PLEA BARGAINING Carney & Fuller

31

look up number

Reprinted from SUFFOLK UNIVERSITY LAW REVIEW, Volume III, Number 2, Spring 1969

A STUDY OF PLEA BARGAINING IN MURDER CASES IN MASSACHUSETTS

FRANCIS J. CARNEY* and ANN L. FULLER**

INTRODUCTION

IN the popular stereotype of the operation of criminal justice, the trial is seen as the culmination of the process of administering criminal justice. This popular image is reinforced in the mass media by the detailed coverage of major criminal trials and the considerable publicity afforded prominent criminal lawyers. In addition, the "courtroom drama" is a favorite focus of television programs and motion pictures. The implication is that anyone who is arrested will have his "day in court," *i.e.* the trial is generally perceived as the expected outcome of an arrest for a crime.

The fact is that the trial is not the typical way of dealing with those who are charged with criminal offenses. According to a recent report of the American Bar Association's Advisory Committee on the Criminal Trial, as many as 95% of the criminal cases in some localities are disposed of without a trial.[1] A similar finding was reported in the Task Force Report on the Courts by The President's Commission on Law Enforcement and Administration of Justice. This Task Force presented the results of a survey of trial courts of general jurisdiction in states where information on the number and proportion of criminal cases which came to trial was available. It was found that 87.0% of the total number of convictions in these courts were accomplished without a trial. This proportion ranged from 66.8% in the Pennsylvania courts to 95.5% in the courts of New York. In Massachusetts 85.2% of all convictions were achieved without a trial.[2] Clearly, then, a trial is the exception to the rule in the disposition of criminal cases.

The procedure whereby the vast majority of criminal cases are

---

* B.A. at Boston College University 1963; Currently a candidate for Doctorate at Tufts University; Social Science Research Specialist Massachusetts Department of Correction.

** B.A. at University of New Hampshire 1966; Currently a candidate for a Masters Degree at University of Massachusetts in Political Science; Corrections Consultant Governor's Committee on Law Enforcement and the Administration of Criminal Justice.

1 AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY 1-2 (1967).

2 TASK FORCE REPORT: THE COURTS, THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE 9 (1967).

settled has been euphemistically referred to as "plea bargaining," "plea negotiation," or "the compromise of criminal cases." Arnold Enker, Professor of Law at the University of Minnesota, has described the phenomenon of the negotiated plea as "an arrangement between the prosecutor and the defendant or his lawyer, whereby in return for a plea of guilty by the defendant, the prosecutor agrees to press a charge less serious than that warranted by the facts which he could prove at trial."[3] The ABA Advisory Committee on the Criminal Trial has acknowledged that "prosecutors and counsel have long engaged in discussions in advance of the time for pleading with a view to an agreement whereby the defendant will enter a plea in the hope of receiving certain charge or sentence concessions."[4] In the introduction to its recommended standards relating to pleas of guilty, the Committee further stated that "conviction without trial will and should continue to be a most frequent means for the disposition of criminal cases."[5] Thus, it seems clear that plea bargaining is not only recognized as a widespread phenomenon, but it is also viewed as a generally acceptable technique for handling criminal cases. This generalization is also supported by the results of a survey of the prosecuting officers in the most populous counties of 43 states done by the University of Pennsylvania Law School. In this survey 86.4% of the respondents reported that it was the practice of their office to "make arrangements" with criminal defendants in order to obtain pleas of guilty.[6]

Plea bargaining is, therefore, regarded as a necessary, if not an expedient, means for dealing with the large number of criminal cases before the courts. Without the option of the guilty plea the courts would be overwhelmed with trials and the system of criminal justice would be severely impaired.

Despite this general acceptance of plea bargaining on the grounds of necessity or, perhaps, expediency, it should be emphasized that there are few issues in the area of criminal justice that generate a greater sense of ambivalence than the negotiated plea. There are aspects of the plea bargaining process which raise some serious questions in legal theory. It would be worthwhile to briefly mention some of the problematic aspects of guilty plea bargaining.

---

[3] Enker, *Perspectives on Plea Bargaining*, in TASK FORCE REPORT: THE COURTS at 108.

