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CRIMINOLOGY

CRIMINAL COURTS AND BUREAUCRATIC JUSTICE: CONCESSIONS AND CONSENSUS IN THE GUILTY PLEA PROCESS*

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I. INTRODUCTION

The resolution of disputes among citizens is one of the primary functions of government, one that—despite the creeping encroachments of some administrative agencies—historically has been within the scope of the judiciary. How these disputes are resolved is an important political question not only because it affects the meaning and implementation of statutory law but also because of what it says about society, its political system, and its view of individuals *vis-a-vis* the state. The importance of the judiciary and its procedures was stated eloquently by Thurmond Arnold in *Symbols of Government*¹:

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¹ T. ARNOLD, *THE SYMBOLS OF GOVERNMENT* 123 (1956).

The center of ideals of every Western government is in its judicial system. Here are the symbols of all those great principles which give dignity to the individual, which give independence to the businessman, and which not only make of the state a great righteous protector but at the same time keep it in its place. . . . It is in this institution that we find concentrated to a greater extent than in any other, the symbols of moral and rational government. . . . For most persons, the criminal trial overshadows all other ceremonies as a dramatization of the values of our spiritual government, representing the dignity of the state as an enforcer of law, and at the same time the dignity of the individual.²

A meaningful assessment of the tenor of justice in a society must focus upon trial courts. While appellate courts are more visible, they also are more sanitized and are insulated from the realities of most disputes. Moreover, they affect directly only a small proportion of all citizens who come in contact with the judiciary. In many regards the most interesting trial courts to examine are criminal courts, especially felony courts where the stakes are highest for both the defendant and the community. In these courts the government is involved as an initiator, participant, and mediator. The citizen is both an unwilling party and frequently a powerless and discredited opponent.

The fairness and consistency of the process by which felony disputes are handled goes to the heart of our conceptions of justice. As Justice Douglas stressed in *Joint Anti-Fascist Refugee Committee v. McGrath*³:

It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law.⁴

Consequently, this Article makes a limited inquiry into the nature of the process used to handle defendants accused of felony offenses. We used an extensive body of data on almost 7,500 defendants in nine diverse, medium-sized counties (populations ranged from 200,000 to 1,000,000) in three states (Illinois, Michigan and Pennsylvania).⁵ This Article examines empirically—if only

² *Id.*

³ 341 U.S. 123 (1951).

⁴ *Id.* at 179 (Douglas, J., concurring).

⁵ The Illinois counties were DuPage, Peoria and St. Clair; the Michigan counties were Oakland, Kalamazoo and Saginaw; the Pennsylvania counties were Montgomery, Dauphin and Erie. We selected the countries in an effort to maximize within-state variance along two dimensions: one was a socioeconomic well-being dimension, the other concerned the nature of the political linkages between the court system and its environment. In selecting counties, however, we were restricted by the number of large counties that fit our criteria. Size was crucial because we needed to sample a large number of

in a rough manner—the degree of fairness or consistency in these nine felony courts.

Understandably, any such attempt encounters a number of barriers. At one level there are problems with the standards to which the courts should be held. Despite the considerable unanimity over what is “fundamental fairness,” there is normally more agreement over what is unfair than what are the requisites of due process. There is a certain degree of ambiguity in the notion of due process, which necessarily must be allowed to evolve over time and through experience. Despite this, a thorough survey of the law and legal treatises could yield an adequate list of due process principles that would provide a legalistic basis for assessing the dispositional process in felony courts. Anyone familiar with the day-to-day operation of criminal courts knows that such an effort would be futile. First, many of the most crucial decisions which affect a case’s disposition are within the discretion of the decisionmakers and are largely ungovernable and unreviewable. The charging decision and the sentencing decision are good examples. Second, an essential component of due process is the right to waive formal rights, prerogatives and proceedings, as long as the waiver is knowing and voluntary. Most criminal cases are disposed of by a legally valid guilty plea or some form of unilateral action; therefore many of the most

cases that were handled by a sufficiently diverse set of decisionmakers. Thus, in each state we selected one economically declining county (St. Clair, Saginaw, Erie), one autonomous county (Peoria, Kalamazoo, Dauphin), and one suburban ring county (DuPage, Oakland, Montgomery). Variance in our socioeconomic welfare criterion is embodied in the differences between the declining counties and the suburban counties; the differences in political linkages are reflected in the autonomous and suburban ring counties. For an extended discussion of selection criteria and procedures, and a detailed description of the nine counties, see P. NARDULLI, R. FLEMMING, & J. EISENSTEIN, *THE TENOR OF JUSTICE: CRIMINAL COURTS AND THE GUILTY PLEA PROCESS* (forthcoming, 1987).

The data do not represent any single, narrow slice of middle America. The ring counties were the most prosperous—with per capita incomes hovering at about \$10,000 in 1979. The declining counties were far less prosperous; per capita incomes were somewhat over \$6,500. Politically, DuPage and Dauphin counties appear to be the most conservative, followed by Peoria and Montgomery counties. The Michigan counties appear to be fairly moderate, while St. Clair and Erie counties are moderately liberal.

The nine counties also showed some important differences in crime rates. According to the FBI reports on violent personal crime rates (per 100,000 population) for the ten years preceding this study (1971-80), Peoria and St. Clair counties had the highest rates; Kalamazoo and Dauphin counties were far lower. While two Michigan counties (Oakland and Saginaw) had fairly low personal offense rates, two of the ring counties (DuPage and Montgomery) and Erie had the lowest. These counties differ markedly even though they are all mid-sized American communities. Indeed, we selected them because of their differences. No claim is made that the criminal courts of these counties are in any way a representative sample; however, their diversity helps undercut the types of biases that often creep into findings based on only one or two locales.

fundamental procedural rights are neither legally nor functionally relevant. Finally, other important components of due process are so routinely provided—apprisements of legal rights, prompt arraignments and bail settings, provision of counsel for the indigent, probable cause hearings—that an inquiry into their provision would be unprofitable.

