Marx & Engels 1848). Yet, in Boston, signs are abundant that the popular classes were, by the 1830s, awash with the democratic spirit and that, as strikes and contestation grew, critical awareness was ripe among the laboring classes of the inequalities of the day and of the material advantages accruing to the city's elite from their work. Few signs of this political consciousness are more telling than the name "plea bargain" with which the new practice of leniency was labeled.

[81] While such reports contributed to growing emphasis on efficiency and rational criteria of performance, their effect was limited in the lower courts where cases were typically handled without attorneys for either defense or prosecution.

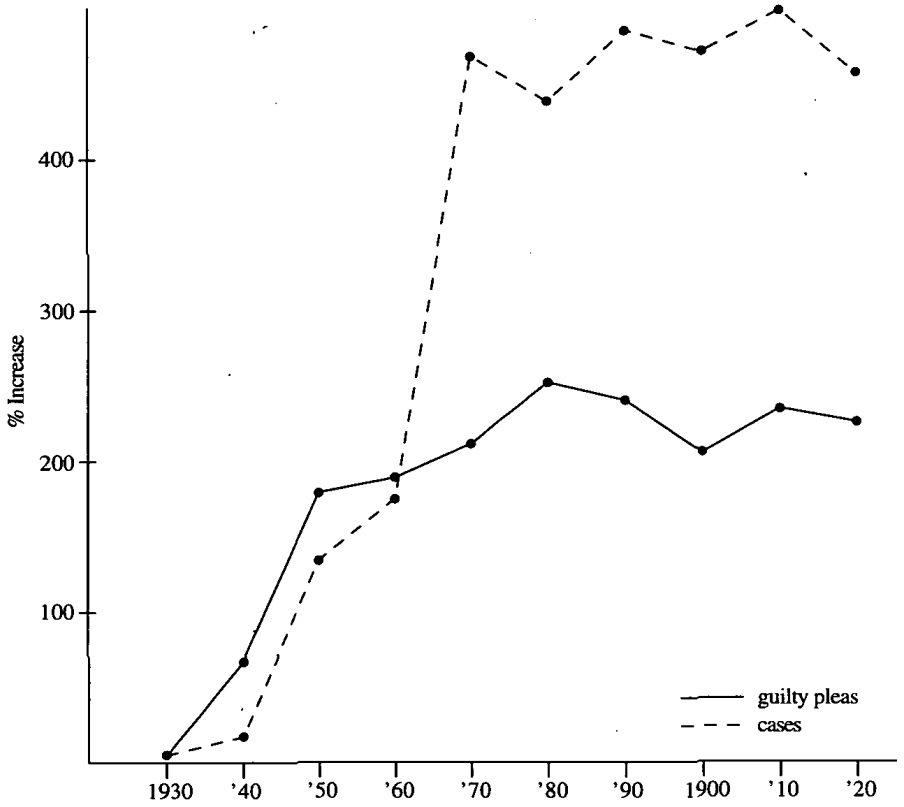

Fig. 3. Guilty plea rates and caseload pressure

While this is still somewhat speculative, the words "plea bargain" increasingly appear to be a thinly veiled pejorative public reference of the 1830s to the famed "corrupt bargain" alleged to have transpired between Henry Clay and John Quincy Adams of Massachusetts during the presidential election of 1824 (Mallory 1843; Schurz 1887; Poage 1936; Eaton 1957; Kohl 1989; Watson 1990; Remini 1991; Baxter 1995). As election results were tallied, Adams had trailed Jackson in the popular vote but neither had won a clear majority. As a result, the election went to the U.S. House of Representatives, where Clay held a seat, for decision. When the House selected Adams, Jackson's supporters protested that Clay's backing of Adams had significantly influenced the outcome. When Clay was named Secretary of State, popular outcry erupted that a "corrupt bargain" had been consummated.[82] While such would be of little note today, in 1824 overt ambition was viewed as opportunism and a sign of flawed character. Jackson went on to triumph over Adams and gain the presidency four years later in 1828 and then to beat Clay himself in 1832—four years before the first trace of plea bargaining is evident—but bad

[82] Jackson's backers alleged that Clay's support originated in a "corrupt bargain" that he had struck with Adams. Adams ostensibly met with Clay and in the meeting intimated that, should Clay support his candidacy, a cabinet post would be forthcoming. All indications are that Clay had long thought Adams the better man. When Adams took office, Clay was given the portfolio of Secretary of State.

blood always lingered. In the presidential campaign of 1828, the rallying cry was "The rights of the people against corruption and bargain" (Schurz 1887:255). Very much a part of the ideological lore of Jacksonian Democrats, the words "corrupt bargain" captured the popular imagination and hampered Clay, a Whig known as the "Great Compromiser," throughout his career.

In dubbing the new form of leniency "plea bargaining," the public, or perhaps, more consciously, Jacksonian partisans themselves, may have borrowed the language "bargain" with its intimation of opportunism, flawed character, and corruption and applied it ironically to this new Whig-inspired legal practice so corrosive of rights and so integral to the court project of "character building." It connoted "compromise" in the service of ambition—namely Whig ambition to preserve privilege and partisan office holding. When plea bargaining arose in the mid-1830s, just after Jackson defeated Clay in 1832, campaign rhetoric decrying the "corrupt bargain" still permeated the air. While Democrats had taken the White House, the Massachusetts statehouse remained a bastion of Whig power. By appropriating the imagery of "bargain," Democratic partisans hinted that Whig power was being unfairly controlled locally through elite dealings and compromise of public office—among them, judicial extension of leniency in the form of bargained "compromise."[83] Although no evidence has been found to suggest that plea bargaining mobilized overt mass protest, the language used to signify the process, whether consciously chosen or not, speaks volumes in itself.