[4] *Supra* note 1, at 3.

[5] *Supra* note 1, at 2.

[6] Note, *Guilty Plea Bargaining: Compromises By Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865, 898 (1964).

One troublesome issue with respect to plea bargaining is that the process itself is almost totally invisible. Since there is no acknowledgement by the prosecutor or by the defendant that an "arrangement" has been reached—in fact, at the time he enters a plea of guilty, the defendant is required to deny that any negotiations have taken place—it is impossible for the judge or the public to be aware of the terms of the bargain, the pressures which may have been brought to bear, or, in general, the propriety of the arrangement. In Jerome Skolnick's words, the guilty plea "covers up" whatever took place before it occurred.[7] Skolnick is concerned that the guilty plea may serve to shield from public view the "patterned occurrence of violations of criminal law by police" in such areas as search and seizure, eavesdropping, and confessions.

Closely related to the extremely low visibility of the plea bargaining process is the informal nature of the practice. In the University of Pennsylvania Law School survey, it was found that 70.2% of the prosecuting officers who engaged in plea bargaining reported that their office has not established any formal rules or procedures with respect to plea bargaining.[8] This absence of explicit guidelines, coupled with the invisible manner in which plea bargaining operates, tends to leave the process open to potential abuses which are generally not subject to judicial review. Aware of this problem, the American Bar Association has recently published a tentative draft of recommended standards relating to pleas of guilty.[9]

Perhaps the most basic issue in the context of plea bargaining is, in the words of the President's Commission on Law Enforcement and the Administration of Justice, "the propriety of offering the defendant an inducement to surrender his right to trial."[10] The University of Pennsylvania survey revealed that over half the prosecutors who utilized the negotiated plea stated that they prepared indictments with plea bargaining in mind.[11] Further, when asked what kinds of considerations influence staff members to plea bargain with a particular defendant, the factor most often cited by prosecutors was that the "Government has a weak case." Eighty-five per cent of the prosecutors cited this as a factor which influenced the

---

7 SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 14 (1966).

8 *Supra* note 6, at 900.

9 *Supra* note 1.

10 *Supra* note 2, at 10.

11 *Supra* note 6, at 905.

decision to negotiate for a guilty plea.[12] In theory, it would seem reasonable to expect that the weaker the case against a defendant, the more entitled is he to a trial by jury, and, correspondingly, the more questionable is the propriety of the negotiated plea. In practice, however, it seems that the weaker the case (up to a point), the more likely is the prosecutor to press for a guilty plea, inasmuch as this was the most often mentioned reason given by prosecutors for trying for a negotiated plea.

The "inducement" aspect of plea bargaining, *i.e.* the pressure on the defendant to enter a plea of guilty—was clearly illustrated in the case of *United States v. Wiley*.[13] In this case the judge imposed a heavier sentence on one of five defendants explicitly because he refused to plead guilty, even though this defendant had no previous record of any kind, while the four who entered pleas of guilty all had prior convictions. Further, the defendant had been described by the judge as a "minor participant" in the offense. In imposing the sentence the judge stated:

> Had there been a plea of guilty in this case probably probation would have been considered under certain terms, but you are all well aware of the standing policy here that once a defendant stands trial that element of grace is removed from the consideration of the court in the imposition of sentence.[14]

A disturbing element of this statement, in view of the circumstances of this particular case, is that the policy of not affording leniency to any defendant who stands trial apparently takes absolute priority over any consideration of the potential for treatment or rehabilitation of a particular defendant. Thus, there is a danger that the most appropriate correctional procedures (*e.g.* probation vs. incarceration) will not be applied to an individual defendant simply because he has chosen to stand trial.

In a study of convicted felons by Donald J. Newman, it was found that the defendants who were most likely to enter an initial plea of guilty were recidivists who were "both conviction wise and conviction susceptible in the dual sense that they knew of the possibility of bargaining a guilty plea for a light sentence and at the same time were vulnerable, because of their records, to threats of the prosecutor to 'throw the book' at them unless they confessed."[15]

---

[12] *Supra* note 6, at 901.

[13] 184 F. Supp. 679 (N.D. Ill. 1960).

