PLEA BARGAINING AND PLEA NEGOTIATION IN ENGLAND

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In this paper, some recent findings about the nature of plea negotiation in the Birmingham Crown Court in England are discussed. These findings, to which the legal profession in England reacted with hostility, raise doubts about traditionally accepted assumptions concerning the role of plea bargaining in English criminal justice.

I. INTRODUCTION

Underlying the common law theory of evidence and procedure in criminal cases is an assumption that guilt will be determined by means of a formal adversarial process in which evidence is presented to an impartial jury. It has long been recognized, however, that courts and legal practitioners, in both England and the United States, operate according to a quite different assumption: that the right to be tried by jury will only exceptionally be exercised and that the great majority of cases will be settled by a plea of guilty. The available statistics for both countries show that this latter assumption is well founded. In England, about 85 percent of defendants charged with indictable criminal offenses plead guilty,[1] and in the United States it would seem that the proportion is even higher (see, e.g., Newman, 1966; Blumberg, 1967; President's Commission, 1967). The recognition of the importance of the guilty plea has led American researchers to devote considerable attention to examining the factors that cause defendants to plead guilty and to exploring the procedural safeguards that should surround pretrial plea discussions as well as those that ought to be available on appeal. The American evidence clearly demonstrates that a large majority of guilty pleas are the result of

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[1] There are variations between courts in this regard. In the (higher) Crown Courts, about two-thirds of defendants in 1976 pleaded guilty; in the (lower) Magistrates Courts, where most criminal offenses are tried, the equivalent figure was almost 90 percent. There are, however, considerable regional variations in these proportions (see Home Office, 1977).

some kind of out-of-court bargaining.[2] By comparison, researchers in England have displayed little interest in guilty pleas and the courts themselves have been reluctant to acknowledge that a plea of guilty can be anything other than a full, free, and voluntary decision by the defendant. More specifically, the idea of plea bargaining, or the notion that pressures may be brought to bear upon defendants to induce them to plead guilty, has traditionally been regarded as repugnant to the English legal system. This has fostered the belief that such bargains or pressures do not exist. The validity of this belief, and the consequences to which it gives rise, represent the central concern of this paper.

It must immediately be recognized that certain features of the American criminal process that give an impetus to negotiated pleas are absent in the English system. Furthermore, the English Court of Appeal has firmly pronounced against the development of plea bargaining practices on a number of occasions (e.g., *Llewellyn*, *The Times*, 3 March 1978; *Atkinson*, [1978] 2 All E.R. 460, 462). Indeed, one of the central features of the English judicial system is the extent to which trial judges have been able to retain their sentencing discretion. With very few exceptions (the principal one being murder), offenses in England, unlike those in many jurisdictions in the United States, do not carry fixed sentences. Two consequences follow from this: the pressure to mitigate the harshness of the law by means of informal procedures is much less intense; and the trial judge's discretion over sentence makes it difficult for the prosecution to offer the defense any promise with respect to the sentence.[3] A second important difference between England and the United States concerns the role of the prosecutor. In the United States, the prosecutor wields considerable power: he decides whether or not to proceed with a prosecution; he may agree to reduce a particular charge; and he can recommend a particular sentence to the court.[4] In England, on the

[2] It is also apparent from this body of research that there is no simple or neat correspondence between a guilty plea and legal culpability, see Whitman (1967); Alschuler (1968, 1975); Finkelstein (1975).

[3] Thus, for example, Newman (1966:54) explained the contrast between Wisconsin (which was characterized by straight guilty pleas) and Kansas and Michigan (which relied on negotiated pleas of guilty to reduced charges) in terms of differences in sentencing structures:

> Both Michigan and Kansas are characterized by legislatively fixed sentences, which seriously limit judicial discretion in sentencing; whereas Wisconsin law provides low minima for virtually all crimes, discretion of the court to fix the maximum term within legislative limits, and probation as an alternative to incarceration for all offenses.

[4] It appears that, even where the prosecutor is required to give reasons for a charge reduction, judicial control is minimal (La Fave, 1970).

other hand, criminal prosecutions are not usually conducted by professional prosecutors at all. In the Crown Court, prosecutions are conducted by barristers who commonly appear for the Crown in one case and for the defense in another.[5] Moreover, the barrister does not have an unsupervised power to manipulate charges, and a specific sentence recommendation by prosecuting counsel would be quite unethical. In short, the dominance of the English judge in the trial system and his control over prosecutorial and sentencing discretion limit the use that can be made of informal settlement procedures in criminal cases.

