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Plea Bargaining Revisited

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"The great enemy of truth is very often not the lie—deliberate, contrived, and dishonest—but the myth—persistent, persuasive and unrealistic." **John F. Kennedy (1962)**

INTRODUCTION

Plea bargaining has its severe critics and its lukewarm defenders. Numerous groups and individuals would entirely prohibit the negotiation or acceptance of guilty pleas; others would subject these processes to a variety of controls or limitations. Those who speak in defense of bargaining dispositions usually rest their case on the practical impossibility of trying all cases to verdict without enormous increases in justice resources.

Probably the best-known and most extreme indictment of plea bargaining is that of the National Advisory Commission on Criminal Justice Standards and Goals. In its January 1973 *Report on Courts,* the Commission flatly recommended: "In no event later than 1978, negotiations between prosecutors and defendants . . . concerning concessions to be made in return for guilty pleas should be prohibited."[1] This has frequently been cited as authority for proposing to abolish guilty pleas entirely; the Commission commentary makes clear that it "does not condemn entry of guilty pleas."[2]

Defenders of bargained justice point to the small percentage of cases currently tried, and extrapolate awesome consequences if plea bargaining is outlawed. When 10 percent of the convictions result from trials, cutting the plea rate from 90 percent to 80 percent will double the costs of the system.[3]

Much of the controversy over plea bargaining is misguided. There are abuses in the present practices of negotiating or arriving at pleas of guilty; some defendants do escape the full consequences of their acts, while some pay too high a price for their actions. On the other hand, it is true that few courts or prosecutors could possibly cope with their caseloads if they were compelled to try every case.

That there is some truth on both sides of the issue does not mean that the question has been properly or squarely posed. Both those who view negotiations with distaste and those who point to the necessity of continuing to bargain have made numerous assumptions on their way to their conclusions. To the extent that these assumptions are unconscious, they have added heat but not light to the debate; to the extent that they are unfounded or mutually exclusive, they have engendered differences of opinion that are illusory or mythical.

Much of the controversy over plea bargaining is misguided.

The extent to which the abolitionists and the preservers of plea bargaining are talking *by* each other is suggested by the ambiguity of the term itself. The phrase has so many meanings that it may in fact have none: it has been used to include all pleas of guilty;[4] negotiations where no agreement was reached;[5] and pleas that resulted from a measurable concession by the prosecutor.[6] Scholarly efforts at research

into the phenomena called plea bargaining are frustrated by this lack of precision.[7] Small wonder that the term has become an emotive slogan for the popular frustration about the crime problem.

The phrase [plea bargaining] has so many meanings that it may in fact have none.

No effort will be made in this article to define the term. The purpose here is not to join the argument, but to point out some considerations frequently overlooked by the protagonists. Some of the causes of bargaining in criminal cases will be set forth and some of the proposed cures will be reviewed. While an effort will be made to address a few of the popular myths about plea bargaining, no novel solutions are offered.

THE CRIMINAL JUSTICE PROCESS AND PLEA BARGAINING

Most discussions of plea bargaining include some sort of statistical comparison. Pleas as a percentage of all convictions,[8] convictions as a percentage of all arrests,[9] and proportion of defendants sentenced to incarceration[10] are among the most popular examples. The authors then proceed to lament the situation described, and suggest that it demonstrates some malaise in the criminal justice process.[11]

Many of these pieces start from the wrong place. That is, they seek to explain the criminal justice process in terms of plea bargaining. It may prove more productive to examine some aspects of the process first, and then look at plea bargaining as a result of those factors.

The difference between these two approaches is not merely one of technique, nor of alternative choices in the chicken or the egg conundrum. Looking at the process emphasizes alternative decisions as they occur in the real world, while working backward from the results to the causes may distort the perception of those causes. Once having concluded that the judges are soft on crime, for example, it is easy to prove it with a few examples and to prescribe simplistic solutions. Thinking about the process—apart from any discussion of overwork or underfunding—may lead to less clamor for sweeping and hasty change.