[14] *Id.* at 681.

[15] Newman, *Pleading Guilty For Considerations: A Study of Bargain Justice*, in

On the other hand, first offenders were more likely to enter pleas of not guilty at the initial stages of the conviction process. The troublesome aspect of this finding is that habitual offenders, with their bargaining skills learned from past experience, may receive more lenient sentences than first offenders who are unsophisticated in the techniques of plea bargaining. This could certainly create an understandable sense of injustice and bitterness among first offenders.

Finally, perhaps the most serious problem related to the issue of offering an inducement to a defendant to encourage a guilty plea is the possibility that an innocent person will enter a guilty plea. This may become a possibility depending on the nature and intensity of the pressure put on a defendant to plead guilty. If a defendant had serious doubts about the successful outcome of a trial by jury, and if he were convinced that he would be dealt with much more harshly if he were convicted at a trial, he may enter a plea of guilty. Other factors which might motivate such a decision could be that he would find the publicity of a trial devastating to himself or his family (particularly if the offense were one that is repugnant to society), or he may have a criminal record which he considers detrimental to his present case. Thus, the gnawing possibility that an innocent defendant may enter a guilty plea contributes to the aforementioned sense of ambivalence which surrounds the whole issue of plea bargaining.

This brief review of the practice of plea bargaining reveals that there are some potential dangers inherent to the plea bargaining process. One of the problems involved in reviewing this issue is that reliable statistical information on plea bargaining is very limited. The goal of this paper is to provide some empirical data on the extent of plea bargaining in murder cases in Massachusetts. As noted earlier about 85% of the total number of convictions in Massachusetts courts are the result of a plea of guilty. The offenses range from traffic violations to murder. A plea of guilty to a traffic violation does not approach the significance of plea bargaining in a murder case where a life sentence is not infrequently the outcome. Hopefully, this analysis of plea bargaining among those indicted for murder will add to the empirical knowledge on negotiated pleas.

THE SOCIOLOGY OF PUNISHMENT AND CORRECTION 27 (Johnston, Savitz & Wolfgang eds. 1962). *See also* NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL (1966), for a detailed discussion of the phenomenon of guilty plea bargaining.

METHOD

The Sample

The sample included all those who were indicted for first degree or second degree murder in each of the Superior Courts in Massachusetts from 1956 through 1965 *and* whose case had received a final disposition in terms of guilt or innocence.[16] That is, those indicted during this period but who were found not competent to stand trial or were not prosecuted by the district attorney (*nolle prosequi*) were eliminated from the sample.

There were a total of 326 subjects in the sample—154 (47.2%) were indicted for first degree murder and 172 (52.8%) were indicted for second degree murder. There were 300 (92.0%) males and 26 (8.0%) females. The average age at indictment was 29.2 years. In terms of race, 198 (68.8%) were White, 87 (30.2%) were Black, and 3 (1.0%) were classified as "Other."[17] 175 (53.7%) of the murders for which these subjects were indicted took place in cities with a population of 100,000 or more. Finally, with respect to the victims, 189 (58.9%) were male and 132 (41.1%) were female.

In the first part of the study, data on the legal process from indictment through court disposition were analyzed, with a focus on the stage at which pleas of guilty were entered. Those indicted for first degree murder and those indicted for second degree murder were analyzed separately. In the second part of the analysis, those courts with a relatively large number of murder indictments were compared in order to ascertain if there were any significant differences among them in terms of the number and proportion of negotiated pleas. Further, an attempt will be made to determine whether or not any such differences among courts could be related to other factors on which information was available, *e.g.* court congestion.

FINDINGS

Original Plea Before Indictment

From 1956 through 1965, 154 persons were indicted for first degree murder and received a disposition from the courts. At the

[16] Data for this study was collected by Alan Tosti, a Northeastern University student working with the Department of Correction at each of the Superior Courts in Massachusetts.

[17] These percentages are based on 288 subjects because information on race was not available for 38 subjects.

time of indictment 142 (92.2%) of them entered a plea of not guilty (Table I). Of the remaining twelve subjects, 5 (3.2%) entered a plea of guilty to second degree murder, and 7 (4.5%) entered a plea of guilty to manslaughter. None of the subjects entered a plea of guilty to first degree murder.