Recrafting the Tradition of Episodic Leniency

Given these motives and micropolitics, how was an ability to anticipate consequences pursued through what is essentially a cultural practice? How conscious a decision it was to turn to the cultural traditions of the common law in creating plea bargaining is still somewhat unclear (Hay et al. 1975). What is clear is that judges looked to the broadening policy role of the courts that had been developing in private law as they crafted a response to social unrest. The dockets reveal that the discretionary practice of leniency, which had eased political tension in England, was increasingly invoked in the Boston courts (ibid.). Building on new forms of leniency already developed in the United States, legal innovators in Boston now abandoned their previous reticence in accepting guilty pleas and began to impose less severe sentences on some defendants who acknowledged culpability for their acts. With responsibility accepted, punishment could be depicted by the state not as coercive or unjust but as deserved.

[83] The irony that Henry Clay came to be known throughout his career as "the Great Compromiser" assumed a double meaning for these ardent Democratic partisans.

We turn now to consider the new forms of leniency on which plea bargaining built.

To understand why state response to these conditions took the cultural form of a plea bargain, one must look, on the one hand, to the unique cultural repertoire of episodic leniency from the common law and to the symbolism of Puritanism which had so pervaded the life of the city. Here we find the imaginative basis of the practice. Then, one must finally consider the distinctive contours of the American state to see why the courts played such a central role in the crisis.

Cultural Repertoire of the Common Law and Puritanism

In determining why plea bargaining took the form that it did, the cultural repertoire of the common law provided much symbolic content and shaped how the practice worked once established. It, along with the Puritan tradition of admonition from religious courts, provided both a precedent for using leniency for policy purposes and the symbolic template for plea bargaining. Various earlier discretionary forms of leniency, other than plea bargaining, had already begun to be used in more purposive policy-oriented ways. On this foundation the more implicit practice of plea bargaining was built.

Episodic leniency, described so eloquently by Hay et al. (1975), was received in America during the colonial and Early National periods. Forms received included the pardon, the plea of nolo contendere, grants of immunity in exchange for testimony, and the nolle prosequi.[84] Early in the 19th century judges began to use these practices in explicit and structured ways to deter future misbehavior by increasing state oversight in offenders' lives.[85] Behavioral requirements were increasingly specified as conditions for receiving leniency—making clear, per Bentham's exhortation, what acts were approved and which proscribed (Bentham 1931).[86] Use of this conditionality began dur-

[84] In a plea of nolo contendere the defendant declines to contest the state but submits to its grace. The nolle prosequi refers to a decision by a prosecutor not to pursue prosecution in a case.

[85] While overt compromise was slow to surface in criminal cases, there were occasional instances of it in Massachusetts in the 1700s. These included compromise of debt foreclosures authorized by a "confessional act" of 1782 (Handlin 1969), provision for resolution of certain criminal cases through payment of negotiated "satisfaction" to a complainant (Revised Statutes of 1835, Commonwealth of Massachusetts, part IV, ch. 126, sec. 27), allowance of reduced penalty for confessions to fornication where a woman had become pregnant (Handlin 1969), and growing acceptance of the longstanding practice of compounding a felony where community gain had been realized (Lane 1971). While these all served policy purposes, they were infrequently used and never achieved the routine acceptance that the recrafted pardon, plea of nolo contendere, nolle prosse, grant of immunity and, especially, the bargained guilty plea did.

[86] While crime had traditionally been equated with sin and it was presumed that a sinner could be restored only through God's grace, the Enlightenment view of punishment, as received in America primarily through Jeremy Bentham, emphasized the respon-

ing the 1820s and 1830s as instrumentalism in law arose. By conserving discretion, these mechanisms strengthened judges' ability to tailor sentences intended to inculcate character and a capacity to reflect on the consequences of one's acts. Crafting case decisions with an eye to policy was, as we have seen, common by the 1830s and the new uses of leniency supported this change. Plea bargaining built on and moved beyond these earlier agreements by offering a more implicit and simpler customary form of leniency.

Despite many similarities to earlier adaptations of leniency, plea bargaining differed in three important ways. First, entering a guilty plea closed the case—eliminating intrusive court oversight. The plea bargain was less likely to require specific behaviors after conviction or to involve subsequent supervision. Second, relative to the widely used practice of pardon, plea bargaining moved leniency up from a postjudgment to a prejudgment event—making it part of the trial process itself and introducing new procedures for judgment and sentencing.[87] Third, a plea bargain was simple and could be entered by defendants without counsel. Thus, even though judicial discretion was maintained, this accessible, close-ended, and less costly practice was more palatable to citizens. Let us consider first the new forms of leniency that had been developed earlier and on which it built.

In the British tradition pardon occurred after conviction and entailed leniency from the Crown. Pardons were extensively granted and ability to obtain one was an important elite prerogative. In the 18th century, "royal review of judicial recommendations . . . [for] pardon . . . became a regular . . . part of . . . [ordinary] criminal procedure" (Langbein 1978:297). Besides being granted after conviction, pardons involved no plea of guilty—either as a sign of repentance or for any other reason. As pardons took hold in the colonies, they grew controversial as they never had in England. Frequent pardons were a source of consternation to law enforcers in Boston, New York, and Philadelphia between 1830 and 1880 (Kuntz 1988). Initially an end in itself, the pardon had, by 1803, been used conditionally in Massachusetts to ensure good behavior (Acts and Resolves, 1803, no. 117). Soon, the "conditional pardon" was being used to exercise ongoing control and supervision over some convicted offenders—a practice later formalized in probation. Although used for oversight, the conditional pardon had the disadvantage, then, of being politically volatile and severely criticized.

siveness of perfectible humans to deterrence as well as to resocialization through incarceration. It also emphasized proportionality in sentencing.