Nor are the restrictions on plea negotiations in English courts indirect. When the Court of Appeal was confronted with some of these very questions in the leading case of *Turner* (54 Crim. App. R. 352, 1970),[6] it sought to check, if not eradicate, the development of plea bargaining. Turner was charged with theft and pleaded not guilty. In the course of the prosecution's case, his barrister advised him in strong terms to plead guilty, telling him that if he did so he might well receive a noncustodial sentence whereas, if he persisted in pleading not guilty, there was a risk he would be sent to prison. Turner refused to take this advice but eventually pleaded guilty after his barrister had discussed the matter in private with the trial judge and thereafter repeated the earlier advice. Turner was fined but appealed against conviction on the ground that his plea has been involuntary because of the pressure exerted by his counsel and because he had believed that counsel had been expressing the view of the judge. On the first point, the Court of Appeal took the view that counsel had not exceeded the bounds of his duty or deprived Turner of a free choice of plea. On the second point, however, the appeal succeeded because, once it was shown that Turner believed that the views about sentence had emanated from the judge, it was idle to think that he had a free choice. In the course of its judgment the Court attempted to

[5] It is often argued that, since barristers are not government officials and appear for both prosecution and defense, the danger of their becoming "case-hardened" is much lower than in the United States and the corresponding routinization in the handling of cases, so conducive to plea bargaining, is therefore much less likely to develop. But this argument can easily be overstated. The closely knit structure of the English Bar, though in one sense a mark of the independence of the profession, may at the same time be seen to facilitate what has been called "a delicate mutual backscratching system" in which informal plea settlements can readily and amicably be arranged by the barristers concerned (see Heberling, 1973).

[6] The cautionary effect that this case appears to have had upon some trial judges is discussed in Seifman (1976).

clarify the confusion surrounding the practice of plea bargaining and to lay down strict rules that would reduce the judicial role to a minimum. The Court did not rule out the possibility that barristers might discuss cases with judges informally prior to trial but insisted that any such discussion must involve counsel for both defense and prosecution. However, the Court said, in vague and elliptical language, such discussions should take place "only when really necessary," and it emphasized the importance of justice being administered in open court. Counsel must be free to give advice to his client, in strong terms if need be, and this might well include the advice that a plea of guilty, showing an element of remorse, could lead to a reduction of sentence. But the Court stressed that counsel must not advise a defendant to plead guilty unless he had committed the offense, and that the defendant must have complete freedom of choice as to his plea. The judge's role in any pretrial discussion was also heavily circumscribed. He could not indicate to counsel the sentence he had in mind, unless it would take a particular form regardless of plea. In conclusion the Court observed that, where some informal meeting had involved the judge, defense counsel should disclose this to the defendant and inform him of what had taken place. Given the very restricted nature of judicial involvement in such discussions, it has been widely assumed that the scope for plea bargaining in England has all but been eliminated.

It is therefore not surprising that researchers in England have shown little interest in the subject of guilty plea negotiation. Only two empirical studies have investigated the practice in any depth. The more detailed study was conducted by McCabe and Purves (1972) who examined 90 Crown Court cases (involving 112 defendants) in which there had been a late change of plea to guilty. Although they uncovered a considerable amount of evidence to suggest some kind of plea bargaining in many of these cases, they concluded that the outcomes served the interests of all parties, including the defendants. They found no evidence that any defendant had changed his plea as a result of excessive or improper pressure (although they did not interview defendants). On the contrary, it appeared to them that the changes of plea were the result of a realistic and practical approach by all concerned, with the defendants openly confronting the harsh realities. As Purves (1971:470) has noted:

> it can at least be concluded at this stage that the plea bargaining process . . . does ease the administration of justice and . . . does so without

> either prejudicing the rights of innocent men or occasioning real injustice to the guilty.

The second study, which examined the subject of plea bargaining in much less detail, was carried out in Sheffield by Bottoms and McClean (1976). They, too, found considerable evidence of last-minute changes of plea, often the result of advice given to the defendant by his own barrister. Unlike McCabe and Purves, however, they were not so convinced that these pleas were always in the interests of the defendant.

> These defendants have for many weeks expected to plead not guilty. This intention has been supported by their solicitor—after all, a trained professional. Then, out of nowhere appears a barrister, usually on the morning of the trial, strongly suggesting a change of plea. It is hardly surprising if defendants acquiesce, faced with this predicament; it is also hardly surprising if some of them subsequently resent having acquiesced to last-minute pressure. [1976:130]

It was against this background of empirical findings and judicial pronouncements that we began our research into late guilty pleas in 1975. It appeared that the scope for informal settlements of plea in England was limited: the criminal justice system lacked certain features that had proved conducive to plea bargaining in the United States; the courts were openly hostile to such arrangements; and the limited empirical data suggested not so much bargaining for sentence as late changes of plea resulting from a realistic, if reluctant, acceptance of the actual situation.

II. PLEA NEGOTIATION IN THE BIRMINGHAM CROWN COURT

Our interest in plea negotiation arose more by accident than design. In 1974, we began an inquiry into the outcome of jury trials in the Birmingham Crown Court. For various technical reasons we wished to identify, some time before trial, those cases that would be contested before a jury. It soon became clear, however, that many of the cases that we (and the Crown Court authorities) confidently anticipated would be tried by jury ended suddenly with the defendant pleading guilty. Many defendants appeared to change their minds abruptly, only deciding to plead guilty literally minutes before their cases were due to begin in court. Cases of this kind were so common that we decided to ask defendants the reasons for this apparent *volte-face*. We therefore selected a sample of 150 defendants, whose cases were tried in a fifteen-month period in 1975 and

1976, and succeeded in interviewing 121 (81 percent).[7] The interviews, which usually lasted between one and two hours, were tape-recorded and subsequently transcribed verbatim. We shall use some of the quotes derived from these interviews as illustrative case material in this paper.