The extent to which non-contested dispositions loom over the larger issue of assessing fairness in the dispositional process is evident from the data on dispositions from our nine counties.⁶ If we merge the nine county samples into one large pool, contested trials account for less than 8% of all dispositions, while guilty pleas account for over 81% of all dispositions and 93% of all convictions. Dismissals account for about 11% of the cases.

II. MODELS OF THE GUILTY PLEA PROCESS AND ASSESSMENTS OF FAIRNESS

These data underscore what many empirical researchers already knew: any assessment of the dispositional process must center upon the guilty plea process. Our entire assessment is limited to this process, which obviously limits its scope. But our efforts are justifiable because the fates of so many defendants are resolved in the discretionary deliberations of this process—which is largely beyond the reach and view of written law—that it overshadows the other facets of the process. Thus, while our diagnosis may not be complete, we at least will cover the critical features of the process.

At an earlier time it would have been sufficient to point to the high level of guilty pleas as an indictment of the dispositional process. Further tests would have been unnecessary and a somber diagnosis would have been rendered. Now a certain ambiguity surrounds the guilty plea process. Until recently an implicit—and sometimes not so implicit—presumption of most criminal court researchers has been that guilty pleas result from plea “bargaining,” in one form or another. This term evokes images of a Turkish bazaar, extensive horsetrading, back room deals, etc. While plea bar-

⁶ In these nine counties, we collected extensive case data on almost 7,500 felony defendants. The number of defendants ranged from 1,162 in St. Clair County to 594 in Erie County. Most of these dispositions were guilty pleas of one sort or another; diversions in the Michigan and Pennsylvania counties were counted as pleas to make them comparable to the Illinois dispositions. These cases represent roughly a year's work in each county; the nine sets of cases reflect about nine years of dispositions. Most were disposed of during 1979 and 1980. In most counties all cases for a given time span were included in the sample; however, in some counties we used systematic samples. In addition, we conducted 300 interviews with the judges, prosecutors, and defense attorneys who handled the cases.

gaining undoubtedly characterizes the procurement of some guilty pleas, we do not know the extent to which it actually pervades the process. Yet the presumed prevalence of plea bargaining is so strong that researchers label many interactions in the guilty plea process as "bargaining," even though they bear little relationship to the term "bargaining" as it is conventionally used. Thus, we began to discover such things as "implicit bargaining" and bench trials, known as "slow pleas."

A review of the literature reveals two contrasting conceptions of the guilty plea process. These conceptions differ fundamentally in their answer to one key question: what makes the plea process work? While most observers agree some form of a trial penalty exists to encourage pleas, they disagree over how pleas are put together. These differences form the basis for two competing models. One could be termed the "concessions" model. Adherents of this model are normally vociferous critics of plea bargaining. Although they span the ideological spectrum, they are in general agreement that charging manipulations and sentencing concessions grease the wheels of justice. The other is the "consensus" model, which places less emphasis on the role of manipulations, concessions, and coercion in producing pleas. Rather, it stresses the importance of shared understandings in lubricating the court's machinery. Concessions and explicit bargaining have a role, but it is restricted to a small subset of cases involving lengthy sentences, evidentiary deficiencies, or some other type of problem.

A. THE CONCESSIONS MODEL

This model has its roots in the crime surveys of the 1920's and forms the basis for most popular conceptions of plea bargaining. Samuel Krislov lists several sets of objections to plea bargaining; some of these draw on the concessions model's emphasis on give and take.

At the simplest level the objection is to the notion of cow buying or haggling over the price. To some it is objectionable because it is unseemly in itself. Others feel that it is unjust because it produces differential results. And finally, there are those who argue that the accused should not participate in defining the punishment.

A second family of objections argues that because plea bargaining takes place *in camera* it undermines the appearance of justice. The privacy of the proceedings not only permits collusion but, even more, suggests to outsiders the possibility of collusion. This latter is an objection over and above the unseemliness of what actually occurs. . . .

The final argument against plea bargaining is that punishment is

ad hoc rather than regular and predictable.⁷

Along with the trial penalty, it is the presumed pervasiveness of these concessions and manipulations—and the process by which they are thought to emerge—that make plea bargaining so distasteful. Evidentiary flaws, legal rights, prior records, witness defects, backlog and scheduling problems, personal relationships and debts, and other factors become grist for the plea bargaining mill—at least in the view of these observers. As Alschuler notes: “The flexibility often praised by the defenders of plea bargaining encourages . . . the introduction of thoroughly improper, even corrupt considerations that they would not for a moment defend. One important fact is that many people are lazy, and bargaining makes it easy for them to split the difference.”⁸

The concessions model, the dominant view for the past fifty years, was useful in focusing attention on the most undesirable aspects of the dispositional process. It fostered the suspicion, however, that bargaining and exchange occur in every nook and cranny of the courthouse and deflected attention from the importance of routine and policies. Moreover, suggestions that explicit bargaining has grown apace with crime and that concessions have gotten larger leave the impression that courthouses resemble the trading floors of stock exchanges where “fixers” and “cop out lawyers” continue to ply their trade. Feeley’s recent comments are pertinent at this point.

Discussion of plea bargaining often conjures up images of a Middle Eastern bazaar, in which each transaction appears as a new and distinct encounter, unencumbered by precedent or past association. Every interchange involves higgling and haggling anew, in an effort to obtain the best possible deal. The reality of American lower courts is different. They are more akin to modern supermarkets, in which prices for various commodities have been clearly established and labeled in advance. Arriving at an exchange in this context is not an explicit bargaining process—“You do this for me and I’ll do that for you”—designed to reach a mutually acceptable agreement. To the extent that there is any negotiation at all, it usually focuses on the nature of the case, and the establishment of relevant “facts”. . . . In a supermarket customers may complain about prices, but they rarely “bargain” to get them reduced.⁹

⁷ Krislov, *Debating on Bargaining: Comments From a Synthesizer*, 13 LAW & SOC’Y REV. 571, 575-76 (1979).

⁸ Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652, 693 (1981).