[87] Some scholars such as Jeffrie Murphy and Jean Hampton (1988) argue that mercy granted before disposition and sentencing entails a sort of forgiveness but may be seen as implicating the prosecutor in responsibility for the offense.

During this same period, pleas of nolo contendere and promises of immunity in exchange for testimony as a state's witness also began to be used in new ways. The key change here was that, instead of a plea being entered and the case closed, pleas, mainly in the higher courts, were negotiated and the cases were then continued "open" as a form of insurance to deter future misdeeds.[88] The deterrent effect of leaving a case "open" was strong because the Commonwealth had enacted potent habitual offender statutes. They prescribed heavy penalties if a case were reopened later because of another complaint. Pleas of nolo contendere had the drawback that they tended to be challenged quite frequently relative to later guilty pleas—perhaps because they were explicitly brokered.[89] This negotiated plea represents a turning point, though, in that such pleas, in contrast to pardons, constituted a request for leniency prior to judgment—an approach later routinized in plea bargains. It contributed to social control effectively as long as defendants could afford it and did not object too strongly to continued state oversight. In practical terms, the problem was that those whom the Whigs most feared could not afford the cost of lawyer-brokered pleas and did object strenuously to oversight.

Grants of immunity in exchange for testimony as a state's witness also changed. This practice became more established with the federal court decision in *United States v. Lee* in 1846 formalizing the court's obligation to informants.[90] Two other decisions specified that the pledge of immunity by the prosecutor may be either "express or implied"—drawing it a step closer to the sometimes implicit plea bargain than to the plea of nolo contendere.[91] Usually a promise of immunity resulted in a nolle prosequi being entered. Cases were left unprosecuted, although they could be reinstated at a later date. In other states cases in-

[88] That this practice was well known and publicly accepted is illustrated by the case of Ashael Huntington, District Attorney for Essex County, Massachusetts. He was brought before the Court of Judicature and charged with taking less in fines from defendants than he might by law. Huntington responded that, the purpose of law being the prevention of the recurrence of criminal behavior, he often, with the explicit approval of local politicians, allowed defendants to enter a plea of nolo contendere to some charges and allowed the other charges to remain "open" on the books as an insurance of future good behavior (House Report, Massachusetts Legislature, No. 4, Jan. 1845).

[89] In its focus on good behavior for a period of time, this use of the plea of nolo contendere drew on the tradition of "recognizance to keep the peace" but substituted for payment of surety the prospect of embarrassment for the intercessor and a more severe sentence for the defendant. In this sense it was a precursor to the practice of probation that began on an informal basis with the work of the humanitarian, John Augustus, in Massachusetts during the 1840s.

[90] The court held that "where an accomplice testifies in good faith in favor for the prosecution and in so testifying implicates himself, he will be discharged, although the person against whom he testifies is acquitted (*United States v. Lee* 1846).

[91] In *Commonwealth v. Brown* (1869) the court held that "in the absence of any express or implied pledge to the contrary, the Commonwealth is not barred from prosecuting an accomplice who has voluntarily testified against his co-adjutor in an offense, upon an examination not attended by the district attorney.

volving immunity were "continued" open to allow time for a pardon to be received.

The nolle prosequi, or decision by the prosecutor not to pursue a case, was the final discretionary element of the legal culture of leniency that was transformed. By the late 1830s, it, like the plea of nolo contendere, was being used to negotiate explicit conditional agreements that would deter future offenses and insure the defendant's continued good behavior. As with promises of immunity, "insurance" of good behavior existed because a prosecutor could reinstate the case if new complaints were received.

In sum, what we see in these new forms of leniency is its channeling into more explicit and contractual, although open-ended, agreements involving both direct behavioral requirements and clear guarantees to the defendant. These agreements were designed to compel desired behavior and to deter future offenses through state oversight as surety had done after judgment in times past.[92] To this end, judges took the explicit assurance of good behavior required at sentencing by surety and moved it up conditionally to the stage of plea—introducing new rules for disposition and sentencing and sometimes producing adjustments to the charge entered too. Negotiation at the plea stage, then, had already begun before plea bargaining appeared on the scene. What plea bargaining changed was the form of the agreement. Here it drew on the cultural template of the Puritan practice of admonition.

While common law tradition provided the mechanism of leniency, an indigenous practice shaped the specific cultural form that plea bargaining took. This was the process of "admonition" and it entered the secular courts from the Puritan religious courts that still functioned.[93] It provided the symbolic model for the process of plea bargaining. Admonition was a process whereby an accused offender appeared before his or her congregation to confess publicly and be "admonished" by the group. After this, the community generally extended forgiveness as a sign of leniency and received the sinner back into their midst (Nelson 1981). Reconciliation, as it restored the sinner, ritually

[92] Prior to the 1840s, the popular American practice of continuing cases "open" or leaving them blank in the docket was widespread in other states as well as Massachusetts. Some cases left "blank" never had even a hearing for probable cause—suggesting that the failure to apprehend the defendant or his or her failure to appear in court was the issue. However, many cases without final disposition were initiated, continued, and left open in the service of state supervision of the accused. Accounting for nearly half the caseload prior to the 1830s, cases left blank declined markedly during that decade. As part of the reforms of the 1820s and 1830s, this customary form of unbridled, unstructured, and intrusive legal discretion became problematic and waned in the reformist atmosphere of the Jacksonian period in Boston.

[93] The author is indebted to an early conversation with Steve Rytina who directed her attention to this potentially relevant practice and to William E. Nelson's (1981) excellent treatment of it.

affirmed the "community" to which the confession had been tendered (Speziale 1992). While this practice originated during the colonial period, its entry to the secular legal sphere by the 1830s is shown by notations in the court docket (e.g., "discharged with admonition") and by the court vignettes of Thomas Gil (1837).[94]

Plea bargaining draws from admonition elements of acknowledging guilt, admonishment by the community through conviction, and reconciliation through leniency. The regularity, though not certainty, with which leniency was habitually granted by congregations demonstrates further kinship. Just as the confessional practice of admonition had been associated with affirmation of community, introduction of this symbolic motif to the courts evoked a sense of membership. Plea bargaining, thus, invoked a "fictive" republican community, though now in a world inexorably moving on to new images of civic membership. Once plea bargaining emerged, it supplanted admonition in the secular courts. The docket of the Boston Police Court shows no mention of it after 1840.