Of the 172 persons who were indicted for second degree murder, 141 (82.0%) pleaded not guilty at the indictment stage (Table I).

TABLE I

PLEAS ENTERED AT THE TIME OF INDICTMENT

Type of Plea	First Degree Murder		Second Degree Murder		Total	
	No.	*(%)*	*No.*	*(%)*	*No.*	*(%)*
Not Guilty	142	(92.2)	141	(82.0)	283	(86.8)
Guilty to Second Degree	5	(3.2)	13	(7.6)	18	(5.5)
Guilty to Manslaughter	7	(4.5)	18	(10.5)	25	(7.7)
Total	154	(99.9)	172	(100.1)	326	(100.0)

At this point, 13 (7.6%) pleaded guilty to second degree murder, and 18 (10.5%) entered a plea of guilty to manslaughter. Thus, of the total of 326 subjects indicted for first degree or for second degree murder, 283 (86.8%) entered pleas of not guilty at the time of their indictment.

Changes in Pleas After Indictment

After the indictment stage, most of the subjects who had pleaded not guilty, changed their minds and entered a plea of guilty to a lesser offence. For example, 85 (59.9%) of the 142 subjects who originally pleaded not guilty to first degree murder subsequently changed their pleas to guilty to a lesser charge. In addition, the twelve subjects who entered guilty pleas to a lesser charge at the indictment stage all had these pleas accepted by the court. Therefore, 97 (63.0%) of the 154 subjects indicted for first degree murder negotiated a plea of guilty to a lesser charge (Table II).

TABLE II

FINAL PLEAS OF THOSE INDICTED FOR FIRST AND SECOND DEGREE MURDER

Plea	First Degree Murder		Second Degree Murder		Total	
	No.	*(%)*	*No.*	*(%)*	*No.*	*(%)*
Not Guilty	57	(37.0)	48	(27.9)	105	(32.2)
Guilty to Lesser Charge	97	(63.0)	109	(63.4)	206	(63.2)
Guilty to Original Charge		—	15	(8.7)	15	(4.6)
Total	154	(100.0)	172	(100.0)	326	(100.0)

With respect to second degree murder indictments, 93 (66.0%) of the 141 subjects who pleaded not guilty at the time of indictment eventually entered pleas of guilty—91 pleaded guilty to a lesser charge and 2 pleaded guilty to second degree murder, the original charge. It is also interesting to note that the 13 subjects who pleaded guilty to second degree murder and the 18 who pleaded guilty to manslaughter at the indictment stage all had their pleas accepted by the court. The result was that 124 (72.1%) of the 172 subjects who were indicted for second degree murder ultimately entered, and had accepted, a plea of guilty rather than undergo a trial (Table II).

When the total number of subjects who were indicted for both first and second degree murder was considered, it was found that 221 (67.8%) entered pleas of guilty (93.2% of the guilty pleas were to a lesser charge), while 105 (32.2%) came to trial on the charge.

The Outcome of the Trials

Table III presents the court disposition for the 105 subjects who maintained pleas of not guilty and came to trial on the charge for which they were indicted. Of the 57 subjects who came to trial for first degree murder, 9 (15.8%) were found not guilty and were

TABLE III

COURT DISPOSITIONS OF THOSE WHO CAME TO TRIAL FOR FIRST AND SECOND DEGREE MURDER

Disposition	First Degree Murder		Second Degree Murder	
	No.	*(%)*	*No.*	*(%)*
Not Guilty	9	(15.8)	14	(29.2)
Not Guilty by Reason of Insanity	8	(14.0)	12	(25.0)
Guilty of First Degree Murder (No Recommendation of Clemency)	8	(14.0)	—	
Guilty of First Degree Murder (Clemency Recommended)	26	(45.6)	—	
Guilty of Second Degree Murder	5	(8.8)	11	(22.9)
Guilty of Manslaughter	1	(1.8)	11	(22.9)
Total	57	(100.0)	48	(100.0)

released. It is interesting to note that these nine subjects represent only 15.8% of the total number of persons who were indicted for first degree murder. Thus, only 15.8% of those indicted avoided commitment either to a correctional institution or to a state mental hospital. Eight subjects (14.0%) were found not guilty by reason

of insanity and were committed to the Bridgewater State Hospital. The remainder were found guilty: 8 (14.0%) were found guilty of first degree murder with no recommendation of clemency; 26 (45.6%) were found guilty of this charge, but with a recommendation of clemency; 5 (8.8%) were found guilty of second degree murder; and, 1 (1.8%) was convicted of manslaughter.