Authors who start with the end product of the criminal justice process are frequently led into a fundamental error in reasoning—they vest one or more of the charges against a defendant with some certitude or validity that never existed. They treat the charges lodged by the police or prosecutor as proper and accurate, without any examination of the question. But a defendant charged with, say, grand larceny is not *ipso facto* guilty of grand larceny, either factually or legally, and a subsequent plea to petty larceny is not necessarily a bargain.

In order to take the position that a given plea was a bargain for the accused, a series of assumptions or conclusions must be reached. These assumptions may be valid and demonstrable in some cases; in many, however, they will not bear scrutiny. By stating and examining the assumptions, some new light may be shed on the process of negotiating pleas.

Assumption 1. *The crime charged was committed.* This unspoken assumption is the datum from which most critics of plea bargaining start. Clearly, unless one assumes that the initial (booking or arraignment) charge or later indictment or information charge is legally and factually appropriate, it is difficult to become exercised by the defendant's plea to a different, presumably lesser, charge.

There are at least four factors that tend to weaken this assumption. None of these has to do with the frequent assertion that police and prosecutors deliberately and maliciously overcharge defendants in order to secure promotions or force pleas, or that innocent persons are falsely accused. The four process factors: a) the haste with which charges are initially placed; b) the doctrine of lesser included crime; c) the lower standards of proof required for arrest and charging than for conviction; and d) speedy-trial provisions.

Hasty charging. Many arrests are made under considerable time pressure. Questions of the value of property stolen, quantity of drugs possessed, and mental state of the defendant—all of which bear on the level or seriousness of the criminal conduct—are deferred until subsequent stages. Thus the case commences at the highest level that may be supported.

The doctrine of *lesser included crime,* under which a defendant may lawfully be convicted of a lesser offense that is an element of the greater, plays a role in overcharging. This doctrine usually means that a defendant can be convicted, by plea or trial, of any lesser offense within the definition of the crime charged, without any added paperwork or processing. On the other hand, if the charge is placed at too low a level, the paperwork and the entire arraignment process must be repeated. Avoiding this added burden by the simple expedient of selecting the most serious probable charge is obviously the response chosen in most cases.

That there is some truth on both sides of the issue does not mean that the question has been properly posed.

The role of *different standards of proof* for various stages of a criminal prosecution is seldom mentioned in discussions of plea bargaining. Probable cause to arrest a suspect on a felony charge may amount only to proof beyond a reasonable doubt to convict the defendant of a misdemeanor charge or less.

Speedy-trial provisions in some jurisdictions may induce prosecutors to overcharge for reasons other than enlarging his or her bargaining room. The typical speedy-trial statute or rule provides substantially more time to dispose of a felony charge than is allowed for a misdemeanor. Thus, where the precise nature of the offense is in doubt, the prosecutor may be influenced to place the charge at a felony level, more to buy time than to coerce a plea.

Assumption 2. *Proof that the defendant committed the crime is available.* Even if the initial charge is properly chosen, in terms of what actually happened, this by no means assures that the defendant can be convicted on that charge. Proof of the guilt of the defendant must be located. Finding and retaining adequate evidence to prove every material element of the crime charged is frequently no simple task. Clearly it is a task that cannot be assumed to be possible in every case.

Some commentators do concede that the quality of the prosecution case is a factor in the plea bargaining equation. This concession has not penetrated the general populace or the media accounts of court proceedings, however. The appeals to emotion seldom mention the fact that there are more eyewitnesses on the average TV crime show than at a real typical crime scene.

Even where proof of the crime charged once existed, it may no longer be at hand when the case is ready for disposition. A cooling-off period of short duration may turn an irate victim

into a reluctant witness. The longer the period between the event and the disposition, and the more numerous the required appearances of the witnesses during that period, the less likely their availability and their certitude becomes.

The end product of the negotiating process may not be very different from the result by trial.

Assumption 3. *The evidence is legally admissible.* Having the right charge and having adequate evidence in hand is not enough. Before the position can be taken that the defendant received a bargain, it must be assumed that the evidence could have been introduced into a trial. This assumption is no longer as axiomatic as it was before the Supreme Court applied the Fourth Amendment to state prosecutions.