The common law and Puritanism, then, provided models for the mechanism and process of plea bargaining. Pardon and admonition initially involved leniency episodically granted by grace of the state or congregation, respectively, after guilt had been established. However, leniency had been an end in itself with no element of exchange involved. Because leniency was awarded after a determination, though not necessarily a sentence, had been arrived at, the court still affirmed both social rules and universality of their application. In contrast, new uses of common law leniency during the early 1800s reveal a shift to earlier explicit compromise. More clearly structured agreements and behavioral requirements were used in a quasi-contractual sense to require desired behavior. The cost to the defendant, however, was more extensive state supervision and control. This oversight, which was greatly unpopular and viewed as untoward intrusion, was eliminated by the plea bargain.

Under plea bargaining, the guilty plea, which closed a case with finality, protected order and, with it, property by drawing conflicts into court and working both to render law known to citizens and to inculcate a sense of consequences that might deter the robber or thief. Equally important, it created a linkage between the courts and society's informal web of social control in the home and workplace. Recognizing that informal social ties with family and employers serve as a powerful ever present influence in the lives of defendants, judges drew on them as interces-

[94] One vignette describes a case brought against an adulterous husband and his mistress for lewd and lascivious behavior who were dismissed with "admonition to go and sin no more" (Gil 1837:14).

sors.[95] As cases flowed into court, judges accepting bargained pleas created new needs on the part of defendants, current and prospective. This was for patrons, most often employers or family members, to intervene on one's behalf and plead for leniency. Often this took the form of testimony or, especially in the higher courts, handwritten letters attesting to a defendant's good character, family life, and commitment to work. In what was already an extremely litigious society, this highlighted the value to the laboring classes of forging such ties. Letters in court files attest to such bonds.[96] Thus, plea bargaining, besides imbuing a sense of the consequences of one's acts, fostered order by cooperating with society's web of control in everyday life. It emphasized the importance of community ties through the informal and privatized "suretyship" that it revived.

In its appearance of fairness, universality, and formal equality so vital to the ideology of a "rule of law," plea bargaining imposed social control in a way that avoided any delegitimating use of force. If the contestation and crisis of the 1830s and 1840s spurred legal innovation that produced plea bargaining, the cultural repertoire of the common law and the Puritan religious courts, then, provided the imagery on which judges drew as they shaped its form. What role, we may next ask, did the structure of the state play in the emergence of plea bargaining?

Contours of the State

To be persuasive, an account of plea bargaining must explain why it did not appear in other similar societies undergoing strains much like those in the United States as they adapted to popular rule. Britain, which shared the common law, is especially interesting here. The answer appears to lie in the contingency of contextuality. Two distinctive features of the American state powerfully shaped its response to crisis. They clarify both why response came from the judiciary and why plea bargaining did not arise in the otherwise favorable context of England. These characteristics are the relatively weak central state and decentralized administration of the courts in America, on the one hand, and the unusually close linkage of law to local politics, on the other.

[95] Acting on a vision that preceded by more than a century the formal articulation of a theoretical perspective known as "control theory" or "social bond" theory, judges worked to triage as reformable those of the accused who were fully embedded in such networks of restraining social ties (Reckless 1976; Hirschi 1969; Sampson & Laub 1993).

[96] Ball Fenner illustrated the tone of such intercession in his colorful 1851 portrait of the Police Court in Boston titled *Raising the Veil, or Scenes in the Courts*. He observed: "One of the girls was now called up to the prisoner's stand. She plead guilty to the charges preferred against her. 'I'll bail that young woman for thirty days, your Honor," cried John Augustus. 'I know her parents, and very respectable people they are, too. If I can't reform her, I'll bring her into court . . ., to be disposed of as you will'" (p. 33).

Virtually every previous historical work emphasizes the broad discretion of American prosecutors and judges as a cause of plea bargaining (Alschuler 1979; Friedman 1981; Steinberg 1984). Many forget that, while capacious procedural discretion exists in America, it also exists in Britain but less so in the more formally rationalized legal systems of the European continent. Weber (1978:809–38) suggests that wide-ranging common law judicial discretion may stem from its substantive orientation to justice. Discretion is also enhanced by decentralized administration of the courts which allows considerable regional variation in decisions. Since such discretion is a central dimension of plea bargaining, this broad procedural discretion suggests one reason why plea bargaining did not initially arise on the continent. More puzzling is why it did not appear first in England. In what follows, I argue that the structure of the American state combined with the timing of political crisis in the 1830s and transformation of the American judiciary to direct legal innovation along paths not viable in England.

Weak Central State and "Local" Administration of the Courts[97]

Essential to the rise of plea bargaining in the United States were the relatively weak state and decentralized court administration that prevailed. This enabled "localization" and regional variation in judicial decisions. In contrast to the strong central bureaucratic states of some European nations, the Madisonian state in America was, during the early 19th century, largely one of "courts and parties" (Skowronek 1982).

Decentralized court administration in both Britain and America left them freer from national supervision and control. Locally focused court activity flourished. Judges had latitude to adjust to local circumstances and, it appears, to compromise. In this sense, the American system reveals some affinities to Britain but differs from the continent. Yet, while, in some ways, comparable to Britain, localization was carried further in the United States, particularly in Massachusetts, to include appointment of judges by the governor and state funding of the courts as well.[98]

[97] The author is indebted to a conversation with Alessandro Pizzorno of the European University in Florence, Italy, and formerly of Harvard University for drawing her attention to this key point.