With respect to the 48 subjects who came to trial for second degree murder it was found that 14 (29.2%) were found not guilty and released; 12 (25.0%) were found not guilty by reason of insanity; 11 (22.9%) were found guilty of second degree murder; and 11 (22.9%) were found guilty of manslaughter. Thus, of the 172 subjects who were indicted for second degree murder only 14 (8.1%) were found not guilty and released. Twenty-six or 15.1% were convicted of the original charge, and the majority of these convictions were the result of guilty pleas.

Another way of analyzing these statistical data is to determine what proportion of the total number of convictions was the result of guilty pleas. For example, there were 137 convictions among the 154 subjects indicted for first degree murder. Of these 137 convictions, 97 (70.8%) were the result of negotiated pleas of guilty to a charge less serious than first degree murder. With respect to second degree murder, there were 146 convictions out of the 172 indictments. Of these 146 convictions, 124 (84.9%) were the result of guilty pleas, and the vast majority of guilty pleas (87.9%) were to a charge less serious than second degree murder. Thus, of the total number of 283 convictions in this study, 221 (78.1%) were the result of guilty pleas and 62 (21.9%) were the result of criminal trials. Therefore, for every two convictions reached through a trial there were approximately seven convictions resulting from guilty pleas.

At this point, it seems clear that, even in murder cases, the courts rely on guilty pleas to a large extent. Only 37.0% of those indicted for first degree murder came to trial on this charge, while an even lower proportion (27.8%) of those indicted for second degree murder came to trial. The next issue to be explored was whether or not there were any significant differences among the courts in terms of the proportion of guilty pleas in murder cases. In order to answer this question, those courts which had a total of at least twelve murder indictments in the period under study were listed along with the proportion of guilty pleas among these indictments (Table IV).

Table IV reveals that there is a significant variation in the proportion of guilty pleas among the courts studied. For example, in the Essex Superior Court 80.0% of the people indicted either for first degree or for second degree murder entered guilty pleas,

TABLE IV
THE PROPORTION OF GUILTY PLEAS FOR THOSE COURTS WHICH HAD A TOTAL OF AT LEAST TWELVE MURDER INDICTMENTS

Court	Total Number of Murder Indictments (1st and 2nd)	Proportion of Guilty Pleas
Essex	20	80.0%
Middlesex	61	78.7%
Suffolk	151	73.5%
Hampden	24	70.8%
Norfolk	16	56.2%
Bristol	12	25.0%
Worcester	15	13.3%

compared to only 13.3% of their counterparts in the Worcester Superior Court.

The next step was to try to explain this wide variation among courts in the proportion of guilty pleas. One explanation for the prevalence of guilty pleas in general has been the matter of court congestion. If court congestion were to explain the variation in the proportion of guilty pleas in murder cases among courts, it would be expected that the greater the court congestion, the higher the proportion of guilty pleas in murder cases. In an attempt to test this hypothesis, the eight busiest courts were first ranked in the order of court congestion. Court congestion was defined in terms of the total number of indictments and appeals in each court over the ten year period under study.[18] Then, their rank in overall court congestion was compared with their rank in the proportion of guilty pleas in murder cases in order to determine whether or not there was a correlation between these two factors (Table V).

Table V shows that there is not a positive correlation between rank in overall court congestion and rank in the proportion of guilty pleas in murder cases. In fact, there was a very slight negative correlation between the rank of the courts on these two variables (Spearman Rank Order Correlation $= -.03$: a perfect positive correlation between ranks on these two factors would have yielded

[18] These totals were derived from the ANNUAL STATISTICAL REPORTS OF THE COMMISSIONER OF CORRECTION: 1956-1965 (Public Document No. 115). The authors are indebted to Lygere Panagopoulos for her work in computing these figures.