Whatever the ultimate wisdom of decisions excluding evidence on constitutional grounds, those holdings are currently the supreme law of the land. Evidence, however persuasive, of the defendant's guilt as charged that runs afoul of some exclusionary rule amounts to no evidence at all.

Exclusion of physical evidence, testimony of witnesses, or admissions of the defendants frequently terminates prosecution. This exclusion may only require reduction of the level of the charge in some cases, where part of the evidence is tainted but part can be used. Moreover, the existence of a substantial question of admissibility without a definitive ruling may itself result in a charge reduction. Where neither the prosecution nor the defense wants to risk an adverse ruling, a plea to a lesser charge may be an appropriate compromise.

Assumption 4. *The finder of fact will be persuaded.* In theory a jury, or a judge without a jury, can properly determine guilt or innocence. Reality may be otherwise. Every reader can call to mind examples of obviously guilty defendants who were acquitted or convicted of much less serious offenses than those charged.

The reasons for these acquittals and lesser-charge convictions are obvious: all the problems of the quality of the prosecutor's case bear on the result of the trial. Others, having little direct bearing on the legal issues, but a great deal to do with the fact finder's reaction to the evidence, also affect the final verdict. That the victim of a crime was himself a notorious underworld figure should have no bearing on the outcome, yet almost surely it will.[12] The fact finder may utilize the doctrine of lesser included crime to balance the equities in the case.[13]

Thus the assumption that a defendant would have been convicted as charged if brought to trial is subject to substantial qualification: some defendants who plead guilty to lesser charges might have been found guilty of more, but identifying in advance those defendants, and predicting accurately the difference between what the fact finder would have done and the agreed plea is difficult. To ignore this difficulty when looking at the case after the fact is easy.

Assumption 5. *The actual punishment for the more serious crime would have been greater than for a lesser crime.* The most frequent and widespread criticism of allowing guilty pleas relates to the assumption that criminals escape the full consequences of their acts by pleading to crimes carrying lesser sentences. This may be true for two reasons: a) the maximum sentence allowed for the lower-level crime may be less; and b) judges may tend to impose

relatively less severe sentences on defendants who show remorse by pleading guilty.[14]

With respect to sentences of incarceration, at least, this premise exaggerates the role of the judge in determining the actual punishment. The initial determinant is the statutory sentencing provisions. The second factor is the discretion of the judge. Beyond that point the parole board or equivalent agency makes the final and only meaningful decision. Parole, and even the executive pardon, plays a large role in determining the actual period of incarceration.

The inability of existing penal facilities to deal with more inmates, either more individuals being sent or the same number of persons incarcerated for longer periods, or both, is not within the scope of this discussion. It is, however, a necessary issue for those who either assert or assume that greater use of incarceration will affect the incidence of crime.

Assumption 6. *Greater punishment serves a useful social goal.* This sentiment compounds the previous one, i.e., the hypothesis is that conviction of a greater offense would have resulted in increased punishment and that greater punishment is good. The first part of the premise has been dealt with above.

Theories abound regarding the effects of various types and lengths of sentences, both on the individual defendant and on others who might be influenced by the punishment chosen. What is sufficiently clear from this speculation is that there is no proof that more severe punishment accomplishes any societal objective.

Summary

The preceding discussion suggests a different picture from that presented in the typical treatment of plea bargaining: the end product of the negotiation process in a given case may not be very different from the result that would have been reached by trial!

Figure 1

	% of pleas to highest charge at trial stage	% of convictions by plea	% of convictions by highest-charge pleas
District of Columbia	36	87	31
Detroit	92	88	81

SOME GLOBAL ASSUMPTIONS

The arguments over plea bargaining are frequently framed in terms of the mass of cases, instead of particular situations. At this level of generalization, sweeping assertions and sloganeering are possible. At this level also the myth-making can proceed, undisturbed by less disseminated evidence that undercuts the myth.