Before the findings are discussed, it is necessary to indicate their limitations. The sample of defendants was drawn from those who appeared for trial at the Birmingham Crown Court, one of the largest court complexes in England. It follows that our study is not concerned with the way in which pleas are settled in the lower criminal courts.[8] Nor can it be stated with certainty how far this sample is characteristic of the mass of individuals who plead guilty at the Crown Court. It is likely, however, that the pressures that defendants in the sample experienced are typical of those in other Crown Court centers, although the intensity may vary regionally.[9] The other important qualification to make is that our research is primarily concerned with informal negotiating procedures as seen from the defendant's perspective. Although it would clearly be foolish to take what defendants say at face value, there are good reasons to believe that defendants' accounts of what happened to them are often essentially true.[10] As will become apparent, there is corroborative evidence independent of the defendant interviews, but the important point in the present context is that it is the defendants' *perception* of events that ultimately explains the decision to plead guilty. We return below to the question of the reliance that can be placed on defendants' accounts of their experiences.

It soon emerged from the interviews we conducted in Birmingham that the picture of plea bargaining (or its absence) traditionally accepted in England was largely mythical. Not only did we find that informal plea negotiation was common but it was also clear that virtually all defendants were exposed to a variety of pressures calculated to induce them to plead guilty. The view put forward by legal commentators that plea bargaining operates to the advantage of all concerned was not shared by many defendants in our sample. Some had benefited

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[7] The details of this research are discussed in Baldwin and McConville (1977a).

[8] The best discussion of this question is given in Heberling (1973).

[9] For a discussion of this variation (and other variations in plea rates), see Baldwin and McConville (1977b).

[10] This is discussed at length in Baldwin and McConville (1977a: 9-12). All interviews were conducted after the trial had been concluded and sentence imposed. It was made clear at the start of each interview that its purpose was not to help the defendant in any way.

considerably but very many were dissatisfied with or angry about the shabby treatment they felt they had received. Table 1 sets out the main reasons defendants gave for changing their pleas to guilty.

TABLE 1

DEFENDANT REASON FOR CHANGING PLEA TO GUILTY

Reason	Number	Percentage
No deal or pressure—defendant guilty as pleaded	35	28.9
Plea bargain—an offer made to and accepted by defendant	22	18.2
No explict bargain but defendant assumed that a bargain was struck on his behalf	16	13.2
Pressure from barrister but no specific offer made to defendant	48	39.7
Total	121	100.0

Less than a third of the defendants said that their guilty pleas reflected culpability and had been entered without any pretrial negotiations. We shall not pursue those cases here (as far as we could ascertain they did not differ qualitatively from others in the sample), but shall concentrate on the remaining defendants, many of whom described experiences that scarcely tally with the official view on plea negotiation.

Though it is quite clear that there is no highly organized *system* of plea bargaining in England, in the sense in which such a system is to be found in many courts in the United States, many defendants in Birmingham seemed to have been involved in a process that resembles plea bargaining more closely than has been hitherto appreciated. The essence of plea bargaining is the offer of a specific sentence concession in return for a guilty plea; in all but three of the 22 cases of explicit negotiation, the defendant said that the bargain had taken this form. Sometimes the defendant had been told of a specific sentence he would receive if he pleaded guilty; in other cases the offer was in more general terms. The following are two examples of the bargains described by defendants:

> The barrister wanted to get it over with. He went to see the judge with the other barrister and told me that if I pleaded guilty I would get a suspended sentence but if I fought the case I'd be done for wasting the court's time and would get 3 years' imprisonment or, if I was lucky, a suspended sentence. He left it up to me—so I pleaded guilty and got a suspended sentence. [Case 13]

> The barrister looked at the witness statements and said, "I don't think you've much hope. If you authorize me to see the judge, I might learn a lot." With the barrister saying that I thought, "Well, he must know." He went to see the judge and when he came back he said, "If you plead guilty, the most you will get is probation, but if you don't plead guilty,

> the judge will have to impose a stiffer sentence." He also mentioned that if I pleaded not guilty the trial would be reported in the newspapers and I thought of the effects this would have on my family, so I pleaded guilty and got probation. [Case 104]

In 9 of the 22 cases, the stories related by the defendants seemed to indicate that the judge in question, by holding out a precise offer to the defendant, was in breach of the guidelines laid down in the *Turner* case. Those guidelines, it will be recalled, permit a judge to discuss a case with counsel but stipulate that he must never indicate the *quantum* of the sentence, only its form, and then only when he is in a position to say that the sentence will take that form whatever the plea. The following case, in which we had the views of both the defendant and his solicitor, represents a clear illustration of this point:

> DEFENSE SOLICITOR: The judge indicated to counsel for the defense in chambers that he would not imprison the defendant in the event of a guilty plea. This is what caused the defendant to plead guilty.
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> DEFENDANT: The judge sent for my barrister and the prosecution barrister and said, "As the case stands at the moment, I'll be more inclined to give your defendant a suspended sentence but if he goes on pleading not guilty he will go to prison." So when the barrister told me this, I pleaded guilty. [Case 128]

Whether such cases are within or outside the rules, however, is largely beside the point. We encountered several in which the judge and lawyers appeared to have behaved impeccably from a legal standpoint but we remained unconvinced that the defendant's guilty plea was truly voluntary. We would argue that once the judge becomes involved in pretrial discussion of this nature it is meaningless to talk about a defendant's plea being voluntary. As many defendants in this situation see it, the judge has made up his mind about their guilt and is already discussing with counsel the question of sentence. Once he has received some intimation on sentence the defendant, understandably, may well feel that he has no realistic alternative but to plead guilty.[11]

We entertain similar doubts about the voluntariness of the actions of the 48 defendants who said that they had pleaded

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[11] Whether the bargains struck were favorable or not is often a matter of opinion, and an interesting glimpse of differing perspectives is given by the following case.