[98] Decentralization and close links of law with politics have long been recognized as hallmarks of common law. Because it developed through case decisions and precedents to resolve actions at hand rather than as an abstract code devised by legal scholars, the common law historically grew out of questions in which powerful political actors, often the monarchy, had interests. Its involvement with practical disputes was one influence that tended to foster close links with politics.

Politicization of the Courts

While decentralized courts enabled innovative local variation, the uncommonly close linkage of law and politics in the United States played a key role in producing legal compromise in the form of plea bargaining.[99] It thrust the courts into the play of state and local politics.

In states like Massachusetts, where "localization" included both gubernatorial appointment of all judges and state funding of the courts, the American experience diverged sharply from both Britain and the European continent. In Britain, as on the continent, appointing judges and funding courts are national tasks. Where, as in Massachusetts, both are controlled by the governor, this exposed the courts to the policy preferences of state officials through appointments and thrust the courts into budgetary politics. This was especially true in this state which had an established tradition of using the courts to rescript social rules in times of change (Konig 1979). Periodic attempts were also made by state legislatures, as they had been at the national level under Jefferson, to limit court autonomy and to expand political control over them—often in the name of accountability, reduced costs, or improved administration (Knudson 1970:248).

The paradoxical result was that court operations grew in scale and their role in conflict resolution expanded even as attempts were made to keep the judiciary relatively weak and to limit its autonomy (Hindus 1980). During the 19th century, the Commonwealth was notable for channelling conflicts into the courts rather than resolving them privately or extralegally (ibid.). This was deliberately done. As local awareness grew of the potential for labor unrest and violence at home similar to the Bristol Riots, the Birmingham Bull Ring Riots, the Last Labourer's Revolt, and the Rebecca Riots in England during the 1830s, Bostonians, under Whig leadership, sought to provide forums for resolving grievances of the popular classes (Knudson 1970:248).

Yet officials also feared and sought to curb too independent a judiciary. They found support from citizens who deplored excess of state power in any form.[100] Although vigorous state activity was touted in road construction or industrial development, the stance of citizens regarding the courts contained powerful contradictions (Siracusa 1979; Handlin 1969). Even as public concern about rising violence grew, some legislators in Massachusetts attempted to reduce the court budget (Wiener 1993;

[99] This is not to argue that "judicial independence," so crucial to democracy and the "rule of law," did not exist. It is to say that independence always exists amid networks of social ties, discourse, and institutions that render autonomy a complex reality.

[100] One evidence of this concern is the reluctance to adopt a professional police force for fear that it would be used for political purposes as a secret police on the model of the French police in the city of Paris.

Parsons 1861). Citizen resistance to increased taxes and public spending, a legacy of the overwhelming debt of the Revolutionary era, provided a favorable climate for such initiatives (Handlin 1979:61, 63).

Not only were budget cutbacks attempted when court burdens were rising. The full thrust of these proposals is illuminated by the fact that, during the 1830s, the legislature reduced salaries of court officers across the board by as much as one-third—a powerful technique for prompting resignations that enabled governors to appoint new judges. It was said of this situation that "Miserly salaries kept promising men off the bench" (Handlin 1969:135). Other battles erupted over the attempts to determine judges' salaries individually by legislative appropriation—a move, eventually rebuffed, for political review of the judiciary. Thus, numerous overt initiatives that, whatever their aim, would have enhanced political control over the courts were attempted.[101]

Appointments and court reorganizations provided another key connection between law and politics. The power of the judiciary to aid or obstruct an incumbent party had long been recognized since the Jeffersonian "reorganization" of the Federalist judiciary between 1802 and 1805. Upon Jefferson's accession to office, no federal court judge in the country had been a Republican (Knudson 1970:55). The Democratic-Republicans moved swiftly to repeal the Federalist Judiciary Act of 1801, one of the last acts of Adams's presidency, and to name an entirely new federal court bench. While beneficial to the Democratic-Republicans, the move had not been entirely opportunistic. Felix Frankfurter and James M. Landis (1927:21, 24–25) note: "Jobbing it was, but by no means the design only of hungry politicians. . . . [T]his measure combined thoughtful concern for the federal judiciary with selfish concern for the Federalist party." Then, beginning with an attempt to impeach Federalist U.S. Supreme Court Justice Samuel Chase, the Jeffersonians worked to change the Federalist cast of that court. Vociferous outcry erupted that independence of the judiciary had been violated. The extent of appropriate mingling of courts and politics was a theme of the day very much in the air.

Similarly, in Massachusetts, political control of appointments played a prominent role at the state level as the Democratic-

[101] While most of the boldest initiatives to establish overt political control of the courts were doomed to failure, Dimond (1975) demonstrates the massive extent of more informal forays through court reorganization during this period. According to Dimond's account, the County Courts of Common Pleas assumed criminal jurisdiction of the Courts of Sessions in 1804. In 1811, "the Courts of Common Pleas were replaced by the Circuit Courts of Common Pleas" and then in 1821 replaced again by a single Court of Common Pleas for the entire Commonwealth. In Sessions, the Courts received regular justices in 1807 and 1808, were abolished in 1809, were revived in 1811, abolished again in 1814 in all counties but three, reappeared again in 1819, and were abolished again in Suffolk County in 1821 (pp. 20–21). Each time new judges were appointed, shifting linkages between court officials and local politicians shaped the appointment process.

