TRIALS AND BARGAINS

Disappearing Trials

How liability prices for crimes are established is the problem of *criminal procedure*. How does the law decide who's guilty and establish the prices they must pay? Almost everywhere, the default response is some kind of trial, and in systems of proportional punishment, the purpose of the trial is to do corrective justice by fixing a penalty that reflects the moral costs of the crime and show the people that this has been done. But not all criminal trials look alike, and the different shapes they assume around the world reflect the differing commitments of legal systems, and their constituents, to finding the truth and treating defendants fairly, laudable objectives that are sometimes in conflict.

In much of the world, trial procedures are *inquisitorial*. As the name suggests, inquisitorial trials are courts of inquiry. Their purpose is to produce, after a thorough investigation by the police and a review of the evidence at the trial, as full and accurate a report as possible of exactly what happened in the case, how the defendant's conduct related to the letter of the law, and how the court reached its conclusions about the defendant's guilt and the appropriate sentence. This assumes that there *is* such an objective truth "out there," that it's possible to know the facts about what happened and what people were thinking, and that they can be found through careful, professional investigation by the police and the trial judge, assisted in court by the prosecutor and defense counsel, using advanced, scientifically informed forensic techniques and administered impartially by experts concerned only with this objective.

Inquisitorial procedure reflects the primacy of this search for objective truth. There is, for example, only one person who knows for certain what a particular defendant did or didn't do or

think, the defendant himself. So the source of evidence in any criminal case that leads most directly to the truth is the defendant, who in most systems is the first witness called. Even in Western Europe, where since 1945 the harsher aspects of inquisitorial procedure have been leavened with limited rights against self-incrimination, there's still pressure on defendants to testify in hopes that a confession or showing of remorse will earn a lighter sentence. More generally, as befits a system whose primary value is finding the facts, inquisitorial defendants have no *rights against the truth*. There are no procedural rights or rules, like a right not to testify or a rule that illegally seized evidence can't be introduced at trial, they can use to keep evidence that's likely to reveal the truth from being considered at the trial.

The trial or investigating judge controls the proceedings and administers them not as a neutral referee but as representative of the people (or the state), who deserve to know precisely what happened, how the law was violated, and how the punishment was determined. There is a state prosecutor and generally a defense attorney, but their role is not to argue with one another or assert any rights that interfere with finding the truth. It's to assist the judge in her inquiry, to add to the relevant facts where they can and cooperate in the investigation. Verdicts are rendered by the judge, sometimes a panel of them, sometimes supplemented by a minority of lay jurors in serious cases, and reached by majority vote, with a less demanding standard of proof than the very high bar Americans are accustomed to, "beyond a reasonable doubt." So convictions are easier to obtain than in the United States. The point of the proceeding, beyond reaching a decision and fixing a punishment, is to produce the report, the state's official resolution of the case, a definitive account of what happened, who violated what laws, and what punishment was imposed, intended to reflect the actual facts as closely as possible.

As a result, inquisitorial trials are simple, cheap, and revealing. They're a straightforward search for the facts and because of this, the depth and quality of the pretrial police investigation

and the limited, auxiliary role of the attorneys, they're usually concluded in an hour or two. And because the trial is so focused on finding the truth, where it's allowed to function as intended it generally does this quite well. At the end of a successful trial in France or Germany, the public knows exactly what the state believes happened in the case and that the laws have been enforced with the greatest possible accuracy in mind (Langbein and Weinreb 1978; Dubber 1997).

To American eyes, the most striking feature of this system is the enormous power it places in the police and judiciary and the corresponding absence of rights to protect defendants against abuses of it. Apart from processes of internal discipline controlled by the state, there's very little to check official power in the inquisitorial system. Where it works with public support, it manifests popular confidence that officials will do their jobs honestly and without abuse, a trust that's earned in places like Germany by intensive training and a professional culture that supports the ideal. This is the fundamental distinction between modern inquisitorial systems and their Anglo-American counterpart, the *adversarial* systems. These are institutions after Locke's heart, built specifically on a mistrust of state power and a determination to make it as hard as possible for government to deny fundamental rights in the guise of order or justice. Ancient though they are, they take a decidedly post-modern view of truth, recognizing that different people will perceive "what happened" in any complex interaction, and even more what the participants were thinking, differently. Truth is not entirely a matter of fact and, especially where states of mind must be inferred from observations that themselves might be mistaken, requires interpretation, for which forensic science is of limited value and human judgment and empathy are paramount.

The adversarial trial is an intellectual combat, an effort by each side to use the evidence to construct a version of events favorable to it and persuade the jury, the final arbiter of the facts, to decide accordingly. Because facts don't speak for themselves, the attorneys speak for them, interpreting the evidence to tell the story they want the jurors to believe. But the evidence is always

incomplete and inconclusive, in part because the rules are purposely structured to keep some of it from the jury. Defendants have several effective rights against the truth, and truth is often the first casualty of the combat, as juries make decisions on the basis of fragmentary, incomplete, even misleading information. The point of the exercise is not to find the truth and report it authoritatively. It's only to decide two specific legal questions: Will this defendant be held criminally liable for some offense, and if so, what punishment will he receive? And because the answers are decided by combat, the primary value of the proceeding is fairness, a level playing field that gives both sides an equal opportunity to convince the jury.

The adversarial trial is controlled by the overtly partisan attorneys, while the judge impartially enforces the rules of combat. The attorneys frame the issues, bring the evidence, question the witnesses, make the arguments, tell the stories, and try to discredit the other side's arguments and stories. Neither side is required to tell the whole truth. The defense attorney may try to persuade the jury of any story he thinks it might believe, true or false, and the prosecutor is constrained only not to argue for a conclusion she knows to be false. The standard of proof is much higher than in inquisitorial trials – "all but impossible for it to have been any other way" – and the decision is made by lay jurors, most often doing so for the only time in their lives and perhaps less ready to inflict severe punishment than professionals more accustomed to the work. Finally, there's no report. There's only a verdict, guilty or not guilty. No account of what happened, no reasons for the verdict, no finding of fact beyond whatever facts are necessary to constitute the crime. No one ever knows what the jury believed or didn't believe or, because even a verdict of not guilty doesn't mean "innocent," just what the defendant did or didn't do. The Constitution guarantees every defendant a public trial before an impartial jury, and a quiver of rights against the truth to use throughout the process. The modern adversarial trial, complex, expensive, uncertain and inconclusive, reminds us that Lockean liberty doesn't come cheap.