> DEFENSE SOLICITOR: The judge met counsel privately after the trial had started. As soon as defense counsel informed the defendant that the judge was not intending to send him to prison if convicted [of the lesser charge], my client changed his plea to guilty. He was as pleased as punch with the final outcome.
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> DEFENDANT: My barrister told me to plead guilty to [the lesser charge]. The judge talked to the barrister and solicitor and they begged me to plead guilty. The two of them said the judge had guaranteed that I'd walk out of court [i.e., receive a noncustodial sentence] so eventually I pleaded guilty to please my solicitor, not to please myself. [Case 29]

guilty in response to the advice of their barristers. It is the barrister who is seen by defendants as the major influence upon their decisions as to plea.[12] In the usual case, the defendant meets his barrister for the first time on the morning of the trial and the pretrial discussions must inevitably be brief and hurried. This fact alone often gives the defendant the impression that the barrister's prime concern is to have the case dealt with as quickly as possible. As noted above, the barrister is permitted to put pressure upon his client to plead guilty and may if necessary advise him "in strong terms," but how much pressure counsel may properly apply, and what "strong terms" he may use, have not been made explicit by the courts.[13] Nevertheless it is clear that many defendants in our sample saw the barrister's advice as nothing short of coercive.[14] The following two examples illustrate how the nature of the advice given may in some cases be seen to be coercive in effect:

> My barrister compelled me to plead guilty. He threatened me, saying: "You will go to gaol for three years if you plead not guilty; the case will go on for a long time and you will have to pay all the expenses, which will come to £400. But if you plead guilty you will just get a fine." He wouldn't listen to what I had to say; he compelled me to plead guilty. [Case 60]

> My barrister came to see me just before the trial and said "Hello, what are you doing?" When I said I was pleading not guilty, he said, "Oh" and he threw a fit—I could see it in his face. Maybe he wanted to get home early but he just didn't want to know. He hadn't even bothered to look at the case papers. [Case 114]

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[12] In England, virtually all defendants who go to trial in the Crown Court are legally represented. Initially, the defendant will usually be advised by a solicitor. It is the solicitor who gets the defense case together and who selects a barrister to represent the defendant at trial. In theory, the solicitor acts as a restraining influence on any barrister who exerts undue pressure on a reluctant defendant. In practice, however, the solicitor rarely accompanies the defendant on the day of the trial, so that the latter must rely upon the ability and integrity of his barrister.

[13] In *Hall* (52 Crim. App. R. 528, 1968) the Court of Appeal expressed no disapproval of the fact that, on the day set for trial, Hall's counsel advised him that, if he persisted in his plea of not guilty, there was a serious risk that he would be convicted of the more serious charge (theft) in the indictment and would probably receive twelve years' imprisonment. If, on the other hand, he accepted the bargain offered by the prosecution, and pleaded guilty to the lesser offense (receiving), he would receive a prison sentence of only half that length. Hall pleaded guilty and received six years' imprisonment. He appealed on the grounds that his plea was involuntary but the Court of Appeal held that he had had a free choice over plea, even though the evidence on the greater charge was, in the words of the Court, "not very strong." The failure of the Court to criticize this advice is tantamount to sanctioning it.

[14] Not surprisingly, one finds different styles and approaches among defense barristers. In an analysis of patterns of involvement of barristers in almost 2,000 cases heard in Birmingham (see Baldwin and McConville, 1977b), it was clear that the proportion of cases contested varied dramatically from barrister to barrister. Some barristers with heavy caseloads did not fight a single case whereas others contested almost half of their cases. Moreover, it is very common to hear defendants say that privately retained counsel will fight harder than barristers who are paid by the State.

Many defendants said that they were given no real alternative but to plead guilty and that their barristers had "instructed," or "ordered," or "forced," or even, on one occasion, "terrorized" them into pleading guilty. It may well be, of course, that this did not really happen, that the barrister scrupulously observed his code of professional conduct. But we would argue that the way the defendant *perceived* the advice of his barrister is critical to understanding how he came to plead guilty. The perception of many defendants that their barristers were behaving in an overbearing or domineering manner is the more disturbing because *Turner* makes clear that only in extreme cases will the defendant be able to argue that counsel's advice was such as to destroy the voluntariness of the plea. Both judges and legal advisers often seem slow to recognize that some defendants are weaker and more compliant than others and that what may be vigorous persuasion to a lawyer may appear coercive to a layman.