TABLE V
RELATIONSHIP BETWEEN RANK IN OVERALL COURT CONGESTION AND RANK IN THE PROPORTION OF GUILTY PLEAS IN MURDER CASES

Court	Court Congestion (Indictments and Appeals)		Guilty Pleas in Murder Cases	
	No.	Rank	Proportion	Rank
Suffolk	27,846	1	73.5%	4
Middlesex	25,780	2	78.7%	3
Worcester	14,825	3	13.3%	8
Bristol	9,072	4	25.0%	7
Plymouth	7,820	5	80.0%	1.5
Essex	7,286	6	80.0%	1.5
Norfolk	5,393	7	56.2%	6
Hampden	5,049	8	70.8%	5

Spearman Rank Order Correlation = —.03

a correlation of +1.0, while a perfect negative correlation would have yielded a —1.0. Therefore, for all practical purposes, rank on overall court congestion is unrelated to rank on proportion of guilty pleas according to this statistical test).

Another indication of the lack of relationship between court congestion in general and the proportion of guilty pleas in murder cases may be derived from the data in Table V. That is, the overall proportion of guilty pleas for the four courts with the highest level of congestion, *i.e.* Suffolk, Middlesex, Worcester, and Bristol was 68.6%, and the total proportion of guilty pleas for the other four courts, *i.e.* Plymouth, Essex, Norfolk, and Hampden was 71.4%. The similarity in the proportion of guilty pleas indicates that court congestion *per se* is not related to the proportion of guilty pleas in murder cases.

Since there is apparently no relationship between overall court congestion and the proportion of guilty pleas in murder cases, other factors will have to be considered in an attempt to explain the extreme variation among courts in the proportion of guilty pleas. One factor which seems to be important in this context is the number of murder indictments in a particular court. That is, the number of murder indictments in a given court seems to be related to the proportion of negotiated pleas. For example, with respect to first degree murder indictments, four courts accounted for 83.1% of all the first degree murder indictments in the study. The proportion of negotiated pleas of guilty for first degree murder indictments in these four courts was 69.5%, while the proportion in all other courts combined was 30.8%. This difference in the proportions of negotiated pleas is highly significant. The probability of

such a difference occurring by chance is less than one in a thousand (*i.e.* $p < .001$), indicating that there is a significant relationship between the number of first degree murder indictments and the proportion of pleas of guilty to a lesser charge.

A similar finding was made in regard to second degree murder indictments. Here, two courts accounted for 70.3% of all second degree murder indictments. The proportion of guilty pleas in these two courts (80.2%) was significantly higher than that of all other courts combined (52.9%). Here, again, the probability of such a difference occurring by chance was less than one in a thousand. Thus, the data suggest that the larger the number of murder indictments in a court—both for first degree and for second degree murder—the greater is the likelihood that a guilty plea will be entered.

In order to further test this relationship between the number of murder indictments and the proportion of guilty pleas, another analytical technique was utilized. Those courts which had at least twelve murder indictments—including both first and second degree indictments—were ranked according to their total number of murder indictments. Then, the rank on the number of murder indictments was compared to the rank on the proportion of guilty pleas in order to determine whether or not there was a significant correlation between a court's rank on these two dimensions (Table VI).

TABLE VI

RELATIONSHIP BETWEEN RANK IN THE NUMBER OF MURDER INDICTMENTS AND RANK IN THE PROPORTION OF GUILTY PLEAS IN MURDER CASES

Court	Murder Indictments		Guilty Pleas	
	No.	Rank	Proportion	Rank
Suffolk	151	1	73.5%	3
Middlesex	61	2	78.7%	2
Hampden	24	3	70.8%	4
Essex	20	4	80.0%	1
Norfolk	16	5	56.2%	5
Worcester	15	6	13.3%	7
Bristol	12	7	25.0%	6

Spearman Rank Order Correlation = .714, $p < .05$

The data in Table VI show that there is a statistically significant correlation between the rank of a court on the number of murder indictments and its rank on the proportion of guilty pleas. The probability of this relationship occurring by chance is less than five in a hundred (*i.e.* $p < .05$). Therefore, it seems safe to make the

generalization that the larger the number of murder indictments in a court, the greater is the probability of a negotiated plea of guilty.