It wasn't always this way. Before the Civil War, American criminal trials were much simpler, less combative affairs. There was a judge, not always an attorney, a jury and sometimes a prosecutor, but often the state was represented by a policeman who could speak knowledgeably about the facts. Very few defendants had lawyers, so they represented themselves with little legal knowledge, but there wasn't much to know. Laws were simple, and almost everyone knew broadly what they were. Pretty much any sort of evidence could be used in court as long as the judge thought it reliable, and there were few rules about what kinds of arguments could be made or what juries could or couldn't conclude from what they were hearing, or already knew. Trials were primarily public forums for the policeman and the accused to offer their versions of events and question one another, without assistance from lawyers. They cost little, and like modern inquisitorial trials, seldom took more than an hour or two. At the same time, beyond petty offenses there wasn't nearly as much crime in rural, preindustrial America as there has been since. The confluence of these factors made it quite possible to fulfill the sixth amendment's promise of a full criminal trial for every defendant, with what now seem very rudimentary procedures (Friedman 1993, pp. 235-255).

Things changed dramatically after 1870. America was transformed by an industrial revolution, and farmers and immigrants descended on cities to find work. Slums proliferated, antagonisms flared among ethnic groups, and with all this came much more crime. The states and large cities responded by creating the modern police and prosecutorial bureaucracies that are still with us. Police forces were professionalized and prosecutors' offices staffed by specialized attorneys who became very good at what they did. In contrast, defendants were generally too poor to engage an attorney at all, and even when they could, the expertise and investigative resources any private counsel could bring to a case were dwarfed by the prosecution's. By 1900, legal reformers and, more crucially, judges increasingly saw the playing field as tilted strongly in favor of

government, and defendants as severely disadvantaged in the intellectual combat of the adversarial trial (Friedman 1993, pp. 261-323).

Had the problem been addressed by legislation, the outcome might have been to level the field by granting defendants access to talent and resources comparable to the prosecution's. But it was judges who took the initiative, and after 1900 the federal courts embarked on a seventy-year project to even the sides by expanding existing procedural rights against the truth, like the rights not to testify or to be free from unreasonable searches and seizures, and creating new ones, like the right to an attorney. Far from making it more likely that truth would emerge as trials became fairer, as increasing defendants' access to resources might have done, the judges made it much *less* likely by enabling defendants to exclude damaging but reliable evidence from trials, on the grounds that it would condone bad behavior by the police or give the prosecutor too great an advantage.

This judge-made reform has done its job. Over time, the sides in American criminal trials have become increasingly even, by now perhaps weighted in favor of defendants, as prosecutors struggle to overcome endless defense motions to construct favorable juries or exclude unfavorable evidence or win favorable instructions on the law. But this has made what now counts as a full criminal trial so long, so complex, so uncertain and so expensive that almost no one other than defendants on television ever gets one. A trial with all the constitutional trimmings now looks much more like the crown jewels, trotted out for viewing only on rare public occasions, than it does the day-to-day workhorse of criminal liability it was for eight hundred years. John Langbein (1992, p. 123), a proponent of inquisitorial procedure, bluntly assigns the blame. While Europeans were perfecting scientifically based, professional systems of investigation and adjudication, he writes, "the Anglo-American systems turned for safeguard down the path of partisan lawyerization."

> The rise of the adversarial system led to the loss of the accused as a testimonial resource, and to the vast elaboration of the law of evidence and of trial procedure that was undertaken in a forlorn effort to regulate adversary combat. . . . The explosive combination of adversary procedure and criminal jury trial produced a system so clumsy, so time-consuming, and so costly that, in the end, Americans found it intolerable to honor the Framers' promise to use jury trial in 'all' criminal cases. As a result, the pressure to subvert adversary jury trial has grown ever more intense across the last century.

One example is the replacement in many cases of a full trial by a far simpler, less costly evidentiary hearing. Suppose it's a crime to possess heroin, and I have a bag in my pocket. A policeman stops me on the street for no good reason, finds the heroin, and arrests me for possession. The only question in my case is whether the policeman's behavior constituted an "unreasonable search and seizure" of the evidence. If it did, the heroin can't be introduced at my trial, so the jury will hear nothing about it and I'll be acquitted. But if it wasn't an illegal search, the heroin will be introduced and I'll be found guilty of possessing it. So the trial itself becomes pointless as soon as my motion to suppress the crucial evidence is decided. If the judge agrees that the search was illegal, the prosecutor will drop the charge. If not, I'll have to go to trial, but so will the prosecutor, who knows that even if the case is a sure thing, actually empanelling a jury, preparing the evidence and arguing the case will take the valuable time of his overtaxed staff and tie up a judge, jury, and courtroom for three days. Nobody wants or needs a trial, and for both sides, there's a more attractive alternative.

Plea Bargaining

A plea bargain takes place when a defendant agrees to forego his right to trial by pleading guilty to some offense in exchange for a more lenient sentence than he expects to receive after

conviction at trial. Once crime began to rise after 1880 and prosecutorial resources had to be more rationally allocated across growing caseloads, even the relatively simple trials of the time became too great a burden for limited budgets to bear. Plea bargaining flourished everywhere, and by 1950, fully 95% of all convictions were by guilty plea, the vast majority of those almost certainly by agreement, a proportion that's been maintained ever since. Given all the discretionary exit points in American criminal liability, moments when a policeman, magistrate or prosecutor can terminate a case and release the suspect, the proportion of suspects who ultimately do become defendants in criminal trials must be vanishingly small. For a hundred years, plea bargains, not trials, have been the default procedure for convicting offenders and establishing liability prices (Alschuler 1979; Friedman 2005, pp. 434-39).

The crux of the bargain is the sentencing discount given in exchange for the guilty plea. So one way bargains might be achieved, *sentence bargaining*, would have the defendant (or his attorney) bargain directly with the sentencer. In the United States, this is usually the trial judge, but concerns about judicial neutrality and dignity in a process most observers (and participants) see as demeaning keep judges from intervening directly in plea negotiations. The alternative, *charge bargaining*, is almost universally employed because it's so well adapted to a peculiar feature of the adversarial system, one that American prosecutors exploit to the fullest. European prosecutors are generally bound by a *rule of compulsory prosecution*, which requires them to try every case on the highest possible charge the evidence will support, nothing more or less. If a defendant is suspected of having actually committed armed robbery, the prosecutor must charge him specifically with and try him for armed robbery.

But American prosecutors have almost complete discretion to decide whether or not to prosecute any defendant and, if so, for what crimes, provided only that decisions be made "in the interests of justice" as the prosecutor sees them. At the same time, there's a huge repertory of fel-

onies covering a broad range of behaviors, all modified by degrees, and many overlap or govern activities typically undertaken together as part of a single criminal transaction. So in a typical "armed robbery" in the United States, the suspect commits, in addition to the armed robbery, a dozen other offenses, from weapons charges to threatening the victim to fleeing the police, and if, like McGautha and Wilkinson's, the robbery was a team effort, there'll be conspiracy offenses as well. Each of these many crimes comes at an uncertain liability price, somewhere in a range that, crucially, has an upper limit. So, for example, armed robbery may be punished by imprisonment of up to fifteen years, while the less serious crime of unarmed robbery may carry a maximum sentence of eight.