III. THE QUESTION OF INNOCENCE

It is evident that, contrary to popular belief, the English criminal justice system effectively secures a large number of guilty pleas by means of covert negotiating procedures. Although these procedures raise many problems, some commentators view the situation with little unease since they believe that present practices discriminate accurately between guilty and innocent. We do not share this view; indeed, the results of our research suggest that some defendants who perhaps were innocent, and a larger group who probably would have been acquitted had the case gone to trial, were nonetheless induced to plead guilty. No fewer than 58 percent of the defendants interviewed made some claim (if often a weak one) that they were innocent of some or all of the charges they faced. Of course this is not, in itself, a reliable measure of innocence though it is worth recording that we ourselves, as interviewers, did encounter certain cases where the protestations of innocence were convincingly expressed and could not be lightly dismissed.[15]

The difficulties involved in testing guilt or innocence suggested, at the outset of the research, that we should examine instead the probabilities of conviction or acquittal had the case gone to trial. In England, all cases to be tried in the Crown

[15] This question is discussed at some length in Baldwin and McConville (1977a: chapter 4). Other researchers in England have drawn attention to the possibility that innocent defendants may be persuaded to plead guilty at trial, see Davies (1970); Dell (1971).

Court begin with committal proceedings in the lower court in which the prosecution evidence is presented to magistrates in the form of committal papers containing witness statements and depositions.[16] Because we thought it important to gain some independent assessment of the strength of the prosecution case on the basis of these committal papers we obtained copies from the Crown Court in each of our cases and had them examined separately by two persons highly experienced in criminal trials: a former Chief Constable of Police and a retired solicitor. These experts were asked to predict the likely outcome of each case on the assumption that the case would ultimately be contested, to specify the degree of certainty with which they made the prediction, and to assess whether, on the evidence contained in the committal papers, the decision to prosecute was justified.[17] These predictions do not have any direct bearing upon the question of innocence: establishing whether the prosecution is likely to prove its case at trial is not by any means the same as judging whether a defendant is innocent or guilty. But the exercise is important for it provides an opportunity of determining the extent to which a defendant was justified in claiming that his case was arguable and affords an independent assessment of the likelihood of conviction or acquittal at trial. Moreover, and directly relevant to the question of plea negotiation, it offers a test for deciding whether there was sufficient evidence to warrant a guilty plea.

The results of these independent assessments clearly indicate that the system of "negotiated justice" we have described distinguishes only crudely between those likely to be convicted at trial and those likely to be acquitted. Although the two experts anticipated a conviction with some certainty in 79 percent of the cases, they were uncertain as to the likely outcome in the remaining 21 percent or else expected an acquittal. Two examples of the assessors' views are given below:

> [Both assessors strongly predicted an acquittal.] There is a complete absence of evidence to support either charge. . . . There is a faint possibility that the jury will convict because of [the defendant's] statement but it is unlikely. [Case 97]

> [A conspiracy charge] I think that this case will not get off the ground. I have never read such inconsequential evidence. Taken in the context

[16] The vast majority of cases are committed to the Crown Court without the magistrates considering the evidence at all. This procedure, under section 1 of the Criminal Justice Act 1967 (England), effectively places an onus upon the prosecution and the defense to ensure that no case is committed for trial unless there is at least *prima facie* evidence against the accused. It has become increasingly clear in recent years that this onus is not always discharged.

[17] This method of assessment parallels that used by Rosenthal (1974) in his study of personal injury settlements.

> of the case as a whole, I do not consider that there was any offense committed. . . . I consider that the time of the court should not be taken up with this rubbish. [Case 138]

As is clear from these forthright comments, a few cases were seen by the assessors as so weak that the prosecution should not have been brought in the first place. Even here, the defendants in question had said that they pleaded guilty only under pressure.

That these independent case assessments should not be dismissed is shown by a related study. As was mentioned earlier, our main research concerned an investigation of contested trials in the Crown Court; the assessors conducted a similar exercise as part of that investigation. Altogether, they examined the committal papers of almost 1,000 defendants who pleaded not guilty over a two-year period in the Crown Court. The predictions were made without knowledge of the actual outcome in all cases, and in most in advance of trial, thereby permitting a test of their accuracy. When the assessors said that the prosecution was not justified in putting a defendant on trial, over 80 percent of the cases resulted in acquittals. This is strong evidence that certain cases in the negotiated guilty plea sample would have ended in acquittals had they gone to trial and suggests that the defendants involved may well have been wrongly advised to plead guilty and were justified in claiming that their cases ought to have been heard by a jury rather than being settled hastily outside the courtroom.[18] To what extent innocent people are induced to plead guilty by these out-of-court procedures is difficult to determine accurately. In our view, the evidence is compelling that innocent persons are frequently placed at risk and that, on occasion, the weaker and less knowledgeable are wrongly persuaded to plead guilty.

IV. THE FACTORS THAT PROMOTE NEGOTIATED PLEAS IN ENGLAND AND THE RESPONSE OF THE COURTS

We noted above that, although certain features of the American system conducive to bargaining are absent in England, nonetheless negotiated plea settlements do occur with some frequency. The paradox is more apparent than real.

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[18] Our study of contested trials in the Birmingham Crown Court shows in addition that certain defendants, acquitted at trial and now accepted by the police (and others) to have been quite innocent of the charges they faced, had nevertheless experienced considerable pressures to plead guilty. For further details of these cases, see Baldwin and McConville (1977a: 77-81).