Republicans, after 1800, began to challenge Federalist domination of public office. In Massachusetts courts were abolished in 1809, 1814, and 1821, each time with new judges appointed. While judicial appointments were formally lifetime ones, "electoral shifts[, then,] frequently led to court reorganizations and the turning out of all sitting judges" (Goodman 1964). The strength of partisan control of state positions is conveyed by Democratic-Republican Joseph Story (1851), who, during the challenge to the Federalists in 1806, observed only half in jest that state notaries ought to be made federal officials so that "in this way in Massachusetts a [Democratic-]Republican would, at least, hold office."[102]

By 1823, with collapse of the state Federalist party, the Democratic-Republican party elected two governors of the Commonwealth, William Eustis (1823–25) and Marcus Morton (1825), and claimed a fleeting hold on political power in the Massachusetts statehouse. This period sent Justice Henry Orne, the only Police Court judge of the antebellum years to be appointed by a Democrat-Republican governor, to the bench. At the state level, the levee had been breached. In the city of Boston, however, Federalist control of the mayor's office and city council persisted until 1834. Party politics emerged in earnest in the city during the late 1830s and early 1840s (Lane 1971:46–47). With the eruption of fierce partisan contestation, court activity took on added significance.

Thus, local court administration, gubernatorial appointment of judges, and state funding of the courts precluded national standardization and supervision. They exposed the courts to local political forces in ways quite different from societies with strong national administration. Judges increasingly operated from a policy perspective that was politically situated. Having examined patterns of plea bargaining in light of the factors hypothesized to be causal, we turn now to draw the results of the analysis together and to present the argument as a whole.

Partisan Contest and Political Stabilization

Plea bargaining arose in Boston, we now see, during the 1830s as part of a campaign by the city's elite families to promote order, assure political stability, and reconsolidate their partisan power in the Whig party. Plea bargaining emerged during a time of crisis. State and private response to this crisis was multifaceted

[102] This view is consonant with Bridges's (1984) observation, in her analysis of the rise of machine politics in New York, that the politicians of the urban machines were faced with a distinctive challenge. They needed to forge a majoritarian consensus without extensive personal wealth or resources on which to draw. Bridges argues that politicians, from the 1840s on, drew on the only kinds of resources available to them—jobs, services and a kind of general assurance of help in times of need.

and prompted, among other things, new uses of leniency by the courts.

By the mid-1830s, conflict produced by structural changes in forms of economic production, working conditions, and class structure, coupled with ethnic tensions, created a perception of crisis. People already focused on the danger that conflict posed to property, social order, and growth saw this tumult as disrupting social order and potentially threatening the republic. The streets of Boston were often fraught with rioting and unrest as burgeoning city life now brought strangers into daily contact. While Bostonians generally believed their market-based society and political institutions to be robust, they were chary as to what path self-rule would take. Their darkest vision was the spectre of threat to the institution of property and to political authority altogether. Concern was intensified because religious belief, previously a source of cohesion, had weakened as secular thinking spread. Social consensus, which pervaded small-scale community life, had eroded as well (Nelson 1981; Lockridge 1981). Because self-rule was still relatively new and local institutions of governance limited, conflict created a sense of crisis and of threat to both social order and the partisan power of Boston's social elite. In this context, the needs to protect order and reconsolidate partisan control elicited new state responses. Aware of restiveness in Europe as generalized unrest in a succession of riots and revolts wracked Britain and other countries, city leaders, primarily Whigs, worked feverishly to quell any possibility of extralegal solutions to discontents of the laboring classes. Extension of the franchise during the Jacksonian era also brought partisan challenge from Democrats.

State coercion, or even its appearance, grew problematic because it could now jeopardize mass political support. Thus, it grew necessary to find ways to uphold order that maintained popular consent. Faced with conjunctural conditions of disorder, riot, and violence, Boston's leading citizens sought new approaches to social control. Eschewing coercion, they found one facet of their approach in a crucial transformation occurring in the courts which were moving to a focus on social policy. Because local political institutions and parties were not yet well established, the courts, which provided citizens' key experience of the state, stepped forward in an effort to conserve and defend the existing order by reestablishing security and assuring the predictability needed for healthy markets and growth. Rich and diverse programs of economic, political, educational, cultural, philanthropic, and religious initiatives rounded out the campaign to "reclaim" order.

Reaching back into the culture of the common law, judges drew on the practice of episodic leniency that had historically eased class tensions in England. Building on recent adaptations

of leniency, a new practice, known as plea bargaining, was introduced. The practice fostered order, as a first step, by drawing conflict into the courts for resolution through the leniency and abatement of oversight that it offered. By resolving conflicts and cultivating order, it aided the beleaguered Whigs in their quest to reconsolidate their hold on elected office. Because this was a time of plasticity, when judicial "architects" were shaping legal institutions into modern form, plea bargaining achieved permanence through cultural codification in a way not otherwise possible.

Plea bargaining was embraced by the Federalist, and later Whig, judges, governors and elite because its discretion in sentencing provided latitude to tailor sentences along lines consonant with prevailing social policies. These policies sought to cure the causes of social crisis, within limits, and to overcome them by promoting political stability, securing property, and creating a fertile environment for growth.[103] By moving riots, strikes and wrangling into the halls of justice through the leniency afforded there, plea bargaining calmed fears about both threats to the security of property and state excess in the exercise of power. Order so achieved not only quelled criticism of the courts but eased the way for reconsolidating Federalist-Whig dominance. By appealing to the "rule of law," plea bargaining presented a picture of warranted and defensible punishment. Regular, nonpersonalized but calculable justice affirmed the state's claim to represent the people.