This gives prosecutors a great deal of sentencing power, and puts them, representing "the people," across the bargaining table from defendants. Subject to a prohibition on "vindictive" treatment, a prosecutor can pile the charges on, so if someone has, in the course of one event, committed several independent crimes, the potential punishment he faces may be much greater than that prescribed for the principal crime in the case. More importantly, since there's no rule of compulsory prosecution, the charge the prosecutor selects needn't accurately describe what he thinks the suspect has actually done. So he can charge a suspect with any crime or combination of crimes on the list of crimes he *has* committed, or with some lesser offense he *hasn't* actually committed, that's required to force the judge to sentence the offender to the punishment the prosecutor has promised in the bargain.

Suppose armed robbery is punishable by up to fifteen years, unarmed robbery by no more than eight, and carrying an unregistered handgun by up to four years. One night, I take my unregistered pistol to a liquor store, wave it at the clerk, and take all the day's proceeds, but the clerk pushes a "panic button" under the counter and I'm arrested as I walk out. If I'm tried on a charge of armed robbery, which is what I did, I'll almost certainly be convicted and might pay a liability

price of fifteen years. But there's always the slim chance I'll be acquitted, so the prosecutor has to take the case seriously, produce the necessary evidence and prepare for whatever bogus defense I might come up with. He'd like to spare himself the cost and uncertainty of a trial, and he can do it by sparing me the risk of fifteen years.

If it's important to him, but not urgent, that we reach an agreement that makes the trial unnecessary, he may offer to let me plead guilty to robbery. If I do, I'll lose any chance at acquittal, but the maximum punishment I can receive will be eight years. So I test him a bit by saying no, to see more about his reservation price for my guilty plea, but when he promises in addition to recommend a sentence of five years to the judge, I agree. In court, the prosecutor tells the judge the charge is robbery, and the judge asks how I plead to that charge. I say "guilty," she asks a question or two to establish that I did something resembling a robbery, and when the prosecutor recommends that I be sentenced to five years, that's what she does. To avoid a costly trial, the prosecutor has traded ten years of punishment for my consent to be punished without one, and I've been convicted of a crime that doesn't describe, and charged a price far below what the law authorizes for, what I actually did. To get the deal, the prosecutor has "swallowed the gun." Had he been more desperate, because he had so many cases to resolve and so little money to spend, he might have been willing to pay an even higher price for my plea, letting me to plead guilty to the gun offense alone and limit my potential liability to four years. In that case, he'd have kept the gun, but made the armed robbery disappear (Uviller 1996, pp. 177-199).

Plea bargaining in this form is made *possible* by two aspects of American criminal liability absent from European inquisitorial systems. First, defendants have the right to plead guilty and abort trials before they occur. The sixth amendment guarantees every accused the right to a jury trial, but doesn't command anyone to exercise it. Defendants may have reasons other than, or in addition to, an offer of leniency to avoid a trial – apart from the expense and uncertainty, trials

open defendants' lives to public view in the most unfavorable light – and pleading guilty lets them do it. A guilty plea is a conviction, an agreement by the defendant to submit to punishment for the crime to which he's pleaded guilty, and it ends the criminal case. But it's not a confession to any crime or admission of any particular facts, and it can't be used as proof of any fact beyond the conviction itself in any other litigation. The only consequence of the plea to the defendant is the sentence to which he's agreed. Inquisitorial defendants can't plead guilty or abort their trials, because the point of the trial is to find out what actually happened. Even a full confession by the defendant is taken only as evidence, testimony from an important source but not the only one, and subject to the same distortions and inaccuracies as that of any other witness. But adversarial trials aren't about discovering the truth. They're about finding someone criminally liable and imposing an appropriate liability price. So the right to plead guilty, the ability to subject the prosecution to a costly trial or make it unnecessary, becomes a valuable bargaining chip for defendants in negotiations. Defendants have something to give that prosecutors want.

The second enabling feature of the American system is that prosecutors, because of their broad charging discretion, have something of value to give them in return. By selecting charges and combining them with sentencing recommendations they know judges, who operate under the same pressures they do, will respect, prosecutors can calibrate punishments as finely as necessary to win guilty pleas from defendants at liability prices they consider an acceptable discount for the defendant's saving the government the cost of trying them. If the defendant saves us this much money, the prosecutor says, we'll save him this much time. Gary Becker would smile in vindication. Plea bargaining is only possible where defendants are consistently made to bear the cost of their trial in the liability prices they pay, so prosecutors can make surrendering their right to it attractive.

The institutions of American criminal liability make plea bargaining possible. Two features

of the environment within which criminal entitlements are exchanged in the United States make it *necessary*. The first is the sheer volume of crime and the correspondingly very large caseloads the liability system must process. Relative to most of Europe, American cities and suburbs are filled with violent crimes, which puts enormous stress on police forces, prosecutors and courts, all chronically underfunded public services. No more than a tiny sliver of cases can be properly tried with the available resources, but there are thousands of crimes to be internalized. Plea bargaining has also been made necessary by the evolution of the liability system itself, the elaboration of rights and procedures that make not just trials but full procedures at every other step in the process prohibitively costly. For generations, American criminal liability, particularly in big cities, has been assigned the task of resolving a hundred times more crimes than could possibly be accommodated if every one were subject to a full trial. Some other way had to be found, or the system would simply collapse.

Yet plea bargaining remains deeply controversial, for four principal reasons. First, it produces inaccurate outcomes, not once in a while, or even inevitably, but *systematically*. Prosecutors have good reasons for allowing offenders to be punished for crimes less serious than what they've actually done. It lets them successfully conclude a larger portion of cases with convictions and allocate their scarce resources to inflict some liability price, even a small one, on as many offenders as possible, all of which is surely in the interests of the liability system, if not necessarily justice. But when their resources are very stressed, so the price in punishment they're willing to pay for a plea is very high, defendants plead to crimes that bear only faint resemblance to what they've really done, and pay liability prices far smaller than the moral costs their crimes actually impose.

And the bias is always in the same direction. The essence of the bargain is the sentencing discount – *every* bargain results in a sentence smaller than what the defendant could expect after

trial on an accurate charge. When discounts are deep, punishments vastly understate the moral costs of offenses. In our example, the legislature's penalty structure makes clear that armed robberies can impose as much as fifteen years' worth of moral cost. Not every one will, so suppose the legislators believed that in the "average" case, ten years would be about right. But if I plead only to the gun charge, even if I get the full four years, I'll suffer far less imprisonment than it would have taken to compensate the moral cost bearers for the armed robbery I actually committed. Something like this characterizes 95% of all criminal convictions. When this systematic effect is added to the effects of uncertainty of conviction we've already discussed, the expected liability prices prospective offenders actually face for their crimes become very, very much lower than the costs of their crimes, and many, many more than the systemically efficient number of crimes will be committed.

A second objection to plea bargaining is that it removes the doing of criminal justice from public view. One of the virtues of public trials everywhere is that they're public. In addition to doing the business of criminal liability, public trials educate. They help make ordinary people into citizens by inviting them to observe how the government treats suspected offenders, what standards it applies to them and itself, and when and how it makes mistakes. But in a plea bargain, there is no trial. Charges and sentences are hastily negotiated by prosecutors and defense attorneys, and defense attorneys and defendants, far from public view. Defendants are often pressured to accept agreements by their attorneys to maintain cooperative relationships with prosecutors at the expense of the particular client whose fate they're deciding. It's not a pretty sight, even if we could see it.