There are inherent pressures within the English criminal justice system that combine to stimulate the informal disposition of cases outside established courtroom procedures. For example, the English sentencing system customarily awards a reduction in sentence in return for a plea of guilty; in some recent cases the reduction has been massive (e.g., *Hall*, 52 Crim. App. R. 528, 1968). Today there is considerable uncertainty whether such a reduction should be offered only to those who show remorse (as the Court of Appeal has frequently maintained[19]) or whether it is an automatic reward for all who plead guilty. Recent judicial pronouncements, which have created a good deal of confusion and ambiguity, indicate a shift from the traditionally accepted view. A startling example is the case of *Cain*[20] in which it was bluntly stated that:

> it was trite to say that a plea of guilty would generally attract a somewhat lighter sentence than a plea of not guilty after a full-dress contest on the issue. Everybody knew that it was so, and there was no doubt about it. Any accused person who did not know about it should know it. The sooner he knew the better.

Though there may be ambiguities of principle, the practice is clear enough. Defendants in England who plead guilty can expect a substantial discount in sentence virtually as a matter of course. The truth is that English courts do not ordinarily embark on a search for remorse in a defendant. One indication of this is that the defendant who pleads guilty in the Crown Court is almost never asked by the judge (or by anyone else) if he wishes to say anything before sentence is passed. The conclusion we draw is that the guilty plea itself is generally taken by the courts to be strong, if not conclusive, evidence of remorse. On the other hand, our own research (and that of other writers) tends to show that few defendants who plead guilty are truly contrite. Indeed, the great majority of defendants to whom we spoke in Birmingham assumed that they had received a reduced sentence by pleading guilty, yet very few made any pretence at contrition about their behavior. The very fact that over half were still protesting their innocence (in

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[19] Thomas (1970: 196) analyzing Appeal Court decisions, writes:
In fixing the sentence which reflects the gravity of the offence, the trial judge must ignore the fact that the appellant has pleaded not guilty and strenuously contested the case, but he may reduce the sentence below the level which reflects the gravity of the offence where there is evidence of remorse. Thus in one recent case the Court stated that "it is quite improper to use language which may convey that a man is being sentenced because he had pleaded not guilty, or because he has run his defence in a particular way. It is, however, of course proper to give a man a lesser sentence if he has shown genuine remorse amongst other things by pleading guilty."

[20] [1976] *Crim. L. Rev.* 464, discussed by Seifman (1976); see also *Tilbrook and Sivalingam* [1978] *Crim. L. Rev.* 172.

whole or in part) when they spoke to us is evidence of this. It seemed to us that, for these defendants, the guilty plea reflected bitterness and cynicism far more than genuine remorse.[21] Yet there can be little doubt that the great majority received substantial reductions in sentence. In conversations with English judges, we have come to recognize a wide range of views on the reduction that a guilty plea justifies: some would reduce the sentence by as much as a third in most cases, whereas others view any reduction as wholly conditional upon evidence of contrition. But a separate study of sentencing patterns in Birmingham showed that reality differs greatly from such expressions of intent. We tried to measure the extent to which a sample of defendants who pleaded guilty received reductions by comparing their sentences with those of a matched group of defendants who had unsuccessfully contested their cases.[22] The result was extremely interesting. Stated baldly, it was that many of those who pleaded guilty received a massive discount in sentence. Indeed, taken as a group, those who pleaded not guilty and were convicted received custodial sentences (and longer custodial sentences at that) one and half times as frequently as those who pleaded guilty.

We were inescapably driven to the conclusion that it was the powerful and pervasive inducement to plead guilty provided by the so-called discount principle that created many of the defects of "negotiated justice" described in this paper. The operation of the principle can scarcely be squared with justice: it exists primarily because of administrative expediency. In recent years the Crown Court system in England has had to cope with a considerable increase in work and has kept pace only with great difficulty.[23] Everyone who works within the system suffers from the burden of this caseload, a burden that is considerably lessened for all officials by the guilty plea. It might

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[21] Rosett (1967: 75) states this view graphically:

> One may doubt whether many of the defendants who "cop a plea" on any given day are motivated by this sort of spiritual awakening. In many courts, the guilty-plea process looks more like the purchase of a rug in a Lebanese bazaar than like the confrontation between a man and his soul.

[22] The samples were matched, on a group basis, according to the defendants' sex, age, prior criminal record, and prior prison experience, and the type of offenses charged. For further details of the procedures, see Baldwin and McConville (1978). Comparable exercises have been conducted in the United States, most notably by Mileski (1971), Shin (1973), and Levin (1977).

[23] Between 1965 and 1974, for example, the work of the Crown Court in England more than doubled and, in the four-year period 1972-1975, the number of Circuit judges had to be increased by 27 percent, the number of courtrooms in use by 26 percent, and Crown Court sitting days by 16 percent (Inter-departmental Committee, 1975: ¶20-23).

well be thought fanciful to argue for the elimination of sentencing discounts, or even for a reappraisal of the premises upon which they are based, but there should at least be public recognition of the severe pressures that they inflict upon all defendants—innocent and guilty alike. Indeed, the greater the disparities (or more accurately, the anticipated disparities) between sentences imposed following pleas of guilty and not guilty, the greater the risk that innocent defendants will plead guilty. Furthermore, we would argue that the mere existence of substantial discounts for guilty pleas lends legitimacy to unfair pressures exerted on defendants by lawyers. Such pressures produce outcomes that can then be justified (if by reasoning that is clearly circular) as realistic and pragmatic, even though morally they are scarcely defensible.