⁹ Feeley, *Pleading Guilty in Lower Courts*, 13 LAW & SOC’Y REV. 461, 462 (1979).

B. THE CONSENSUS MODEL

Feeley's contrasting images highlight how misdemeanor courts differ from conventional beliefs about the fashioning of guilty pleas. Some recent work suggests that felony courts also operate more like supermarkets than bazaars in that they are more orderly than the freewheeling concessions model would suggest.¹⁰ Mather, for example, contends that "there *are* rules for the plea bargaining process . . . embedded in the social and cultural experience of the courtroom."¹¹ Rosett and Cressy develop this ordered view even further. They contend that:

Even in the adversary world of law, men who work together and understand each other eventually develop shared conceptions of what are acceptable, right and just ways of dealing with specific kinds of offenses, suspects and defendants. These conceptions form the bases for understandings, agreements, working arrangements and cooperative attitudes. Norms and values grow and become a frame of reference which prosecutors, defense attorneys, judges and experienced offenders all use for deciding what is fair in each case. Over time, these shared patterns of belief develop the coherence of a distinct culture, a style of social expression peculiar to the particular courthouse.¹²

Much of the order in the consensus view rests upon the existence of strong, well established "going rates." Going rates are county specific ranges of acceptable sentences for a given offense. While they vary across counties, they bind the plea discussions within a given county and grant a level of predictability to sentencing that renders the machinations implicit in the concessions model unnecessary, even futile, in most cases. Courthouse actors often simply "take" the going rate and drastically truncate their interactions because of what Maynard calls a "concerting of expectations."¹³ In his analysis of bargaining, he found that many cases concluded when one party offered a disposition and the other simply agreed to it and that only in a small number of cases was there a visible compromise.

¹⁰ See, e.g., M. HEUMANN, *PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS* (1978); L. MATHER, *PLEA BARGAINING OR TRIAL? THE PROCESS OF CRIMINAL CASE DISPOSITION* (1979); A. ROSETT & D. CRESSY, *JUSTICE BY CONSENT: PLEA BARGAINS IN THE AMERICAN COURTHOUSE* (1976); Heumann, *Thinking About Plea Bargaining*, in P. NARDULLI, *THE STUDY OF CRIMINAL COURTS: POLITICAL PERSPECTIVES* (1979); Mather, *Some Determinants of the Method of Case Disposition by Public Defenders in Los Angeles*, 8 *LAW & SOC'Y REV.* 187 (1973).

¹¹ L. MATHER, *supra* note 10, at 2-3 (1979).

¹² A. ROSETT & D. CRESSY, *supra* note 10, at 90-91.

¹³ Maynard, *The Structure of Discourse in Misdemeanor Plea Bargaining*, 18 *LAW & SOC'Y REV.* 75 (1984).

That each recipient "takes" rather than "leaves" his counterpart's offer may be due to the "concerting of expectations" that occurs implicitly before an offer is made The concerting of expectations . . . means simply that participants are able to read situations in like manner and infer what resolution will be mutually acceptable. Such a process in plea bargaining is surely aided by the participants' knowledge of the courtroom subculture. The establishment by legal practitioners of "going rates" for run-of-the-mill, "normal crimes" . . . in local jurisdictions and the administration of these rates as a matter of course . . . is a well-documented practice.¹⁴

Maynard concludes "it is clear that settling cases by agreement is not the same as 'compromise';" he points out that in the literature on bargaining "this is considered to be a different bargaining game altogether."¹⁵

A more subtle distinction between the concessions and consensus models may be seen in their view of a defendant's motive for pleading guilty. Both models take for granted that a trial penalty provides a major impetus for pleading guilty.¹⁶ In the consensus model, however, trial penalties operate only in cases where there are genuine doubts about important factual issues. More importantly, this perspective suggests a large number of guilty pleas will be forthcoming even in the absence of a general trial penalty.¹⁷ Thus, coercion plays a smaller role in the consensus model than it does in the concessions model.

C. CONCESSIONS OR CONSENSUS?: OBSERVATIONS AND IMPLICATIONS

The contrast between these two models leads to several questions, the answers to which will aid the understanding and assessment of the operation of criminal courts. The most basic question is: which model is most consistent with the reality of criminal courts? While criminal court processes inevitably involve a blend of consensual as well as manipulative and symbiotic interactions, it is important to obtain some rough estimates of the role each type plays within the dispositional process. It would be far too simplistic to expect that just one model accurately portrays all criminal court operations. A specification of the actual blend, however, will help us assess the nature of the "justice" dispensed by criminal courts.

If the empirical evidence indicates that exchange or bargaining interactions dominate criminal court operations, then the fears of those who cherish the ideals of due process would be realized. The

¹⁴ *Id.* at 81.

¹⁵ *Id.* at 98.

¹⁶ See L. MATHER, *supra* note 10; Alschuler, *supra* note 8.

¹⁷ See M. HEUMANN, *supra* note 10, at 154; L. Mather, *supra* note 10, at 72.

indiscriminate manipulation of the powers entrusted to public officials to coerce defendants into yielding important constitutional rights is the antithesis of Justice Douglas' above stated view that "steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law."¹⁸ Such manipulations breed contempt and resentment—instead of remorse and resolve—on the part of the defendant and undermines the justice system's credibility and legitimacy in the eyes of the public.

Strong empirical support for the consensus perspective would lead to somewhat different and certainly more involved conclusions. The impact of formal due process strictures—the type articulated in landmark Supreme Court decisions and legal treatises—upon the formation of pleas would be no greater if the vast majority of them were the result of a "concerting of expectations." No mistake should be made of this. There would be order within a given court system based upon widely shared norms and perceptions. But that order would not be the result of our most learned and articulate jurists ruminating over, extending, and applying the hallowed principles of the Anglo-Saxon legal tradition. Rather, it would be produced by practical people with varying degrees of imagination, skill, and resources who face a continuing parade of fairly mundane problems, and who are restricted in their actions by the local political and socioeconomic setting. The aim of the order is not the realization of cherished abstract principles but the elimination of uncertainty and of the need not to reinvent the wheel in each case, as well as to accomplish the goal of utilizing scarce resources within a given setting.