Which is a third objection. A criminal trial has a kind of majesty, as the full power of the state is deployed against a lone defendant purposely equipped by the law to resist it effectively. This obedience to the law, staying its hand against defendants until fair procedures convict them,

shows the modern state at its best, elevated in its citizens' eyes by the respect it shows them and the law. The plea bargain has none of this. Compared to the moral weightiness of a trial, it seems shabby, even dirty, like dispensing rough-and-ready justice in a dusty bazaar. Judged against the normative and constitutional standards manifested in the modern criminal trial, the undignified, unlovely haggling of plea bargaining is hard to defend on any ground beyond necessity. Not even its defenders like it much.

But the most serious objection to plea bargaining, if it's accurate, is that the system itself routinely operates to coerce defendants into pleading guilty. It doesn't hold a gun to their heads, but it does, very often, present them with sentencing discounts so large that even innocent defendants who think there's some chance they'll erroneously be convicted at trial will plead guilty to crimes they didn't commit. With the system's many exit points, it's rare for anyone to reach the point of pleading without there being substantial evidence that he's guilty of some crime, but it does happen that defendants against whom there's strong evidence are in fact innocent. Cases where there's good but imperfect evidence and the defendant insists, correctly or not, that he didn't do it are the hardest for prosecutors to win, so they may be exactly the ones in which a prosecutor who wants a defendant he thinks guilty to be convicted and suffer *some* small punishment will offer him a very deep discount to induce a plea to some punishable offense.

Does plea bargaining impose a price on exercising the right to trial and create a danger that innocent defendants will falsely plead guilty? This isn't an easy question to answer, for several reasons. First, apart from serious factual errors or dispositive new evidence revealed after a conviction, the only authoritative institution we have for discovering, or pronouncing, anyone guilty or not guilty is the liability system itself. There's no other standard against which its outcomes can be compared or shown to be deficient or erroneous. If the evidence is strong enough to convince a jury beyond a reasonable doubt that a defendant is guilty of a crime, he *is* guilty, and sub-

ject to a liability price, even if he really didn't do it. It's the conviction that creates the fact, irrespective of what the defendant or anyone else might believe. Every defendant is presumed innocent until proven guilty, but once he is proven guilty, he's no longer innocent.

So for any defendant who's offered a plea bargain, the relevant question is not what he actually did, but how likely he is to be convicted at trial of the charge against him. Suppose I'm accused of an armed robbery for which, if I'm convicted at a trial, I'm certain to receive a 10-year sentence. My defense is that I didn't do it, which may or may not be true. But there's evidence against me: my gun was used in the robbery, and my fingerprints were found on it afterward. All things considered, my lawyer tells me, the chance of my being convicted is 70%. So the *expected punishment* I face in going to trial is $0.7 \times 10 = 7$ years. This doesn't mean I'll be sentenced to 7 years – the only possible outcomes of my trial are 10 years or none. It means that going to trial is like being subjected to a punishment lottery that, "on average," costs me 7 years per trial.

So, as Americans say, let's play hardball. Suppose the prosecutor says that if I plead guilty to robbery, he'll guarantee a sentence of 7 years. Then one could say that the "objective values" of the bargain and the punishment lottery are the same: take the deal and get 7 years for certain, or enter the lottery and expect to pay 7 years for an "average" trial. Whether I take the deal or not depends on how I feel about the risk of the lottery. If I'm *risk averse*, I'll take the deal. The 70% chance of a sentence as long as 10 years seems worse to me than a certain sentence of just 7, and I'd even be willing to accept a little more than 7 to be relieved of the possibility of 10. But if I *prefer the risk*, I'll enter the punishment lottery by refusing the bargain and going to trial. To get me to relinquish my chance for acquittal, the prosecutor will have to offer me a sweeter deal, a sentence less than 7 years. In neither case am I forced to "pay a price" for exercising my right to trial. As far as anyone knows before the trial, the "objective" liability prices in the two cases are the same, and whether I take the deal or not depends on my preferences, just as whether I buy an

orange for a dollar depends on how much I value that orange and that dollar. Indeed, were the prosecutor offering a lower price for my plea, say a 9-year sentence for it rather than 7, the price might be too low to get even a risk averse me to surrender my lottery ticket, and I'd take my chances at trial. It's only when the price the prosecutor is willing to pay for the plea, the extent of the sentencing discount, is greater than the objective value of the plea that a price is put on exercising the right to trial.

Suppose the prosecutor offers a sentence of 5 years. Then the price he's willing to pay for the plea, 5 years less than the trial sentence, is greater than the 3-year sentence discount needed to make the certain punishment of the deal and the expected punishment in the lottery have equivalent objective value. Taking the deal means 5 years, when the expected sentence after trial is 7, so exercising the right to trial means paying an objective price of 2 years. Whether I surrender my right to accept the deal or pay the 2-year price for exercising it depends, again, on my preferences. If I'm risk averse, I'll almost certainly take the deal, since I would have accepted a 7-year sentence to avoid this risk but will actually have to pay just 5. This might even get a risk-preferring gambler to plead – it's hard to turn down a 5-year sentence discount for a lottery ticket that's objectively worth only 3. In either case, refusing the deal amounts to paying an objective price of 2 years for exercising the right to a trial.

Now turn up the heat. Supposed a hard-pressed prosecutor offers me nine months for my plea. This may be an offer I can't refuse, a deal that, given my predicament, is much too good to pass up no matter how I feel about risk. In light of its possible outcomes, the price I'd now have to pay to exercise my right to trial is very large. If I'm risk averse, my reservation price for the deal, the minimum discount I'd accept for my right to trial, is less than 3 years and the prosecutor is offering me more than 9 years to surrender it! That's a lot of surplus to pass up in an uncertain world. Even if I know in my heart I'm not guilty, and even if I'm a gambler and prison holds less

terror for me than for others, if there's a 70% chance I'll be convicted and have to serve 10 years and I can avoid this risk by serving just nine months, I'm very likely to accept the deal and plead guilty. The overwhelming need of prosecutors to secure guilty pleas means that terms like these are offered to most American defendants, and thus that most are being made to pay a substantial price for exercising their right to trial.

Despite all this, or because of it, for much of the twentieth century, as plea bargaining sank deep roots in American criminal liability, the Supreme Court simply averted its eyes. It refused to acknowledge the existence of plea bargains or consider their constitutionality, and regulated guilty pleas only by requiring that they be made voluntarily by defendants informed of their consequences. It might have continued in its denial indefinitely, had it not used the language it did in a case that didn't involve a plea bargain at all.