This finding does not readily lend itself to interpretation. One line of speculation would lead the authors to suggest that perhaps the more murder indictments a prosecutor has to handle, the more likely he is to treat them like other kinds of criminal cases. If this were so (and there is really no empirical indication that it is), then the more murder cases a prosecutor had to handle, the more likely would he be to allow or to press for a negoiated plea of guilty, since it is known that the vast majority of criminal cases are disposed of by guilty pleas. On the other hand, in those courts where murder indictments are relatively rare, the prosecutor may view them as a special kind of case and tend not to allow a guilty plea.

One other issue to be explored in this paper is the possibility that the prosecutor may "overcharge" a defendant in order to have a better bargaining position. For example, a prosecutor may press for a first degree murder indictment with the primary objective of gaining a strong bargaining position in terms of negotiating for a plea of guilty to second degree murder. It will be recalled that in the University of Pennsylvania Law School Survey, the majority of those prosecutors who engaged in plea bargaining reported that they prepared indictments with plea bargaining in mind.

The first question to be examined in this context is whether or not there is a difference among the courts in the proportion of people indicted for first degree murder relative to the proportion indicted for second degree murder. Table VII, which includes data on the six courts with the largest number of murder indictments, shows that the proportion of people indicted for first degree murder varies tremendously from court to court. For example, in Hampden Superior Court 87.5% of the total number of murder indictments were first degree indictments, while in Worcester Superior Court only 26.7% of all murder indictments were for first degree murder. Thus, there are significant differences among courts on the proportion of first degree murder indictments.

If there were a tendency to "overcharge" defendants, then it would be expected that those courts which have a high proportion of indictments for first degree murder would also have a high proportion of guilty pleas among the first degree indictments. As Table VII indicates, the three courts which have the highest proportion of first degree murder indictments, *i.e.* Hampden (87.5%), Essex (80.0%), and Suffolk (47.0%) also have the three highest pro-

portions of guilty pleas among these indictments. Conversely, the three courts with the lowest proportion of first degree indictments, *i.e.* Middlesex (32.8%), Norfolk (31.2%), and Worcester (26.7%) also had the lowest proportions of guilty pleas among the first degree indictments.

TABLE VII

RELATIONSHIP BETWEEN THE PROPORTION OF SUBJECTS INDICTED FOR FIRST DEGREE MURDER AND THE PROPORTION ENTERING GUILTY PLEAS IN FIRST DEGREE MURDER CASES

Court	Total No. of Murder Indictments	First Degree Murder Indictments		Proportion of Guilty Pleas in First Degree Murder Indictments
		No.	(%)	
Hampden	24	21	(87.5)	66.7%
Essex	20	16	(80.0)	81.3%
Suffolk	151	71	(47.0)	69.0%
Subtotal	195	108	(55.4)	70.4%
Middlesex	61	20	(32.8)	65.0%
Norfolk	16	5	(31.2)	40.0%
Worcester	15	4	(26.7)	50.0%
Subtotal	92	29	(31.5)	58.6%

The data in Table VII suggest that there is a relationship between the proportion of people indicted for first degree murder and the proportion of guilty pleas among first degree murder indictments. However, this relationship is not a particularly strong one. For example, the combined proportion of guilty pleas among first degree indictments for the three courts with the high proportion of first degree indictments (70.4%) was not significantly higher than the combined proportion of guilty pleas for the three courts with the low proportion of first degree murder indictments (58.6%). Further, the correlation between rank on the proportion of first degree murder indictments and rank on the proportion of guilty pleas in first degree indictments was not quite statistically significant for these six courts (Spearman rho = .772, $p > .05$). Thus, although there is some indication that "overcharging" defendants takes place in murder cases, the relationship between the proportion of the first degree murder indictments and the proportion of guilty pleas in the six courts studied is not really strong enough to make a firm generalization about the issue of "overcharging" in this context.