For officials and the city's elite, the practice enhanced the stature of political incumbents through the improved quality of life it provided and forged improved ties between the laboring and upper classes through its use of patrons as intercessors. For city leaders, seeking to resecure power, plea bargaining alleviated fears that the "dangerous" classes, with little prospect for mobility, would either remedy grievances extralegally or, in the extreme case, be moved to challenge the institutions of property and self-rule so fundamental to the order of their "well-regulated society" and the "people's welfare" altogether. Through character references, established citizens attested to the industry and good character of those accused—asking leniency on that account. Thus, the employed were distinguished from vagrants, cross-class ties of reciprocity were forged, and the importance of secure employment was highlighted.[104] By favoring "productive hands," the courts linked themselves with everyday life's powerful

[103] Emory Washburn notes in his *Sketches of the Judicial History of Massachusetts:* "There have been ever since the establishment of our government, a class of politicians who have decried the independence of the Judiciary [from popular will] as anti-republican in principle and as a feature of our constitution which ought to be modified" (p. 396).

[104] Files of the Superior Court, formerly the Court of Judicature and later the Municipal Court until 1866, are replete with letters and notes on rich stationery attesting to

web of informal social control in work and family relationships (Simon 1993). Political officials maintained touch with the policy stance of the courts through gubernatorial control of judicial appointments. The overwhelming affinity of the law craft for the elite-dominated political parties, first Federalist and then Whig, also resulted in a bench and bar strongly aligned ideologically with their views.

In its reliance on intercession and character witnesses, plea bargaining underscored the value of a secure place in the traditional hierarchical social order that persisted behind the liberties of the citizen. That hierarchy structured the options and the terms amid which a citizen could exercise choice that was, at least, formally free. "Choosing" to acknowledge guilt was interpreted favorably as a first participatory step on the path to reform.[105] In its response to criticisms of state intrusiveness, high costs, and indifference to the grievances of the poor, plea bargaining paradoxically appeared to protect the freedoms of those less privileged even as it, in fact, surrendered their right to a presumption of innocence. By requiring a defendant's participation, judges symbolically worked to imbue sober focus on the consequences of action through the discourse of market exchange. It was an apt metaphor for a merchant society seeking to revitalize Puritan character amidst seductive opportunities of the marketplace.

Defendants, largely lower class and predominantly male, tolerated the practice because it offered a sense of leniency with control over one's fate through negotiation, reduced costs and eliminated intrusive state oversight of those convicted.[106] Yet it now appears that Democrats may have voiced their reservations in bestowing the name "plea bargaining" on the practice, after Henry Clay's famed "corrupt bargain," connoting unfair advantage in the service of privilege and ambition. The plea bargain, in its customary simplicity, was more knowable (or "cognoscible" in Bentham's term) than the arcana of common law—and so drew citizens into a relationship with a comprehensible state by clarifying what law proscribed, the menu of costs associated with any breach, and facilitating a grasp of the consequences of those actions. Variations in concessions among types of offenses and over time, known as they were to the public, communicated state priorities. With market-like precision, plea bargaining produced the

the upstanding character and faithful service of various defendants—often employees of the signatory.

105 Robert Gordon (1981:98) notes that by the early 19th century, "the criminal was no longer envisioned as a sinner against God but rather as one who preyed on the property of his fellow citizens."

106 This rendered the accused vulnerable to complaints from any source, much like the situation of illegal aliens in the modern day, and gave rise to a tradition of malicious prosecution.

swift and certain punishment believed vital to deter crime (Beccaria 1764).

The practice of plea negotiation constituted a sort of "trade" or "cultural bargain" among social groups as the tradition of leniency was rescripted and its language used in new ways to meet demands of social ordering, political stabilization, and partisan contest in a new world of popular politics. Culturally, it represented an extraordinary symbolic mediation of the countervailing pressures of the times. Plea bargaining entailed acknowledgment of guilt in a form consonant, at once, with the waning religious worldview and, at the same time, with the emerging market metaphor of laissez-faire liberalism.

Conclusion

This work set out to explore how plea bargaining arose when and where it did and why it took the cultural form that it did. To accomplish this task, five aspects of the historical contours of early plea bargaining were identified—the argument being that a compelling explanation should be able to account for each. An explanation has been advanced here that meets this methodological challenge. The argument has been brought together just above.

The emergence of plea bargaining had three primary implications. First, what emerged was a powerful system of social control through the nonapplication of the law in ways that bore strong parallels to the British system of episodic leniency but with a uniquely American turn. Initially developed as part of a political project of protecting property, securing stability, and establishing popular consent, plea bargaining soon enhanced the discretionary power of both prosecutor and defense attorney, and, along with it, the political currency that could accrue to men seeking to mix law with a career in politics. In years when independence of the judiciary had been contested at the federal level, the judiciary at the state level faced the same struggle. By the 1830s, court autonomy had been formally reasserted. Thus, the ascendancy of the judiciary as supreme in America through judicial review and through immunity from repeal and reorganization (though not, in some states, election) had begun. Power in that forum would become a potent resource for the man combining a career in law with politics.

Second, plea bargaining, in its reliance on the Puritan confessional motif, reasserted a kind of "fictive" secular community—the elite republican order that the Whigs struggled so mightily to sustain. Soon that "fiction" would also pass, but the courts' use of leniency was laying the groundwork for membership of still another kind. Through "compromise" in imposing penalties, the court was creating a simple, "cognoscible" law that

nurtured in people lacking formal education the capacity to consider long-term consequences that was believed necessary for character building. While debatable whether the campaign to build character succeeded, it is clear that the court sought to create a relationship between itself, as agent of the state, and the popular classes. In contrast with earlier times, popularized by images of the Boston Tea Party or the British highwayman, when law was seen as an instrument of oppression and overtly resisted, a new model was being created. Unlike the grandeur of the Napoleonic code, it was a model that, as in England before, was crafted gradually and combined common law precedent with customary law. In this model, under the mantle of the "rule of law," elements of cognoscibility and calculability, now coupled with market-like regularity and impersonality, were being set in place. The model was presented as a participatory one. What was taking shape, in a gradualist way, was the formulation of a model of citizenship. In American society, without nationality for social glue, commonality was defined in terms of liberty exercised by virtue of the status of citizenship. The experience of liberty was thought to center on participation, especially the free exercise of rights and the making of public choices. How citizens could learn to act and choose responsibly in this decentralized Madisonian state was problematic. The lower courts, in their use of customary practices, not only promulgated the "rule of law" in palatable form, they also provided a model for learning the free participatory exercise of structured choice so essential to citizenship. The unspoken subtext was that traditional social hierarchies of power still structured the terms on which choice was made.