Prisoners' Dilemmas

In 1966, Charles Jackson and two accomplices seized a hostage in Milford, Connecticut and left him, "not unharmed," in rural Alpine, New Jersey. At the time, the Federal Kidnaping Act provided:

> Whoever knowingly transports in interstate . . . commerce, any person who has been unlawfully . . . kidnaped . . . shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

The statute thus made it possible to be sentenced to death for kidnaping only by a trial jury returning a verdict of guilty. If a defendant waived a jury trial or, more importantly, pleaded guilty to kidnaping so there was no trial at all, there was no way he could be sentenced to death.

Jackson was charged with kidnaping, but when asked to enter a preliminary plea, to termi-

nate the case at that early stage by pleading guilty or preserve his bargaining chip by pleading not guilty, he refused to plead at all. He claimed that the sentencing procedures created by the Act "made 'the risk of death' the price for asserting the right to jury trial, and thereby 'impairs . . . free exercise' of that constitutional right." In *United States v. Jackson* (1968), the Supreme Court agreed, and invalidated the Act's penalty provisions. The government had argued that the purpose of the sentencing provision was not to discourage any defendant from demanding a jury trial, but to mitigate the severity of the death penalty for all defendants by making it rarer, committing its imposition solely to lay juries, who were less likely to impose it than judges. That this might discourage some defendants from exercising their right to a trial was regrettable but incidental, not enough to render the sentencing structure unconstitutional (*Jackson* 1968, p. 571).

The Court, speaking through Justice Potter Stewart, agreed that the Act's intention to ameliorate the harshness of the death penalty was worthy, and it didn't say that Jackson, who hadn't yet pleaded at all, or any defendant who did enter a plea under the Act, had been or would necessarily be coerced into pleading guilty by the sentencing provisions. But the Act clearly *did* discourage exercise of the right to trial, and the Court noted that there were other ways, like convening a penalty jury in every case, that the Act's purpose could be achieved without burdening any defendant's choice to insist on a trial. Since it wasn't *necessary* to burden the exercise of a constitutional right to achieve the objective, the burden was *excessive* and therefore unconstitutional. "Whatever the power of Congress to impose a death penalty," Stewart wrote, it "cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right" (*Jackson* 1968, pp. 582-83).

This was enough to decide the case and require Congress to replace the Act's sentencing structure with one that didn't disadvantage defendants who chose a jury trial. There was no plea bargain, and had this been all the opinion said, it would have posed no threat to plea bargaining,

which clearly did penalize the assertion of the right to trial but was, equally clearly, indispensable to the continued operation of the liability system itself. But in setting the rhetorical stage for this reasoning in a case involving the death penalty, a central constitutional issue of the day, and almost certainly not thinking about plea bargaining when he did so, Stewart planted a time bomb under the institution that kept American criminal liability afloat. Whatever its purpose might be, he wrote, the "inevitable effect" of the Act's penalty provision

> is to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial. *If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional* (*Jackson* 1968, p. 581, emphasis added).

But "chilling the assertion" of the right to trial by penalizing those who assert it is the very essence of plea bargaining. The system simply can't work unless prosecutors can play hardball and make recalcitrant defendants pay the price for demanding a trial. The only way any defendant can be induced to plead guilty in exchange for a sentencing discount is to convince him that the discount is real, that he will in fact be sentenced more harshly after a conviction at trial than he would under a proffered bargain. And the only way to do that is to turn those who do insist on a trial into examples to encourage the others, by following through on the threat to sentence them more harshly when they're convicted than they would have been had they pleaded guilty. There is "no other purpose or effect" of plea bargaining than precisely this, deterring the exercise of the right to trial by making those who do so pay a higher liability price than they would had they relinquished the right and pleaded guilty. It's not pretty, but that's how it has to work if it's going to work at all. Now, Stewart seemed to say, the linchpin of American criminal justice was "patently unconstitutional."

The Court quickly grasped the implications of its language and moved to address the problem. Forced for the first time to explicitly recognize plea bargaining and test it against the Constitution, and fully aware that banning it would bring the liability system to collapse, the Court opened the practice to judicial scrutiny and, bowing to the inevitable in *Brady v. United States* (1970), concluded that it must be openly accepted so it could be regulated and made fair to all sides. The case it chose to clarify the meaning of *Jackson* was, not coincidentally, an actual plea bargain made in the shadow of the same Federal Kidnaping Act. In 1959, Brady and a codefendant were charged under the Act. At first, both persisted in pleas of not guilty, fully aware that a jury trial could end in the death penalty and that because the judge wouldn't grant them a bench trial, pleading not guilty meant choosing trial by jury. But there were no other witnesses to the kidnaping, and the prosecutor knew it would be very hard to convict either man unless one of them could be made to confess to some role in the crime and testify against the other. So he put them in the situation that mathematicians call, with an eye toward just this kind of example, the *Prisoner's Dilemma*.

Brady, apparently the prosecutor's primary target, and his codefendant were put in separate cells. The prosecutor initially approached the other defendant with a chance to plead guilty for a sharply reduced sentence in exchange for enough testimony to convict Brady. The codefendant's dilemma was clear, and painful. Assuming Brady would be presented a similar offer, the codefendant might have reasoned that if neither he nor Brady took the deal, the prosecutor wouldn't be able to prove either guilty and they'd both walk free. At the same time, if one of them held out and refused to cooperate with the prosecutor while the other took the deal and testified ("defected," as mathematicians say), the loyal holdout would very likely be convicted by a jury and face the maximum punishment while the defector got away with a much smaller liability price for the same crime. So the codefendant's choice was to remain loyal to Brady, refuse the deal and trust

Brady to do the same when his turn came, or protect himself against the worst outcome for himself by taking the deal. After mild resistance, the codefendant agreed to testify in Brady's kidnaping trial, at one stroke slashing his own liability price and depriving Brady of any leverage *he* might have had in his own negotiations with the prosecutor. Caught between a trial that could kill him and a prosecutor playing serious hardball, Brady pleaded guilty for the highest price he could still get, fifty years in prison, later reduced to thirty.

Then, in 1968, *Jackson* invalidated the penalty structure under which Brady had been sentenced. Hoping to ride Jackson's coattails to freedom, reopening his guilty plea and forcing the prosecution to convict him again, many years after the crime, Brady took to the appellate courts. Because the only constitutional limitation on guilty pleas at the time was that they be knowing and voluntary, he argued that his plea was involuntary because the structure of the Kidnaping Act "operated to coerce" his guilty plea. The lower courts denied relief, pointing out that Brady knew that a trial could result in death and persisted in his plea of not guilty for some time, changing his mind only when his codefendant agreed to testify and made his conviction at trial all but certain, hardly the actions of a man terrified or coerced by the statute itself into pleading guilty.