Summary and Conclusion

In the introduction, a brief discussion of the issue of guilty plea bargaining was presented. It was noted that plea bargaining is recognized as a widespread phenomenon which is generally considered as an acceptable and, indeed, necessary means for disposing of criminal cases. However, it was also found that there are some aspects of the plea bargaining process which generate a sense of ambivalence or uneasiness among several legal writers regarding the negotiated plea of guilty. These problematic aspects of plea bargaining include: (1) the extremely low visibility of the plea bargaining process which makes it virtually impossible for the judge or the public to be aware of the terms of the bargain, the pressure which may have been brought to bear on the defendant, or the actions of the police in terms of the arrest and the confession; (2) the informal nature of the practice, *i.e.* the absence of formal rules or procedures governing the plea bargaining process; (3) the general propriety of offering a defendant an inducement to surrender his right to trial; (4) the possibility that harsh sentences may be meted out to those who do choose to stand trial (particularly first offenders who are unsophisticated in the techniques of plea bargaining) while more lenient sentences may be given to recidivists who are experienced in negotiating for a plea of guilty; (5) finally, the possibility that an innocent person may enter a guilty plea.

The specific focus of this paper was on plea bargaining among those indicted for first degree or for second degree murder in Massachusetts between 1956 and 1965. It was found that 86.8% of the 326 subjects studied entered pleas of not guilty at the indictment stage. However, only 32.2% of the sample maintained pleas of not guilty and came to trial for the charge on which they were indicted. The remaining 67.8% of the sample entered pleas of guilty, and 93.2% of these guilty pleas were to a charge less serious than that for which they were indicted. With respect to the 105 subjects who did come to trial, convictions were obtained in 59.0% of the cases. Therefore, of the 326 subjects who were indicted for murder, there were 283 (86.8%) convictions. It is interesting to note that 78.1% of these convictions were the result of guilty pleas and 21.9% were the result of trials. Clearly, then, the courts depend upon guilty pleas to a large extent, even among those indicted for first or second degree murder. The study further revealed that there was a wide variation in the proportion of guilty pleas in murder cases among the courts studied. It was found that this variation could not be

explained by court congestion *per se*. However, there was a significant relationship between the number of murder indictments and the proportion of guilty pleas. In general, the larger the number of murder indictments, the higher the proportion of guilty pleas in murder cases. Finally, there was some evidence to suggest that "overcharging" defendants may take place in some instances so that prosecutors will be in a better bargaining position. However, the findings in this area were not conclusive so that it would not be appropriate to generalize about the issue of "overcharging" in the context of murder cases.

One issue that is very clear from this study is that there is a wide disparity among the courts in terms of the proportion of guilty pleas in murder cases. This finding indicates that the practice of plea bargaining is far from uniform. It also underscores the potential risk inherent in such an informal and invisible process as plea bargaining. For example, a defendant indicted for first degree murder in one court may have a very good chance of negotiating a plea of guilty to second degree murder, while in another court such a possibility may be minimal. The implications of this are serious, since conviction for first degree murder may well result in a sentence of death. According to Massachusetts law, even if the jury recommends clemency and a life sentence is imposed, one who is convicted for first degree murder is not eligible for parole at all, while one convicted of second degree murder is eligible for parole after serving fifteen years.[19] Therefore, it seems crucial that the practice of plea bargaining be governed by specific and explicit guidelines that could be systematically and consistently applied from court to court. In a recent tentative draft the American Bar Association has developed such a set of standards relating to pleas of guilty which could, perhaps, serve as the starting point for the establishment of formal criteria governing plea bargaining. The existence of, and adherence to, such standards would help to make the plea bargaining process more consistent from court to court, as well as rendering the practice more formal and more visible, and, therefore, more subject to scrutiny by the judge and by the public. This would be a significant improvement in the administration of criminal justice in the area of guilty plea bargaining.

19 MASS. GEN. LAWS ch. 265, § 2, *as amended* by the Acts of 1956; MASS. GEN. LAWS ch. 127, § 133A, *as amended* by the Acts of 1965.