But this is not the only problem. There seem to us to be other defects in the criminal justice system that lie at the root of many of the problems of negotiated guilty pleas and with which the courts seem reluctant to grapple. One, in particular, stands out: the complaint by many defendants in our sample that counsel seemed unwilling to contemplate challenging police evidence in court. Of course allegations of brutality and fabricated evidence are frequently leveled against the police by defendants, and the present sample was no exception. There was no way in which we could ascertain the truth—but then neither could the barrister. That abuses of police power occur is indisputable; the only question is the frequency with which the police concoct evidence or secure confessions by illicit methods. But the unhappy truth, as we have been told by several barristers (including a good number of our most vocal critics), is that to challenge police evidence in court or engage in any kind of defense that resembles mudslinging will generally be ill-advised. The police, rather than the defendant, *will* almost always be believed in court and a heavier sentence is a likely consequence of an unsuccessful defense based upon allegations of police misconduct. This is a disturbing situation, the more so because there will usually be no way of ascertaining which party is telling the truth. In England, the questioning of suspects by the police is largely unregulated in practice and, as most police officers readily concede, the existing rules are routinely honored only in the breach.[24] For a barrister to be placed in the position of having to advise a defendant to plead guilty after he has been interrogated in these unsatisfactory

[24] Good discussions of the existing system in England are given in Heberling (1973) and Greenawalt (1974).

circumstances is, in our view, insupportable, though once again such advice may well be realistic and even prudent. Though the courts in England have discretion to exclude evidence illicitly obtained by the police, it is widely recognized that judges tend to wink at infractions. The upshot is that the defendant can easily be convinced by counsel that his position is hopeless and abandons all thought of acquittal, pleading guilty even though he may believe himself to be innocent.

As we have already hinted, the response of the courts has been far from reassuring. They appear determined to ensure, by means of a general sentencing policy, that all defendants are subjected to some pressure to plead guilty and they have shown no real willingness to control what takes place during police interrogations. Their early response to the problems of negotiated pleas demonstrated, at the least, a lack of appreciation of realities. A good illustration of this occurred in the case of *Peace* ([1976] *Crim. L. Rev.* 119), where a defendant had pleaded guilty after his barrister told him that failure to do so would lead to a heavy prison sentence and possibly to prosecution of his alibi witness for perjury. Subsequently, evidence came to light exonerating the defendant and he was granted a free pardon. Despite this, the Court of Appeal refused to treat the plea as a nullity on the ground that, although he might have pleaded guilty "unhappily and regretfully," he could not be said to have lost his power to make a voluntary and deliberate choice. Since the publication of *Negotiated Justice* (Baldwin and McConville, 1977a), the Court of Appeal appears to have become more willing to intervene in cases involving negotiated pleas in order "to preserve the good face of justice" (*Bird* [1978] *Crim. L.Rev.* 237, 238; see also *Atkinson* [1978] *Crim. L. Rev.* 238; *Howell* [1978] *Crim. L. Rev.* 239). It is hardly sufficient, however, for the Court to proceed on this ad hoc basis: what is required is a thorough examination of the basis of the discount principle and the place, if any, of negotiated plea settlements in the English system. Unless and until this is done, the remedies available to those who have been wrongly induced to plead guilty will remain both arbitrary and ineffective.

V. THE REACTION OF THE LEGAL PROFESSION

If the results of our research pointed to deficiences in the operation of criminal justice in England, the response of the legal profession scarcely encourages optimism that these deficiences will be rectified. From the outset, it was clear that

the leaders of both branches of the legal profession were fundamentally hostile to the publication of our report. Indeed, even before publication, a concerted attempt was made not merely to discredit the findings publicly but also to create serious doubts about our professional integrity. These activities did not abate once the report was finally published, after several delays, in September 1977. The thorough public airing that we hoped our book would receive took a form we could scarcely have anticipated. Its academic merits are obviously for others to judge; indeed, whether its hostile reception is justified turns, in part, on whether the research has made any contribution to an understanding of the English criminal justice system. It nevertheless remains the case that many of the comments and repeated slurs broadcast by senior figures are very important in themselves since they exemplify the stance adopted by the profession in England when delicate questions about plea bargaining are raised. Hence the very ferocity of the reaction that the book provoked among lawyers is of interest in its own right and requires some explanation.

To superficial observation, the response of the legal profession may appear to be outrage at the suggestion that plea negotiation, traditionally assumed to be virtually nonexistent in England, occurs with some frequency. Yet one of the most interesting aspects of the reaction to *Negotiated Justice* has been the complete absence of any denial that plea bargaining is fairly widely practiced. Quite the contrary—even the Chairman of the Bar has publicly stated that "plea bargaining is a very useful part of the system of English criminal justice."[25] Furthermore, several practicing lawyers in England have now gone on record as saying that the findings of our book are entirely unexceptionable (*The Times*, October 6, 14, 18, 1977). Nor can there be any great secret about this. Informal plea settlements have acquired a special language, and a casual visitor to any Crown Court can readily overhear barristers, defendants, and police referring to the "deals" that have been struck, the anticipated contested trials that have "folded," and the "knife and fork" or "carve-up" cases that are being informally settled. It seems likely, therefore, that the shrill (one might almost say hysterical) reaction of the senior ranks of the profession can be satisfactorily explained only in terms of a deliberate attempt to divert public attention from the sensitive issues underlying plea bargaining.