In a unanimous opinion by Justice Byron White, the Supreme Court agreed, and dismissed the appeal. In *Jackson* itself, White wrote, the Court had carefully noted that not "every defendant who enters a guilty plea to a charge under the Act does so involuntarily." *Jackson* had "ruled neither that all pleas of guilty encouraged by the fear of a possible death sentence are involuntary pleas nor that such encouraged pleas are invalid whether involuntary or not." So the Court saw

> no reason on this record to disturb the judgment of [the lower courts that Brady's plea was voluntary]. Petitioner, advised by competent counsel, tendered his plea after his codefendant, who had already given a confession, determined to plead guilty and became available to testify against petitioner. It was this development that . . . triggered

Brady's guilty plea (*Brady* 1970, pp. 746-749).

Again, because this was enough to decide that Brady's appeal should be denied, the opinion might have ended here, leaving the law on guilty pleas as it was and sidestepping the question of plea bargaining altogether. But the ominous dictum of *Jackson* made this impossible, and the point of *Brady* was to clean up the mess it left behind. So, stressing the "mutuality of advantage" that underwrites every agreement, the Court gave its blessing to plea bargaining, approving sentencing discounts "to a defendant who in turn extends a substantial benefit to the State." Guilty pleas must still be voluntary, but only those induced by threats of physical harm or mental coercion "overbearing the will of the defendant," which White hinted could be created by overcharging, would be rejected as involuntary. Plea bargains require defendants to choose the lesser of two evils, pain or the chance of more pain or none, but this doesn't make the choice to plead guilty involuntary. White emphasized that the presence of competent counsel during bargaining helps ensure that pleas are both voluntary and knowing despite the inevitable psychological pressures that attend any defendant's decision, and was alert to the dangers of false convictions. If it could be shown that a particular tactic, or the bargaining system itself, "substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves," the Court would have serious doubts about the case.

> But our view is to the contrary, and is based on our expectations that courts will satisfy themselves that pleas of guilty are voluntarily and intelligently made by competent defendants with adequate advice of counsel, and that there is nothing to question the accuracy and reliability of the defendants' admissions that they committed the crimes with which they are charged (*Brady* 1970, pp. 752-758).

Having brought plea bargaining into the open and pronounced it constitutional, the *Brady* Court made a good start at regulating it as well, offering three guidelines to let prosecutors know

what tactics they could and could not use to induce guilty pleas. Suppose a defendant knows that if he's convicted at trial, he'll receive a sentence of T years, and believes that the probability he'll be convicted is p. If the cost he'd bear from receiving a sentence T is $C(T)$, the *expected punishment* the defendant faces in going to trial is $p \times T$, and the *expected cost* to the defendant of entering the punishment lottery, his "average cost per trial," is $p \times C(T)$. If the prosecutor offers the defendant a certain sentence of B, the defendant will accept the deal only if the cost imposed by the bargained sentence is smaller than the expected cost of the trial. That is, the defendant will plead guilty only if

$$C(B) < p \times C(T).$$

If the inequality goes the other way, the defendant will reject the deal and enter the punishment lottery.

So there are three ways the prosecutor can influence the defendant's decision to plead guilty or insist on a trial. Other things equal, the trial alternative can be made less attractive by piling on the charges to raise the sentence on conviction, T, or by increasing the likelihood the defendant will be convicted, p. Or the bargain can be made more attractive relative to the trial by lowering B, the sentence the defendant will serve if he pleads guilty. After *Brady*:

(1) Prosecutors may induce pleas by increasing the probability of conviction. This is what happened in the case – Brady pleaded guilty immediately after his codefendant agreed to testify and made it much more likely he'd be convicted. This creates no problem of convicting the innocent. Because the fact of conviction is what determines who is innocent, subjecting codefendants to the prisoner's dilemma to increase p in one defendant's case by lowering B in the other's can't be unfair to the defendant who's become more likely to be convicted. Finding defendants guilty or not as a legal fact, not finding authoritatively who did or didn't do what, is what adversary trials are about, and increasing the likelihood that a jury will find a defendant guilty is what prose-

cutors are supposed to do.

(2) And prosecutors may induce pleas by lowering *B*, by far the most common tactic in negotiations. This follows directly from the Court's approval of the plea bargaining system in general, but it does raise the possibility that very low values of *B* relative to *T*, like the nine-month offer in our example, might persuade innocent defendants that a deal is in their best interest. The Court's assumption that this danger is minimized by the presence of counsel may itself reflect the view that, in practice, the many opportunities for preliminary screening and discretionary abandonment of weak cases ensure that almost no defendants actually faced with proffered plea bargain are in fact innocent of some offense connected to the event, and that the few who are will be able to secure a dismissal or acquittal with the aid of competent counsel.

(3) But prosecutors may not induce pleas by increasing *T* to inappropriately high levels by substantial overcharging, nor may legislatures achieve the same result through a penalty structure like that struck down in *Jackson*. This not only avoids "overbearing the will" of reluctant defendants by threatening them with artificially inflated liability prices, it relieves judges of the need to administer those prices to preserve the prosecutor's credibility in future negotiations. Overcharging that results in inflated punishment after a trial conviction distorts the central function of criminal liability, matching the liability price to the moral costs of each offender's crime, and if the charging power is held in check, the results of bargains are more likely to reflect the true cost of crimes and the actual value to the prosecutor of a defendant's willingness to plead guilty (Adelstein 1978, pp. 823-827).

Six months after *Brady*, in yet another death penalty case, *North Carolina v. Alford* (1970), the Court revisited the troubled relationship of plea bargaining, and the adversarial system itself, to the truth. Alford was charged with first-degree murder under a penalty structure that, like the Kidnaping Act, put only defendants found guilty by a trial jury at risk of the death penalty. Al-

ford insisted throughout the proceedings that he was innocent, but while there was no eyewitness to the shooting, there was strong evidence against him, including testimony from witnesses who saw him with the murder weapon and heard him say he was going to shoot the victim and later that he'd done so. Faced with the likelihood he'd be convicted of first-degree murder at trial and, at best, receive a sentence of life imprisonment, he accepted the prosecutor's offer to plead guilty to second-degree murder in exchange for a thirty-year sentence. Addressing the court after entering his guilty plea, to provide the factual basis for the sentence that was about to be imposed, Alford again specifically denied that he'd committed the crime at all, and said that, on the advice of his attorney and fully aware of the consequences of all the alternatives, he'd reluctantly decided to plead guilty to a crime he didn't commit to avoid the possibility of the death penalty.

Could such a guilty plea be accepted, or must Alford be forced in the circumstances either to admit the crime by pleading guilty or face the death penalty for a crime he continues to say he didn't commit? In dissent, Justice Brennan argued that *Alford* was the case that *Brady* wasn't, that Alford *had* pleaded guilty only because he was "gripped by fear of the death penalty," so his plea should be reopened and the question of his guilt left to a jury (*Alford* 1970, p. 40). But the majority understood that rejecting pleas like Alford's would give defendants yet another way to gum up the works, agreeing to plead guilty to see the prosecutor's offer and then denying the facts to reopen the trial option, and that having approved plea bargaining in *Brady*, the Court was now obliged to make it work with minimal injustice. "The Constitution," White wrote for them,

> does not bar imposition of a prison sentence upon an accused who is unwilling expressly to admit his guilt but who, faced with grim alternatives, is willing to waive his trial and accept the sentence. . . . When [Alford's] plea is viewed in light of the evidence against him . . . its validity cannot be seriously questioned. In view of the strong factual basis for the plea demonstrated by the State and Alford's clearly expressed desire to en-

> ter it despite his professed belief in his innocence, we hold that the trial judge did not commit constitutional error in accepting it (*Alford* 1970, pp. 36-38).