Myth 1. *Most pleas are to a lesser charge.* It is commonly assumed that defendants place a high value on their rights to trial, confrontation with their accusers, and the full trappings of the trial process; and that they will waive those rights only if given a substantial charge concession. At the very least, those who trace increasing crime rates to bargained justice assume that inadequate or half-hearted enforcement of the criminal laws, produced by shortages of resources in the justice system, encourages the spread of crime.

If it were true that defendants hold the upper hand and can dictate the terms of the bargain, it should follow that the defendants who hold out the longest should get the greatest benefits. A defendant who bluffs or stalls to the brink, and pleads only on the eve of trial, should be able to exact a significant charge reduction. Pleas at the trial stage would seldom, if ever, be to the highest pending charge, according to the myth.

Yet it can be shown that in several jurisdictions, pleas of guilty at the trial stage are to the highest charge then pending. Figure 1 sets forth the percentage of pleas to the highest pending charge in robbery, assault, burglary, and larceny cases in the District of Columbia and Detroit in 1977. The second column shows the percentage of convictions obtained by pleas in those jurisdictions. The third column is the product of the first two, and represents the percentage of convictions in those four charge groups that was produced by pleas to the highest charge.[16]

These data do not prove that prosecution in these two cities, and the others discussed in the same source, is particularly stringent. In the District of Columbia, for example, fewer than half of the felony arrests survive as felonies to plea at trial.[17] Unfortunately, the comparable figures are not shown for Detroit,

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but those for Los Angeles (22%), New Orleans (36%) and Cobb County, Georgia (63%) indicate that the District of Columbia is about average.

Moreover, there may be other charge or sentence concessions that are not reflected in the data, such as dismissal of other charges or a recommendation for light sentences. In many cases, however, such concessions are of slight value to the defendant since conviction on other charges will add little or no further punishment.

Myth 2. *High plea rates are found in high-volume courts only.* Another persistent myth is that trials are held whenever possible, and are forgone only in high-volume metropolitan courts. The premise is that prosecutors are forced to make concessions in order to move the cases in these busy courts and will accept pleas or bargain less frequently if they have an opportunity to try a larger proportion of the cases.

The fact that a substantial part of the pleas are to the highest charges pending, as was pointed out above, undercuts this premise to some extent. The defendant who so pleads at the trial stage has either received some charge concession or will receive none respect to the higher charge. A trial in these cases would be fruitless.

Direct comparisons between courts of identical jurisdiction within a given state are infrequent. Where they have been done the results indicate that pleas are taken in low-volume courts almost as often as in the high-volume courts. This suggests that court size or volume alone has little to do with the frequency of pleas of guilty.

The response that smaller courts have fewer resources and are therefore equally as busy is partly valid. The ratio of judges and prosecutors to cases may indeed be the same for suburban and rural courts as for the metropolitan areas. The dynamics of case processing in both groups of courts may thus be quite similar.

There is, however, at least one indication that a sudden decrease in the caseload in high-volume courts, which according to the mythology should have increased the proportion of dispositions by trial, produced no such result. Were the number of trials fixed by resource limitations, a substantial reduction in caseload should produce a higher trial rate since the division is smaller. A court that can try 10 cases out of 100 would double the trial rate if the caseload dropped to 50 and the same number of trials were held.

The indication that this relation between trial rate and caseload is mythical appears in Henmann's research in Connecticut. In 1971 the jurisdiction of the circuit courts was increased significantly, which resulted in a 42 percent reduction of the caseload of the superior courts.[18] The same personnel resources were provided in the superior courts after the transfer as had been provided before. Clearly, the rate of trials, i.e., the percent of dispositions achieved by trial, would be expected to rise; if the same judges, clerks, and other staff simply went about their business as they had done prior to the shift of cases, the rate would have increased about 75 percent.

No such increase in the trial rate occurred. In fact, on a statewide basis, the trial rate as a percentage of dispositions in the superior court declined from 4.43 percent of all cases in the year before the change in jurisdiction to 3.79 percent in the 12 months following the transfer.[19] The number of trials conducted with the same resources in the prechange and postchange periods thus declined by more than the reduction in caseload.

Thus, the explanation for pleas of guilty cannot rest upon either the gross

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volume of cases in a court or upon caseload pressures alone. Those who make this assumption must look elsewhere for an explanation.