[25] B.B.C. radio interview, September 22, 1977.

A campaign has been conducted by the legal profession, both privately and publicly, to suppress publication of the book. This campaign—unprecedented even in England where there has always been an uneasy relationship between researchers and the legal profession[26]—culminated in the Chairman of the Bar writing to the Home Secretary, urging him to intervene to prevent publication of the report which would be, he said, "directly contrary to the public interest." The Home Secretary's response was as swift as it was unpleasant. First, a letter was sent to the Vice-Chancellor of our University seeking his support in discouraging publication of the report; second, three months before publication, the Home Secretary gave a lengthy comment about our report in Parliament stating that, though he did not wish to suppress publication of the book, he nevertheless regarded the conclusions as "questionable" (932 H.C. Debates col. 169 (Written Answers) May 18, 1977). Our Vice-Chancellor, Sir Robert Hunter, mindful of the long-term interests and reputation of the University, was greatly disturbed by the public furore and press speculation about the findings of the research. He decided to carry out his own assessment of whether the methods we had adopted were those that others in the discipline would regard as sufficiently sound to support the conclusions we had drawn. In the event, our approach was vindicated and the Vice-Chancellor offered to contribute a Foreword to the book making this point explicit.[27]

We were very much taken aback by the way the campaign against publication was conducted and, on several occasions, wrote to individuals (both privately and through the columns of national newspapers) to correct serious misstatements of fact and quite unfounded allegations made against us. Indeed, the allegations were on one occasion of so grave a nature that we considered them to be defamatory and a full public apology was eventually made.[28] But perhaps the most depressing aspect of the various outbursts has been the underlying attitude

[26] Although the legal profession in England has never demonstrated much enthusiasm for research, its assault on *Negotiated Justice* has been seen by some writers as representing a serious breakdown in dialogue, see Zander (1977). Comparable tensions between academics and practitioners in the United States in the early years of the century are discussed in Auerbach (1976).

[27] A fuller description of the pressures that were brought to bear to prevent publication of *Negotiated Justice* is given in Baldwin and McConville (1979).

[28] These were allegations made by the Chairman of the Criminal Bar Association in the *Guardian Gazette* (Sept. 28, 1977). We were said to have broken strict guarantees of confidentiality to those we had interviewed; to have failed to produce a report to the Home Office about our research on jury trials; and even to have abandoned the whole inquiry because of doubts that had

that leaders of the profession have shown toward those charged with criminal offenses. It is no exaggeration to say that their comments on the statements of convicted defendants that we cited have been contemptuous. They have completely refused to place any credence in what defendants have had to say—their views, opinions, and complaints about the system have been summarily dismissed as worthless.[29] How far the views of defendants should be taken seriously is clearly a contentious issue and one discussed at considerable length in the first chapter of our book. Suffice it to say here that the complaint by many defendants in our sample that they had received cursory attention from their legal representatives is rendered the more credible if the reaction by leaders of the legal profession to their views can be taken as any guide.

VI. CONCLUSION

Plea bargaining is a fact of life in the English criminal justice system. It is not practiced on the same scale as it is in the United States and its true dimensions are only now beginning to emerge. Although openly and avowedly opposed by English appellate courts, plea bargaining thrives in a climate actually determined by the principles and procedures approved by the Court of Appeal itself. The unwillingness of the courts publicly to acknowledge what goes on has stultified the development of appeals procedures, so that the honoring of promises held out to defendants is problematic.[30] The Court has given superficial

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been raised about our competence as researchers. In each case, the allegations were entirely without foundation and apologies appeared in the *Guardian Gazette* (Oct. 26, 1977).

[29] To take only a couple of examples of this, the Chairman of the Bar (in a letter to the press) referred to the research as "a compilation of unsubstantiated anecdotes . . . and no more than the tittle-tattle of the cells" (*The Guardian*, June 9, 1977); and the President of the Law Society has said that "Anyone connected in any way with that sort of people knows that one hazard is that they will complain first of their innocence and second that they were misled by barristers, solicitors and so on. If you investigate them 98 percent or more are as guilty as hell" (*Birmingham Post*, May 12, 1977).

[30] In *Deary* (*The Times*, June 9, 1976), for example, the defendant pleaded guilty only after the judge had promised not to send him to prison. In the event, the bargain was broken and the defendant given a custodial sentence. Although the Court of Appeal corrected the injustice so caused, it did so on the vague basis that the defendant had a "real sense of grievance"; there was no suggestion that the Court would necessarily uphold promises given to defendants in such circumstances in the future.

attention to the question of plea bargaining and, more generally, to the voluntariness of a defendant's plea. The blind indifference of judges and lawyers to the effects of "back-stairs" agreements and discussions can only reinforce an informal system that, with some frequency, rewards the compliant at the expense of justice.

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