Many years ago, I knew a prisoner from a small town nearing the end of a five-year sentence for sexually assaulting the fire chief's daughter. He was not a violent or angry man, but he'd been in and out of trouble most of his life and had a well-earned reputation around the town as a petty crook. The chief's daughter, he told me, was his girlfriend, and all their relations were fully consensual. But the young woman's parents couldn't tolerate the scandal of their relationship, and called on the courts to help break it up by pressing a charge of rape against him. He was told that the alleged victim would testify against him and that if he was convicted, things would go badly for him. So he agreed to plead guilty to a lesser charge in exchange for the five years. Hadn't this made him bitter, I asked? No, he replied with a smile. It wasn't the end of the world, and made up for some of the things he *had* done that they hadn't caught him for.

An Essential Component

The *Brady* Court didn't explicitly acknowledge the reason for its embrace of plea bargaining. But a year later, in *Santobello v. New York* (1971), Chief Justice Warren Burger admitted for the Court that

> The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called "plea bargaining," is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.

But proper administration demanded "fairness in securing agreement," and Rudy Santobello's predicament offered an easy chance to ensure it in a more typical criminal case (*Santobello* 1971,

pp. 260-261). Charged with two gambling offenses, Santobello agreed to plead guilty to one, which carried a maximum sentence of a year in prison, in exchange for the prosecutor's promise not to recommend any prison time. He entered his plea, but the actual passing of sentence was delayed several months, and when it finally came time to sentence Santobello on his plea, the prosecutor who'd made the agreement had been replaced by another who, unaware of his predecessor's promise, introduced Santobello's long criminal history and demanded a one-year prison sentence. Santobello objected this wasn't what he'd agreed to, and asked that his plea be reopened so it could be renegotiated or he could have a trial. The judge refused and, citing the report, sentenced him to a year in prison.

The Court applied a basic principle of ordinary contract law to hold that, despite the fact that the breach of the agreement was inadvertent and the one-year sentence itself was not unjustified, Santobello must receive specific performance of the agreement or be given an opportunity to withdraw his plea. "[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor," Burger wrote, "so that it can be said to be part of the inducement or consideration, such promise must be fulfilled" (*Santobello* 1971, p. 262). This is the "lemons problem" in the market for guilty pleas, and the Court had no alternative to ruling as it did if it hoped to preserve the bargaining system itself. The existence of even a few unkept plea bargains will be enough to surround every subsequent negotiation with an uncertainty that keeps many otherwise mutually beneficial deals from being made.

Recall that defendants will accept a bargained sentence B if $C(B) < p \times C(T)$. But if a defendant thinks there's a possibility that, having been promised a sentence B, he'll actually receive a greater sentence, he'll have to replace B in his calculations by the higher sentence $(B + h)$, where h represents the expected boost in the sentence due to the possibility that the prosecutor will renege on his promise. If broken promises are frequent enough that h is signifi-

cant, then whenever $C(B) < p \times C(T) < C(B + h)$, a mutually beneficial bargain that would have been made without the uncertainty won't be made because of it. Expensive trials no one wants will have to be mounted, and the already huge costs of criminal justice will rise still further. "Bad" bargains will drive the "good" from the market, to everyone's detriment.

That the existence of broken promises threatens the market for guilty pleas is easy to see, and having committed itself to preserving it in *Brady*, the Court's decision seems the right one. But there's no constitutional command that such a market exist or function smoothly, nor did Santobello claim there was. Instead, like McGautha, he invoked the fourteenth amendment, arguing that the breach of the agreement was *fundamentally unfair* to him, and this is what the Court held. Most people, I think, would agree. Like the underlying moral principle of markets, tort and crime, *take only what you're willing to pay for, and pay in full for what you take*, the *Santobello* rule is both efficient and fair. Keeping promises on which others have relied *is* an elementary principle of moral behavior and fair dealing, at the same time that its general observance enables institutions that would founder otherwise to govern exchange in challenging environments. That the ancient norms that have this quality, *tit for tat*, *tell the truth*, *keep your word* and others, support value-increasing exchange as effectively and in as broad a spectrum of trading environments as they do, all in the name of fundamental fairness, suggests the depth and power of the human desires they're in place to regulate.

But as the Court was forced to conclude in *Bordenkircher v. Hayes* (1978), playing fair doesn't preclude playing hardball. Hayes had two felony convictions in Kentucky, one for sexual assault and one for robbery. What would be his last felony was less serious than either, passing a bad check for $88.30, punishable by imprisonment of two to ten years. The prosecutor offered Hayes a 5-year sentence for his guilty plea, and to pressure him to accept, told him that if Hayes were convicted at trial on the bad check charge, he'd invoke Kentucky's habitual offender act, a

"three-strikes" law that provided for an automatic sentence of life imprisonment after a third felony conviction. Hayes knew this third conviction would put him in prison for life if the prosecutor invoked the act. But he refused the deal, was convicted at trial and duly made to pay the price for his choice: the prosecutor did invoke the act, and Hayes was sentenced to life.

The *Brady* Court had left open the question of how much pressure on defendants to plead was too much, when charging might become so excessive as to "overbear their will" and cause even innocent suspects to convict themselves. But this wasn't the case to provide the answer, since Hayes's will clearly *hadn't* been overborne by the prosecutor's threat and, foolishly or not, he *had* insisted on, and received, a fair trial on the check charge and received a sentence that all sides agreed was authorized by the law on the facts. In two prior cases, the Court had held that prosecutors could not act "vindictively" against defendants, either out of personal spite or to punish them for having successfully appealed their convictions by trying them again on more serious charges. So the question in *Hayes* was whether the prosecutor's threat to invoke the three-strikes law, which he acknowledged was made specifically to induce Hayes to plead guilty and carried out specifically to encourage others to plead guilty in the future, amounted to vindictive behavior that rendered Hayes's sentence unacceptable.

The appellate court said it did, and four dissenting justices in *Hayes* agreed, arguing that since the prosecutors' motive in the earlier cases, avoiding the cost of defending appeals by making successful appellants pay for exercising their right to appeal with harsher sentences after reconviction, was identical to the motive in *Hayes*, and every plea bargain, avoiding trials by making defendants pay for exercising their right to them, the latter must be unconstitutionally "vindictive" as well. But because it had to, the majority in *Hayes*, speaking through Stewart, saw the threat and eventual invocation of the three-strikes law as acceptable prosecutorial hardball, using a statutory weapon put in the prosecutor's arsenal by the legislature that, while certainly severe

and possibly unjust, wasn't challenged in this case, to achieve a purpose the Court had already sanctioned in *Brady*. Stewart struggled to distinguish the earlier cases by suggesting that they concerned "the State's unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right. . . . But in the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer" (*Hayes* 1978, pp. 362-363).