Regardless of the nature and origins of the shared norms and perceptions that may structure the guilty plea process, their existence and vitality lend a degree of certainty and consistency to the dispositional process. To the extent that these norms curb the blatant manipulation of official powers and are applied to individuals on a uniform basis, they meet minimal definitions of fairness to a far greater extent than a system based upon manipulation and exchange.

III. ASSESSING THE GUILTY PLEA PROCESS

If we consider the contrasting images of the plea process depicted in the concessions and consensus models, the outlines of a realistic and meaningful approach to assessing that process is dis-

¹⁸ *Joint Anti-Facist Refugee Committee v. McGrath*, 341 U.S. 123, 179 (1951) (Douglas, J., concurring).

cernable. The approach would have to focus on the structure of the charging and sentencing decisions. These decisions are the primary levers of power used by public officials to influence a defendant's decision to waive his rights to a formal adjudication, with all of its procedural safeguards. The hypothetical structure of these decisions varies considerably in the two models of the plea process; their actual structure would shed much light on the nature of the process.

Basic to the concessions model is the assertion that the plea process is characterized by pervasive and significant charge reductions due either to calculated overcharging or prosecutorial infidelity to the public trust. Extensive charge manipulations involving substantial reductions would support the view that guilty pleas are characterized by considerable horse trading and the rebuttable inference that give-and-take oils the wheels of justice. This support is limited, however, unless it is buttressed by findings of wide ranging sentencing disparities (for the initial, "untainted" charges). Otherwise the data on charge manipulations would be vulnerable to the accusation that the manipulations are wholly symbolic, made only to mollify defendants and to assure them that they have received something in exchange for their plea.

In contrast to the concessions model, the consensus model would predict high levels of consistency with respect to both charging and sentencing. Charge and count modifications would be relatively infrequent, and instead of rampant sentence disparities, a set of going rates would minimize variations in sentences for comparable cases and circumstances. If charging modifications are infrequent, it could be concluded that common understandings and perceptions among court participants underlie the process, and that participants are chiefly concerned with pigeonholing defendants, not with negotiating over relative advantages. But charging consistency must be accompanied by sentencing consistency. Otherwise, beneath the placid surface of charge constancy a lively trade in guilty pleas—with sentences as currency—will be conducted.

This Article discusses consistency in the charging and sentencing decisions in general terms because any attempt to specify an *a priori* level would be wholly artificial. The criminal court system is highly complex and composed of largely autonomous units catering to a variety of interests while handling large numbers of defendants of varying backgrounds who are charged with a variety of acts. Any assessment of consistency must yield a certain amount of slack, while recognizing unacceptable inconsistencies if they are present. Moreover, we do not expect absolute levels of consistency or manip-

ulation. Instead, we want to clarify the mix of practices with some empirical precision.

One last point warrants attention. This approach relies on an assessment of outcomes that will enable us to say something about the nature of the process, a tactic which frequently requires a leap of faith. In this case, however, we feel that the leap is fully justified. The study of trial courts has relied for some time upon qualitative research on the dispositional process—based upon observations and interviews, as well as preconceptions, but seldom buttressed by hard data.¹⁹ Our approach enables us to quantify the level of charge changes and sentencing disparities which flow out of the process. Both measures lend themselves to straightforward quantification and enable us to gauge accurately the flow of changes and the level of disparity throughout the system. While the evidence would be indirect, findings of high levels of charge consistency from arrest to sentence and the predominance of going rates would put the burden on concession adherents to respecify the role of manipulation and concessions in the process. If high levels of charge reductions and wide sentencing disparities emerged, then consensus adherents would be forced to rethink the role of common perceptions. Why would charge reductions be necessary if there is a concerting of expectations and few questions of fact exist? How important can going rates be if sentences are widely disparate?

A. MEASURING THE INCIDENCE AND SIGNIFICANCE OF CHARGE CHANGES

Changes in the charges pending against a defendant can have an impact upon the decision to plead guilty because, irrespective of any sentencing agreements, reduced charges can limit the defendant's legal liability at sentencing. But we should be cautious in interpreting whatever charge modifications occur, and we should be careful in equating one with another. While some changes (a reduction of rape to battery or armed robbery to robbery) can be significant and have important sentencing implications, others may be symbolic or largely so (a reduction of burglary to building larceny or dropping three counts of theft in a four-count indictment).

In order to assess the actual incidence of charge reductions, and to sort out the various types, we developed two charge modification measures. The first comprises a set of general measures. One component of this set captures any changes in the set of

¹⁹ See generally, J. EISENSTEIN & H. JACOB, *FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS* (1977)."

charges between arrest and conviction.²⁰ A second component reflects any drops in the number of counts charged, and a third indicates whether there was a primary charge reduction. The primary charge is the central and most serious charge listed in an indictment or set of indictments filed against a defendant. It is normally easy to determine. Most cases involve either a single count or a set of charges such as burglary and possession of burglary tools, rape and aggravated battery, battery and resisting arrest, etc.

The measures of count drops and primary charge reductions permit us to differentiate—at least to some extent—among the various types of charge reductions. Unfortunately, we can infer only in the most general way the sentencing impact of these charge reductions. More precise assessments of sentencing impact require a separate measure detecting the magnitude of the change in seriousness due to a charge reduction. We compute this magnitude measure by comparing the seriousness value (measured in months) of the initial charge(s) with that of the reduced charge(s). Our measure of offense seriousness is tied strongly to sentencing practices in a county.²¹ Indeed it is equal to the average sentence, in months, given to the defendants convicted of the relevant offense in each county sample. For the merged pool of cases from all county samples the correlation between the seriousness of the most serious offense convicted upon and sentence is .7. Thus, there is a strong correspondence between the offense seriousness scores and sentencing, as well there should be given the nature of the offense variable's derivation.