Myth 3. *Pleas of guilty have increased dramatically in recent times.* Assertions abound that the use of plea bargaining is a response to the burgeoning caseload of the courts in relatively recent years. Even where there is no such direct assertion, citation of recent arrest or caseload figures serves to create the impression that it is only under the pressure of present-day volume that pleas have replaced trials as the common disposition of charges.[20]

There may have been a time and place in the Anglo-American legal tradition when trials were almost universal. If so, this judicial Camelot has escaped detection. As with most other aspects of the human condition, the good old days in criminal justice weren't. Various efforts in the 1920s and 1930s to document the incidence of trials reveal that little has changed.

To illustrate this point, a column has been left blank in the Table 1. The reader is invited to fill in the approximate year to which the data relate. The answers [21] indicate that there may have been a slight decline in the percentage of felony convictions by trial from the earlier to the later group. At the same time, there has been a larger increase in the percentage of arrests that lead to conviction on felony charges. Thus, if these data are indicative of anything, they suggest that the increase in pleas, if any, has been at the expense of dismissals and misdemeanor dispositions—not felony convictions by trial!

THE END OF PLEA BARGAINING?

Some jurisdictions have purportedly stopped plea bargaining, in part as a result of the National Advisory Commission's recommendation. Does this development clinch the case for the critics of negotiations regarding pleas by proving that the process need not rely on bargains to survive? Or are these changes partly cosmetic, partly real?

The answer depends on what plea bargaining means in each such jurisdiction. Given the variety of meanings, the end of plea bargaining in one place may not be deemed such in another jurisdiction. Therefore, assertions that plea bargaining is no more should be examined with care.

Since no jurisdiction has eliminated pleas of guilty, the change must have occurred with respect to bargaining. In fact, what has been heralded as the end of the bargaining is perhaps merely a displacement of the practice to an earlier stage of the criminal justice process, or increased reliance on tacit rather than explicit plea bargaining. These processes can be discussed under four types: a) more realistic case assessment and charging; b) prosecution of or emphasis on only a portion of the caseload; c) precharge bargaining; or d) routinizing the bargaining process.

Early case assessment. Prosecutor's offices that assign experienced trial staff to screen cases shortly after the defendant is arrested can reduce some of the bargaining. Perhaps equally important, they can reduce much of the appearance of bargaining both to defendants and to the public.

Realistic assessment of the strengths and weaknesses of a case permits charges to be filed or pursued at the proper level. Cases that cannot be prosecuted at all can be quickly eliminated, and those where files are incomplete can have the gaps filled while memories are fresh.

City	Year	Felony Arrests—% Convicted of Felony	Felony Convictions—% Convicted by Plea
Chicago	_____	8%	50%
Cleveland	_____	37%	75%
District of Columbia	_____	46%	87%
Los Angeles	_____	21%	83%
New Orleans	_____	33%	82%
New York	_____	22%	86%
St. Louis	_____	29%	89%

This early assessment process, even if done unilaterally by the prosecutor, lays the foundation for a no-plea-bargaining posture by the prosecutor. Since the prosecutor has a well-prepared case on the chosen charge, the inducement to bargain with the defendant for a reduction is lessened.

This approach should be preferred to that of overcharging and bluffing the defendant into a plea. The line, however, between fixing the charge at the proper level and fixing it at a level low enough to induce a plea is difficult to maintain. The price of ending plea bargaining by this approach may be that the discounts are applied even less visibly than at present.

Limiting the caseload. Some prosecutors have addressed the disparity between the capacity of the system and the criminal caseload by confining their attention to a small part of the incoming cases. Cases are selected for prosecution or for increased attention according to the nature of the alleged offense, the prior record of the defendant, the probability of conviction, or similar criteria.

This process usually displaces plea bargaining, making plea bargaining more prevalent in cases not selected for priority treatment, [22] or shifts the caseload burden to another, lower, court,[23] or means that some defendants who could be prosecuted are not even held to answer any charge.