Third, plea bargaining, through its use of intercessors, created links between the courts and employers that reinforced the workplace as a central element of societal social control in a way that would endure throughout the century. It integrated the courts with the powerful web of social control in everyday life. It is this third implication of plea bargaining that provides clues as to why the practice is so problematic today.

In reflecting back on the rise of plea bargaining, one finds hints as to why plea bargaining is ineffectual now in the changing context of the practice. From this analysis we see that it arose in a world where conviction often meant loss of a job and inevitably stigma. In a world of attachment where most defendants were employed, these involved real costs. Today plea bargaining operates in a society where vast segments of our urban populations, especially young males of prime crime-producing age, are unemployed and have little prospect of bettering their situations. For such a defendant, there is precious little to lose. While the grace of the state was meaningful in a world where conviction bore a social cost, leniency looks very different in the world of today. Where a defendant has little to lose, largesse from the state now

tends to be viewed as weakness and elicits only cynicism. Perhaps one primary lesson to be drawn from this analysis is that common law–based criminal courts, which rely so heavily on leniency despite crucial changes in context, deter more effectively when those who are accused are employed and immersed in family—that is, when they have something tangible to lose. Given its emphasis on leniency, the unique logic of the common law is such that employment, as much as incarceration, is essential to order.

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Appendix A

Guilty Plea Rates: All Offenses, Boston Police Court, 1870–1920 (Simple Random Sample)

	% of Total Cases		% of Total Pleas		Rates of NG/G Pleas		Sample Size
	%	*N*	%	*N*	Ratio	*N*	
1870	66.0	66/100	78.6	66/84	0.30:1	18/66	100
1880	80.0	84/105	88.0	84/95	0.13:1	11/84	105
1890	73.7	76/103	84.4	76/90	0.18:1	14/76	103
1900	44.1	45/102	78.9	45/57	0.26:1	12/45	102
1910	63.8	67/105	77.0	67/87	0.30:1	20/67	105
1920	50.5	52/103	57.1	52/91	0.80:1	39/52	103

Appendix B

Guilty Plea Rates: Supplementary Trend Data Showing Growth in Guilty Pleas

	Larceny		Assault and Battery		Public Drunkenness		Prostitution	
	% of Total Cases	Ratio NG/G	% of Total Cases	Ratio NG/G	% of Total Cases	Ratio NG/G	% of Total Cases	Ratio NG/G
1832	7.3	8:1	4.2	14:1	7.1	12:1	4.2	19.5:1
1834	5.4	6:1	3.3	19:1	8.7	9:1	20.2	4:1
1836	14.1	3:1	7.8	8:1	8.7	9:1	22.8	3:1
1838	14.9	3:1	11.9	5:1	21.7	3:1	10.5	8:1
1840	13.8	3:1	7.0	8:1	23.3	3:1	27.2	2:1
1842	23.3	1.5:1	10.7	6:1	36.2	1.7:1	25.2	2:1
1844	19.2	1.5:1	11.8	3:1	46.0	0.9:1	21.0	2:1
1846	18.6	2:1	13.8	4:1	48.7	0.9:1	33.3	1.6:1
1848	21.0	1.7:1	7.3	4:1	51.8	0.9:1	55.9	0.8:1
1850	22.2	1.5:1	6.4	3:1	51.3	0.9:1	48.4	0.7:1

SOURCE: Ferdinand 1992.

NOTE: By computing guilty plea rates by taking guilty pleas as a percentage of total cases, Ferdinand shows high rates for public drunkenness. This is partly a function of the fact that, in contrast with other types of cases, ordinary drunkenness cases are very rarely transferred to higher court unless a prior record exists. This boosts the guilty plea rate for drunkenness because few such cases are absent a plea and the base for computing the guilty plea rate contains only guilty and not guilty pleas but no transfers to swell the base and pull the rate down. Comparing ratios of not guilty to guilty pleas reveals that, during the late 1830s (when plea bargaining began), guilty pleas for larceny have a presence equal to or even more substantial than such pleas for drunkenness cases, which were relatively rare during those years.

Appendix C

Mid-Decade Data Showing Continuity of Growth in Guilty Pleas

Offense-Specific Guilty Plea Rates: Shoulder Year and Mid-Decade, Boston Police Court, 1831 and 1835

	% of All Cases	% of All Pleas	Ratio of NG/G Pleas	Guilty Pleas (*N*)	Not Guilty Pleas (*N*)	Total Cases (*N*)
Larceny:						
1831	11.2	16.2	93/18	18	93	161
1835	7.8	20.8	95/25	25	95	321
Assault and Battery:						
1831	6.3	10.6	178/21	21	178	334
1835	6.1	11.4	240/31	31	240	505
Common Drunkard:						
1831	8.9	10.2	167/19	19	167	212
1835	9.0	11.9	207/28	28	207	299
Drunkenness:						
1831	0.0	0.0	1/0	0	1	1
1835	0.0	0.0	0/0	0	0	0
Nightwalking:						
1831	0.0	0.0	0/0	0	0	0
1835	27.3	27.3	16/6	6	16	22

NOTE: Data for this table are based on a complete count of all cases in the docket of the Police Court in 1831 (i.e., a shoulder year of 1830 which opens the decade when plea bargaining began) and 1835 (i.e., a midpoint in that decade). These data add robustness and assure that the end points of this crucial decade are not aberrations.