Although we had offense seriousness scores for a large number of different offenses, this analysis requires that we use only the most frequent offenses handled by the courts in computing the magnitude measure. First, seriousness estimates are more stable for the more frequent offenses simply because they are based upon a larger number of cases. Stable estimates are crucial because the whole analysis is based upon the differences in these estimates, and estimate errors would be compounded in the calculation process. Second, by using only more frequent offenses we can be more certain that we are capturing real reductions. By including a large number of miscellaneous offenses we introduce a good deal of ambiguity and uncertainty into the analysis. Situations do exist in which

²⁰ We recorded only the first four charges on the case file forms. Thus, the measures are limited to those four charges. Our data revealed, however, that less than one percent of the cases had as many as four charges, so the loss of information due to this limitation is minimal.

²¹ See P. NARDULLI, R. FLEMMING & J. EISENSTEIN, *supra* note 5, at ch. 3.

charges are changed, but it is unclear whether the change is a reduction or an adjustment. For example, regardless of what the seriousness scores indicate, a change from gambling to disorderly conduct, or from conspiracy to commit theft to attempt theft creates interpretational problems. We have less serious problems assessing changes from rape to aggravated battery, burglary to theft, attempted murder to aggravated battery, etc.

The cost of using only frequently appearing offenses, in terms of cases eliminated, is not high. The offenses included in this analysis are listed in Table 1; it also shows the proportion of the total cases they represent at the first appearance and at the trial court disposition. By limiting the analysis to these cases we eliminate less than 9% of the cases at the initial appearance and about 15% at disposition.²²

²² Limiting the analysis to this subset of offenses did not eliminate all the problems encountered in this analysis. Another problem was the handling of multiple count cases. The calculations involved in a single count case involving, for instance, a reduction from burglary to theft was simple, and its accuracy was only dependent upon the accuracy of the seriousness estimates. But two or three count cases in which a second or third count was dropped or reduced caused additional problems. Reductions (or enhancements) of non-primary offenses could not be ignored. At the same time it would be inflationary to evaluate modifications of these secondary and tertiary offenses at "face value." The net impact upon sentence of a burglary offense as a second or third charge is much less than if it were the only charge. For example, most defendants charged with only one count of burglary may get eight months in a county. If a defendant is convicted of rape and burglary, however, that burglary is not likely to add eight months to the defendant's sentence.

To integrate the seriousness of the non-primary offenses into an overall seriousness score for each case, we assigned weights to each offense. To determine these weights, variables depicting offense seriousness for the first, second, and third offense charged at the conviction stage were entered into a regression equation with minimum confinement time, in months (probation coded 0), as the dependent variable. We included only the first three offenses in the analysis because only 3% of the cases involved convictions on more than three counts; if there was no second or third offense the offense seriousness variable was scored 0. While the B-coefficient for the OFFSER1 (the most serious offense at conviction) was 1.0, the B-coefficient for OFFSER2 was .15, while OFFSER3 was .18. The implications of these results are quite straightforward. In computing a summed, weighted case seriousness variable, which incorporates the three most serious charges, the second and third offenses weights are .15 and .18, respectively. For each case then the summed, weighted case seriousness variable would equal $1 * \text{OFFSER1} + .15 * \text{OFFSER2} + .18 * \text{OFFSER3}$. If no second or third offense existed, then the value of the offense seriousness variable would be "0" and it would make no contribution to the overall score. For example, if a defendant is charged with one count of burglary (county specific seriousness score = 10 months) and one count of simple battery (county specific seriousness score = 3), its summed, weighted case seriousness score is $10.45 (1 * 10 + .15 * 3 + .18 * 0)$. Using this algorithm, we assigned a case seriousness score to each case in which *all offenses charged* involved one of the offenses listed in Table 1. This led to the elimination of additional cases; but over 72% of all guilty plea cases remained (4,038 out of 5,600).

TABLE 1
OFFENSES USED IN CHARGE MODIFICATION ANALYSIS

OFFENSE	PERCENT OF CASES AT	PERCENT OF CASES AT
	FIRST APPEARANCE	SENTENCING STAGE
Murder	1.6 (124)	1.0 (76)
Manslaughter	.4 (28)	.5 (38)
Rape	2.0 (152)	1.1 (87)
Armed Robbery	4.1 (310)	3.2 (247)
Unarmed Robbery	1.2 (93)	1.3 (99)
Aggravated Battery	3.6 (277)	2.9 (222)
Simple Battery	1.4 (104)	2.2 (166)
Aggravated Assault	2.5 (188)	1.8 (138)
Simple Assault	.3 (22)	.4 (30)
Possession Hard Drug	8.0 (612)	7.8 (598)
Burglary	17.1 (1306)	14.1 (1082)
DWI	7.6 (582)	7.5 (577)
Theft	16.9 (1296)	18.3 (1401)
Fraud	4.3 (332)	4.4 (336)
Arson	.8 (64)	.7 (57)
Vandalism	2.0 (150)	2.5 (189)
Unlawful Use of Weapon	2.8 (214)	2.5 (189)
Disorderly Conduct	.9 (72)	1.1 (85)
Kidnapping	.5 (42)	.5 (35)
Credit Card Crime	.5 (39)	.4 (28)
Resisting Arrest	.2 (19)	.2 (18)
Receive Stolen Property	1.0 (80)	.8 (65)
Interfering with Officer	1.1 (87)	1.0 (80)
Possession of Marijuana	1.8 (140)	1.8 (137)
Delivery of Marijuana	.8 (63)	.9 (66)
Miscellaneous Sex Act	1.0 (80)	1.0 (78)
Possession of Controlled Substance	.5 (37)	.5 (40)
Building Larceny	2.3 (178)	1.7 (133)
Car Theft	1.3 (98)	1.1 (81)
Insufficient Funds	.7 (55)	.7 (55)
Lesser Sex Offense	.7 (54)	.6 (48)
Attempted Murder	.7 (50)	.5 (39)
Attempted Armed Robbery	.3 (25)	.4 (27)
Attempted Burglary	.6 (47)	.6 (47)
Attempted Theft	.2 (18)	.4 (33)
	91.7 (7035)	85.4 (6627)

B. DETECTING "GOING RATES"

Our assesment of the plea process must extend beyond the incidence and significance of charge reductions. Given that courthouse participants expend their time and resources negotiating over sentences, it is possible that charge manipulations are superfluous, and hence less frequent than supposed. This possibility is trouble-

some because, while it is plausible, it is difficult to examine. An important implication of this position is that there should be marked sentencing disparities within charge categories. If they do not exist and sentences are tightly clustered within each offense type, it would be difficult to maintain the position that sentencing concessions grease the wheels of justice. To determine the role they do play, we must grapple with the notion of "going rates."