These effects are not particularly undesirable; at the same time they represent no clear gain over the present practices. A prosecutor may refuse to bargain at all in assault cases and make increased concessions in burglary cases, or treat the weaker felony cases as misdemeanors. As long as he or she does not believe or represent that some improvement or toughening in enforcement has occurred, nothing is lost and nothing is gained.

If the displacement is consciously or unconsciously concealed, and greater resources are used to produce no net gain, there may be reason for objection. Where a prosecutor establishes a major offenses bureau, a career criminal unit, or some similarly titled special prosecutorial force, and simultaneously cuts the felony charge caseload in half, the resulting improvement in conviction rate, time to disposition, severity of sentence, etc., should be carefully explained. To permit the public to believe there has been a tightening of prosecutorial policy is dishonest if in fact fewer defendants are being prosecuted and these few are prosecuted more harshly.[24]

Precharge bargaining. Some prosecutors escape the brunt of criticism, and scrutiny of the process, by negotiating a plea before formally charging the defendant. The plea is subsequently entered to the agreed charge or charges, thereby creating the appearance that the prosecutor is extremely successful and does not engage in plea bargain-

ing.[25] This is surely the most cynical compromise between the uncertainties in the criminal justice process and the pressures to stop plea bargaining. It may preserve all the abuses charged to the stereotyped plea bargaining process and offer no clear saving graces.

Standardizing the bargains. Various jurisdictions have developed guidelines for bargains in an attempt to reduce disparate results in similar cases. This is a salutary trend but should not be confused with eliminating plea bargaining.[26] The fact that no defendant gets a special or individualized bargain does not mean that there is no bargaining.

CONCLUSION

Few openly advocate plea bargaining on its merits, though many argue that it is necessary to the survival of the criminal justice system. Many oppose the practice—both the reality and the mythological beliefs that frequently pass as truth.

Those who urge the ending of plea bargains must undertake a heavy burden: they must offer a suitable substitute that will perform all the offices of plea bargaining without the same or worse abuses, and they must gather sufficient support to impose their solution. Simply to assert that plea bargaining is unwholesome, or that it leads to cynicism by the guilty and desperation on the part of the innocent, will not do. A recommended solution must take into account the factors that create the need to adjust charges.

The mechanistic view of the criminal justice process asserted or assumed by many reformers does not square with reality. Determining the factually and legally proper charge in any case is a difficult and complex calculus when one must attempt to do so prospectively in light of the available evidence, or if the estimate takes into account the probable result of a trial. As long as the criminal justice process is staffed by humans, as long as decisions in that process have to be made on the basis of probability rather than certainty, and as long as a lower standard of proof is required for arrest than for charging, and for charging than conviction, charge adjustment—by bargaining or less visible administrative action to reduce charges—will persist. □

NOTES

[1]National Advisory Commission on Criminal Justice Standards and Goals, *Report on Courts* (Washington, D.C.: GPO, 1973), Standard 3.1, p. 46.

[2]*Id.* at 47.

[3]Chief Justice Warren E. Burger, "The State of the Judiciary—1970" 56 ABA Journal 929, 931 (1970). The Chief Justice was referring to federal courts, but the calculation is identical for state courts.

[4]See, e.g., James E. Bond, *Plea Bargaining and Pleas of Guilty* (N.Y.: Clark Boardman, 1975), p. 11 where discussion of the number of guilty pleas is intertwined with the term plea bargains; "Is Plea Bargaining a Cop-out?" *Time* (Aug. 28, 1978), p. 44.

[5]E.g., Neva Flaherty, "Bargaining for Justice" (newspaper series) *Times-Union* (Rochester, New York, March 1, 1976), p.4. The defendant in the first case, described as an example of plea bargaining, elected to go to trial.

[6]This is the sense in which the National Advisory Commission uses the term. *Op cit supra,* note 1.

[7]Prof. Herbert S. Miller, in *Plea Bargaining: Nemesis or Nirvana* (Washington: ABA Section of Criminal Justice, 1977), p. 10.