But convicted defendants are free to appeal or not as they choose, and the state did impose a penalty on Hayes for exercising his right to trial, so the distinction is hard to see. In any case, if an injustice was done to Hayes, it wasn't the prosecutor's threat that did it, but the fact that Kentucky's liability law permitted a life sentence in these circumstances. But in the end, none of this counted for much against the imperatives of plea bargaining itself, which requires that prosecutors be permitted to credibly threaten recalcitrant defendants with much higher sentences and, as here, use existing statutes that defendants have in fact violated to do so. Having scrutinized "this previously clandestine practice" and approved it, the Court now had to ensure that the bargaining system did the unpleasant but necessary business of determining liability prices fairly and effectively, given the structure of criminal laws and punishments that legislatures put beneath it.

> Indeed, acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in the constitutional sense simply because it is the end result of the bargaining process. . . . [By] tolerating and encouraging the negotiation of pleas this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forego his right to plead not guilty (*Hayes*, pp. 361-364).

The Court's struggle to square the demands of bargaining with its instinct that government should not put prices on constitutional rights illustrates both the justices' commitment to that

Lockean principle and the enormous difficulty of maintaining it in light of the utilitarian pressures of huge caseloads and inadequate budgets. But in the end, once the Court was forced to acknowledge an embarrassing institution to which there's no practical alternative, its candor in identifying and addressing the problems plea bargaining creates has been an important virtue. Admitting the extent to which American criminal liability has come to depend on this undignified haggling, and exposing it and the distorted prices it produces to public view, have enabled the Court to make the best of a bad situation, keeping an indispensable system operating while it tries to regulate it for fairness and efficiency.

Other systems of criminal liability have done this as well, in their own ways. By the 1960s, plea bargaining had established itself in England, brought on by the same unhappy confluence of increased crime, rising caseloads and limited prosecutorial budgets that nourished it in the United States. The English system of criminal liability is the one most like the American – more accurately, of course, it's the other way around – though England has more successfully resisted the "lawyerization" of trials and constrains them with fewer and simpler rules. But seemingly small differences in the way crimes were prosecuted and sentences determined at the time in the two systems led to different styles of plea bargaining and very different judicial responses to it.

In the United States, where charge bargaining is the norm and judges don't participate in negotiations, the Supreme Court could regulate plea bargaining by curbing prosecutorial excess or adjusting defendants' rights, much less delicate tasks than monitoring judicial behavior directly or telling judges how they must sentence. But until 1986, English prosecution was under the nominal control of the police rather than a professional prosecutor's office, one reason the system was able to avoid lawyerization. This encouraged a tradition of matching the charge to the facts more like continental compulsory prosecution than American discretionary charging. This in turn left sentencing power in judges, and made direct sentence bargaining the only way discounts

could be negotiated. But England's adversary procedures demand the same impartiality of judges that American procedures do, so for the Court of Appeal, sentence bargaining became a far more sensitive question of judicial behavior and independence than charge bargaining was for the Supreme Court. Faced with the same painful divergence between the adversarial ideal and the reality of plea bargaining, and knowing that English criminal liability could no more do without bargaining than the Americans, the Court of Appeal did what the Supreme Court did until *Brady*. It simply turned its eyes from the practice, and needed to assume increasingly difficult positions to do so. But its contortions had the effect of turning what might have been good bargains into lemons, and made the bargaining system less efficient and less fair than it could have been.

The Court of Appeal saw its first plea bargain in 1970, just as the Supreme Court was discovering the institution in *Brady*. In *Turner*, a defendant pleaded guilty in response to his counsel's opinion, formed after meeting with the judge, that this would result in a reduced sentence, which it did. He appealed, claiming that this deprived him of a free choice of plea, and the Court agreed. It forbade explicit judicial statements that a guilty plea would be rewarded with a specific discount, but at the same time, because they were said to indicate remorse, it emphasized the propriety of the discounts themselves and specifically charged defense attorneys with informing clients about them. And "when it is felt to be really necessary," the Court encouraged private discussions between both parties and the trial judge of matters that were "of such a nature that counsel cannot in the interest of his client mention them in open court," including the desirability of a guilty plea to a lesser charge (*Turner* 1970, pp. 326-327).

Sentencing judges need not participate overtly in bargaining to inform defendants of the prices that will be paid for their guilty pleas. If discounts are reliably granted and defendants know what they are, sentence bargaining can proceed implicitly without sullying the judge. Hence the ambiguity of the *Turner* directions, which forbid the explicit inducement of guilty

pleas at the same time that they sanctify procedures that enable them to be effectively induced. The Court did little after *Turner* to resolve the tension and, in a series of increasingly tortured opinions, continued to disclaim the form of plea bargaining while carefully preserving its substance. As one commentator put it at the time: "The law seems to have got into a very confused and puzzling state. The accused ought to know that a plea of guilty will attract a lighter sentence. . . . Yet, where precise information is available, he is to be denied it: so that, if the accused decides to plead not guilty, he will or may do so on a false premise and one which . . . his counsel knows to be false" (quoted in Adelstein 1981a, p. 244).

This makes it hard for accurate information about what discount might be given for what plea to pass easily from judge to defendant, with familiar results. As in *Santobello*, if defendants have to add an increment to the sentence they expect after a guilty plea because they're unsure what the discount is, they might not plead guilty even though they would have done so had they known the discount. And some will plead not guilty when they wouldn't otherwise because they erroneously believe the trial sentence will be lower than it actually will, so the prosecutor's offer looks less valuable to them than it really is. In either case, there'll be more trials and fewer guilty pleas, to everyone's detriment, than there would have been had the actual discounts been communicated more reliably to defendants before they entered a plea.

With the Court of Appeal unable to extricate itself from the dilemma, Parliament stepped in with two crucial changes that have regularized and institutionalized the taking of guilty pleas in England. In 1985, it removed the primary power of prosecution from the police to a Crown Prosecution Service responsible for all public prosecutions of serious crimes and given broad discretion to determine charges. This transformed sentence bargaining between judges and defendants into charge bargaining between prosecutors and defendants, as in the United States, and made it unnecessary for judges to balance their neutrality against the need to inform defendants of their

options. Then, in 1994, Parliament greatly lessened the need for explicit bargaining itself by establishing a fixed price for guilty pleas in every case: a one-third reduction in the statutorily prescribed sentence if the plea is made at the first reasonable opportunity; a one-quarter reduction once the trial date has been set; and a one-tenth reduction if the plea comes after the trial begins (Prosecution of Offences Act 1985; Dawes *et al* 2011, p. 6). Only the charges to which these reductions apply remain negotiable, greatly expediting individual bargains and increasing the system's efficiency by eliminating unnecessary sources of uncertainty.