While intuitively and theoretically attractive, a critical problem with the concept is defining it empirically. Generally, establishing a link between charges and sentences is sufficient. Thus, an ordinary or typical theft case may be "worth" probation; a burglary may call for one or two years in prison; an armed robbery may have a going rate of three years in prison. These are norms or averages. An unstated assumption is that the distribution around these norms is narrow, but how dispersed can the cluster of sentences be before the idea loses its meaning? Another assumption is that each offense has only one going rate or cluster of sentences. This assumption, however, is not necessarily true.

The procedure used here requires a rather detailed explanation, because two major problems had to be overcome before starting the analysis. First, the analysis had to rest on frequently appearing offenses to an even greater extent than the derivation of the magnitude measure of charge reductions. Using offenses with only a handful of cases could either inflate the number of clusters (for example, three cases of attempted theft receiving probation might qualify as a cluster) or deflate them, because the small number of cases prevented a pattern from emerging. Accordingly, we included only offenses totaling at least ninety cases at the sentencing stage. Behind this criterion was the thought that in most counties ten cases would be enough to permit the formation of a sentence cluster (if one existed). Where the actual number of cases dropped below this criterion, the offense was excluded from the calculation for that county unless a strong cluster emerged. Table 1 reveals that thirteen offenses (the two marijuana categories were merged into one) meet the ninety cases requirement. These sentences accounted for approximately two-thirds of all sentenced cases.

The second problem centered on the definition of the spans for the clusters. Figure 1 portrays this problem in a simplified way. It indicates three major sentence clusters for a hypothetical offense. With sentence length measured in months along the horizontal axis, defendants who received probation constitute one cluster, those receiving between four and six months define a "low" cluster, while

FIGURE 1
HYPOTHETICAL SENTENCING CLUSTERS FOR A SPECIFIC CASE

those receiving fifteen months constitute a "high" cluster. The low cluster in the example is what might be termed an interval cluster, while the probation and high clusters are point clusters. The simple fact that probation is so common means that many felony charges will have two sentencing clusters, one for probation and one for incarceration. Only a handful of serious offenses may have high clusters, largely consisting of defendants with serious criminal records. Obviously, the meaning of "low" or "high" depends entirely on the spread of the overall distribution and the distance between the clusters; they are entirely relative to the sentencing pattern for a particular charge in a specific court.

To identify and define these clusters, we examined the distribution of *guilty plea* sentences for each qualifying offense (as defined by the original primary offense at *arrest*) within each county to see if patterns such as those depicted in Figure 1 existed. We grouped sentences by arrest offense because this maximizes the potential for disparities to emerge. If we had grouped sentences by charge at conviction, those cases receiving reductions would have been excluded and the range of sentences could have been narrowed considerably. The identification of clusters was a difficult process that had to be sensitive to competing concerns. Obviously, the wider the span allowed for internal clusters, the greater the number of cases they would include. This could lead to more consistency than was justifiable. At the same time the actual distribution of sentences might be obscured by unrealistically stringent criteria.

If an offense had less than ten sentenced cases, we categorized the cases as "indeterminate," unless a strong cluster emerged. We assigned the probation cases to a "probation cluster." With only a few exceptions (e.g., armed robbery), all offenses in each county had a probation cluster. We then examined the distribution of the remaining cases to determine if there were any other discernible clusters. In some instances there were none. We categorized these as "no cluster above probation." In other instances a unimodal distribution existed for detention sentences. If the modal category accounted for at least 10% of all cases, we assigned defendants receiving that sentence to a "low cluster" category.²³ Next, we ex-

²³ The figure of 10% may seem low as a cutoff point, but it usually accounted for a much higher percentage of the incarceration cases—20-25%. For example, if probation accounted for 60% of all sentences for an offense, then a second sentence category, say three months, which accounted for 10% of all cases, actually accounted for a quarter of all cases remaining after the probation cases are removed. In a few instances (where probation accounted for a large proportion of the sentences) a low cluster was defined even if the percentage of cases dropped slightly below 10% (8-9%). This only occurred where the overall distribution of incarceration cases indicated clearly that a cluster ex-

amined the distribution of sentences around the modal incarceration sentence to determine if the "low cluster" was an interval cluster or a point cluster (i.e., three to five months instead of four).

The vast majority of all clusters were point clusters (about 90%), but we still had to be extremely careful in defining interval clusters. A researcher could expand indefinitely the range around the mode and consume increasingly larger numbers of cases. To control this, we generally limited our intervals to three months (only three of 160 clusters exceed a span of three) and computed a ratio of cases to months in analyzing whether a cluster was a point or an interval. Where the "span ratio" was greater than three, the span was considered "tight" enough to be a cluster. For example, assume a distribution of burglary sentences in which the mode for confinement cases was six months and twenty defendants received such a sentence. If ten other defendants received four months, then we would assign them to the low cluster because the span ratio of fifteen was greater than three (span ratio = $10 + 20 / 6 - 4 = 15$). Before we computed a span ratio the pattern of sentences had to suggest that an interval cluster existed; a few stray cases near the mode were not considered part of a cluster. The span ratio of three was a wholly arbitrary cutoff point which we inductively constructed after a preliminary examination of the data. Patterns which "looked like" a cluster generally had span ratios well above three (the mean for interval clusters was seven); if there was no cluster, the ratios were normally below three. While the criteria were subjective, no independently determined standards for such a procedure exist, and while arbitrary, the criteria lent an element of objectivity to the classification procedure, permitted replication, and greatly facilitated the classification procedure. Moreover, because these procedures affected only a small proportion of the cases (only about 10% of the cases were in interval clusters), the arbitrariness has only a marginal effect upon the number of cases falling within a cluster.