[8]James P. Manak, *Plea Bargaining—The Prosecutor's Perspective* (Chicago: National District Attorney's Association, 1973)

[9]See, e.g., Association of the Bar of the City of New York, *Criminal Justice: Discussion Paper Number 1* ("Conviction Rate on Original Felony Charges Is Only 15%"), p. 2.

[10]*Ibid.*

[11]Since many of these discussions appear in the print media, the use of eye-catching, if inaccurate, headlines is common. E.g., Nicholas Scoppetta, "Getting Away With Murder: Our Disastrous Court System," Saturday Review 10 (June 10, 1978). Despite the title, Mr. Scoppetta has less to say about the courts than about other criminal justice agencies and the criminal laws.

[12]In the case history cited *supra,* note 5, the victim was described as "a fence . . . , he runs a gambling house, an after-hours (unlicensed liquor) joint, and has a couple of broads working for him."

[13]The principle properly applies to the trial process and arises most often in connection with the judge's duty to charge the jury regarding all lesser crimes of which a defendant may be found guilty. The police/prosecutorial response has far outgrown the scope of the original doctrine.

[14]James E. Bond, *op cit supra,* note 4, at 42-44. See also Richard Kirk, former District Attorney, New York County, New York, and Chairman, ABA Criminal Justice Section Committee on Plea Negotiations in *op cit supra,* note 7, at 15.

[15]Longer prison terms may increase incapacitance of the inmates from committing crimes against the outside population. It also extends the period of opportunity to commit crimes within the facility.

[16]*Newsletter* 3:1, Washington: Institute for Law and Social Research (April, 1978), p. 4. The precise figures are subject to some question, since the totals shown for various jurisdictions do not add to 100 percent.

[17]*Ibid.*

[18]Milton Hermann, *Plea Bargaining, The Experiences of Prosecutors, Judges and Defense Attorneys* (Chicago: University of Chicago Press, 1978), pp. 30-31.

[19]*Id* at 31, Table 7.

[20]See, e.g., Arthur Rossett and Donald R. Cressey, *Justice by Consent: Plea Bargains in the American Courthouse* (Philadelphia; Lippincott, 1976), p. 3; "Casual courthouse observation would reveal that few trials are held *nowadays* . . ." [Emphasis supplied]. Scoppetta, *supra,* note 11, in his opening paragraph states, "last year the police made over 240,000 arrests in New York City alone . . . ." This is characterized as an "onslaught of criminal activity."

[21]Chicago, 1926; Cleveland, 1919; District of Columbia, 1977; Los Angeles, 1977; New Orleans, 1977; New York City, 1925; St. Louis, 1923-24. PROMIS Newsletter, *supra,* note 16. See also Raymond Moley, "The Vanishing American Jury," Southern California Law Review 2 (1928), p. 97.

[22]To the extent that perceptions of resource scarcity influence decisions in prosecutors' offices and judges' acceptance of pleas, risking more trials in high-priority cases will mean greater willingness to accept a lesser disposition in others.

[23]Selwyn Raab, *"New York City's Judges Give More Criminals More Prison Time"* (New York *Times,* July 17, 1978, *p. B9.* Despite the title, the article suggests that the percentage of persons arrested on felony charges who end up in state prison may have decreased. The explanation for this disparity is that while the percentage of persons convicted of felonies who are sent to prison has increased, the total dispositions in the felony trial court have fallen by 40 percent in the past five years. About 80 percent of the felony arrest cases are reduced to misdemeanors, according to the article.

[24]Precisely this point is made in the New York Times article cited above. The "get tough" policy has been criticized as focusing on about 20 percent of the felony defendants "thereby allowing more than 80 percent of felony suspects to get off with light misdemeanor sentences or no prison time at all."

[25]One prosecutor with whom the author previously worked went one step further and prepared press releases setting out the charge and the plea as charged. These were routinely picked up by the press. No reference to the level of the initial charges was made.

[26]See the remarks of Judge Sam Callan, El Paso County, Texas, in *Plea Bargaining: Nemesis or Nirvana, supra, note 7,* at 1-3. The judge concedes that the fairly stringent guidelines confining the plea limits may have contributed to a "docket crisis."

END