Some sentencing distributions above probation revealed a bi-modal pattern. Where appropriate, we assigned defendants whose sentences were part of a grouping above the low cluster to a "high cluster" category. We applied the same criteria used to determine the existence and nature (point or interval) of the low clusters to the high clusters. We assigned cases that fell into the "valleys" between the "peaks" (clusters) to one of three categories: between probation and low, above low (or between low and high), and above high.

isted. The 10% cutoff was not met solely because of the large proportion of probation cases.

In a few instances no clusters existed, and we assigned cases in these distributions to a "no cluster" category.

The data presented in Table 2 reveal how successful the above procedure was in identifying tight clusters of sentences. Because probation clusters are so dominant, the data in Table 2 are reported with the probation clusters included and excluded. If probation clusters are included, "point" clusters account for about 90% of the clusters and cases. Only about 2% of the clusters had spans in excess of three months (about six weeks either side of a mid point), and these clusters accounted for about 2% of the cases. If we exclude the probation clusters, the point clusters account for about 77% of the clusters and about half of the cases. The three clusters above three months account for 4% of the clusters and about 14% of the cases.

TABLE 2
DISTRIBUTION OF CLUSTER SPANS (IN MONTHS)

Span of Cluster (difference between high and low sentence, in months)	INCLUDING PROBATION			EXCLUDING PROBATION		
	# of charge- based clusters	% of all clusters	% of all cases	# of charge- based clusters	% of all clusters	% of all detention cases
0 (point cluster)	143	89.4	91.4	58	77.3	50.6
1	2	1.2	.3	2	2.7	1.6
2	7	4.4	3.5	7	9.3	19.9
3	5	3.1	2.5	5	6.7	14.2
4	—	—	—	—	—	—
5	1	.6	.6	1	1.3	3.2
6	2	1.3	1.8	2	2.7	10.5
	160	100%	100%	75%	100%	100%
			(n=3241)			(n=563)

IV. CHARGE MODIFICATIONS AND GUILTY PLEAS

The most general charge reduction variable reveals four distinct patterns of charge modification in guilty plea cases: (1) no changes in charges; (2) a "pure" reduction in the number of counts or seriousness of offenses; (3) a "mixed" modification, with an enhancement of counts or charge seriousness later followed by a reduction; and (4) a straightforward enhancement through increases

in the number of counts of charge seriousness. Figure 2 reports the frequency of these patterns.

Complete consistency—no modifications in *any* count or charge from the time of arrest through final disposition—occurred in 60% of the cases. “Pure” reductions were made in over a quarter of the cases (26.7%). Enhancements took place in roughly 13% of the cases, but the preponderance were “mixed” cases in that 71% of these enhancements were later mitigated through reductions. Charge enhancements normally took place when the indictment or information was filed and reductions were made in the trial court. Comparisons of the arrest and conviction charges showed that this two-step process produced real reductions, and they should be combined with the “pure” category for an accurate picture of concessions.

Together the two groups accounted for 36% of the entire pooled sample of cases, at first glance a rather sizable proportion. Yet the concessions focused mainly on secondary or tertiary offenses, not the primary or most serious charge. For example, 68.4% of the “pure” reductions entailed alterations in these secondary charges. For the “mixed” cases, the proportion was 50.1%. Altogether only about 15% of the cases involved a reduction in the primary offense. The remaining reductions were largely count drops in multicount cases. Finally, the number of true enhancements amounted to only 210 cases, or slightly less than 4% of the pooled sample. For this reason, plus the fact that enhancements are not normally the result of bargaining, the following discussion concentrates only on charge reductions.

Depending upon an individual's views, these data on charge reduction may show either too much charging manipulation or too little (i.e., the reduction of secondary offenses are insignificant and wholly symbolic, resulting in the deception of most defendants). While such an assessment is premature at this point, we cannot even begin to address such issues without comparing charge changes in guilty plea cases with those in trial convictions. A certain level of adjustment is bound to occur in a process as complex as the criminal justice system. Hence, charge reductions may not be unique to plea cases but simply inevitable within the dispositional process. Table 3 reports data on the incidence of a charge reduction by mode of conviction.

As the table indicates, reductions were significantly more likely to occur (statistically speaking) in guilty plea cases than in trial cases, regardless of which measure is examined. But it also is quite evident that charge modifications were not unknown in trial convic-

FIGURE 2

CHARGE MODIFICATIONS FROM ARREST TO DISPOSITION, GUILTY PLEA CASES ONLY

TABLE 3
INCIDENCE OF A CHARGE REDUCTION BY MODE OF CONVICTION

	GUILTY PLEA	TRIAL CONVICTION
ANY CHARGE Reduction	36.0% *** (5600)	30% *** (370)
REDUCTION OF PRIMARY OFFENSE	15.1% * (5564)	10.9% * (387)
COURT DROP	29.9% ** (5353)	23.1% ** (375)

* Significant at .05 level.

** Significant at .01 level.

*** Significant at .001 level.

tions, due to dismissal or acquittals of certain counts. Some type of a reduction was made in 30% of the trial cases, a figure close to that for guilty pleas (36%). The differences narrow when focusing on reductions in the primary charge: 10.9% of the convictions in trial cases were for reduced primary charges compared to 15.1% of the guilty pleas. The difference in the percentage of count drops by mode of conviction was about 7% (29.8% for guilty pleas and 23.1% for trial cases).

The fundamental similarity in the charge reduction patterns of guilty plea and trial cases introduces a certain element of ambiguity to the data reported in Figure 2. The fact that there are no great gaps by mode of conviction suggests that at least some of the charging concessions which purportedly limited the defendant's legal exposure at sentencing might have occurred even if a plea had not been submitted. An examination of the magnitude of these concessions may erase some of this ambiguity. As noted earlier, the measure of magnitude is based on weighted changes in seriousness scores which are tied to the sentencing patterns of individual courts.²⁴ In other words, they give us a rough estimate of a reduction's sentencing implication which we can use to assess its significance. We also can compare it with reductions in cases where the defendant is convicted after a trial.

Table 4 reports data on the changes in weighted seriousness scores between arrest and conviction. Almost a quarter of the guilty plea cases in this subset of most frequent offenses received a reduction in one of the first three arrest offenses. The mean projected sentencing value of these reductions was 7.6 months, but that figure

²⁴ See *supra* note 22.

is highly skewed by a handful of extreme cases. As the median value of 1.4 months indicates, half of those pleading guilty had charge reductions "worth" somewhat less than two months in projected sentence. Almost 80% of the defendants received reductions under six months. In interpreting these data, it should be kept in mind that the absolute level of charge reductions is limited by the projected sentence of the total package of charges. Thus, it is important to note that the last two columns in Table 4 report the reductions as proportions of the weighted seriousness scores. The mean value of these proportions is .39, and the median is .24. According to the median figure, the projected sentences of half of the defendants who pleaded guilty and received some form of charge reduction was cut by about one quarter.

TABLE 4
WEIGHTED CHARGE REDUCTIONS BY TYPE OF CONVICTION

CHARGE REDUCTION	PERCENT OF ALL CASES	AVERAGE WEIGHTED MODIFICATION (IN MONTHS)		PERCENT OF ALL WEIGHTED CHANGES THAT ARE LESS THAN 6 MONTHS	AVERAGE CHANGES AS A PROPORTION OF WEIGHTED CHARGES	
		Mean	Median		Mean	Median
GUILTY PLEAS	23.9* (965)	7.6*	1.4	79	.39*	.24
TRIAL CONVICTIONS	22.08 (62)	11.68	1.1	79	.40*	.35

* Non-significant

These proportions seem somewhat more significant. They represent, however, less than one quarter of the guilty plea cases in our subset of regular offenses. Moreover, if these statistics, as well as the others reported in Table 4, are compared with the attrition of charges in trial cases, it is not at all clear that the charge reductions which do occur are real concessions. No significant differences occur between plea and trial cases in terms of the proportion of cases receiving some charge reduction (in this subset of cases) or the magnitude of charge reductions.

V. GOING RATES AND GUILTY PLEAS

The argument that common perceptions characterize the guilty plea process to a greater extent than horsetrading and explicit bargaining is supported by the results of the charge reduction analysis. Nonetheless, a comprehensive assessment of the guilty plea process

must await the analysis of sentencing patterns. Charge concessions may be infrequent because they mean so little. Real negotiations may focus on sentences, and the most serious manipulations, disparities, and biases therefore may exist at that stage.

To determine whether or not this is true, we must examine the proportion of cases within one of the three types of clusters described earlier. The first column of Table 5 reports this information for defendants who pleaded guilty. The three major clusters combined account for almost 80% of the guilty plea cases (79.5%). Going rates clearly play a prominent role in determining sentences in guilty plea cases. The fact that the probation cluster had 65.8% of the cases does not diminish the significance of these findings; the simple reality is that many felony cases involve first offenders or people convicted of routine crimes who receive minimal punishment.

TABLE 5
DISTRIBUTION OF SENTENCING CLUSTERS BY MODE OF CONVICTION

SENTENCING CLUSTER	PERCENT OF QUALIFYING GUILTY PLEA CASES* (Actual Number of Cases)	PERCENT OF QUALIFYING TRIAL CONVICTION CASES* (Actual Number of Cases)
PROBATION CLUSTER	65.8 (2759)	38.7 (91)
BETWEEN PROBATION AND LOW CLUSTER	7.4 (302)	11.9 (28)
LOW CLUSTER	11.1 (457)	11.9 (28)
Between Low Cluster AND HIGH CLUSTER	7.3 (298)	21.7 (51)
HIGH CLUSTER	2.6 (106)	1.7 (4)
ABOVE HIGH CLUSTER	2.5 (104)	6.0 (14)
NO CLUSTER AND NO CLUSTER ABOVE PROBATION	3.8 (155)	8.1 (19)
TOTAL	100.0 (4100)	100.0 (235)

* These data excluded 1072 cases which were convicted but which involved non-regular offenses (i.e., not one of the 13 offenses discussed in the text).

Available evidence also suggests that this estimate of the impor-

tance of going rates is not seriously inflated by restricting the analysis to the most frequently handled offenses. An analysis of 947 of the 1072 excluded cases (the other 125 were in an aggregated miscellaneous category) revealed that 711, or 75.1% of the 947, received either probation or the modal confinement sentence. We excluded these cases from Table 5 because the number of offenses handled in the county samples were too small to yield stable results. While we still believe that the numbers underlying the 75.1% statistic are too small to yield stable results, they do demonstrate that our selection procedure did not have a marked impact upon our estimate of sentencing consistency; irregular offenses do not involve widely disparate sentencing patterns.

The sentencing norms represented by the findings reported in Table 5 are not as effective in constraining sentencing after a trial conviction. While nearly 80% of the plea cases fell within one cluster or another, only 52.3% of the trial cases did, a difference that is statistically significant well beyond the .001 level. As the second column of Table 5 indicates, the probation cluster includes proportionately fewer cases, and the "off-cluster" categories include more, raising the possibility of a trial penalty that moves defendants who fail to plead guilty "over the hill" (or peak).

Table 5 yields a portrait of sentencing that is dominated by a small handful of going rates for a specific offense, but it cannot reveal whether the pigeonholing process was consistent. The assignment of going rates to defendants could be distorted by bartering. An examination of the criminal records of the defendants in various clusters is a first step toward understanding and assessing the consistency of this assignment procedure. Therefore, we constructed a trichotomized criminal record variable. About half of the defendants were first offenders, and we assigned them to a separate category. The remaining half of the defendants we divided roughly in half, depending on whether they had less serious or more serious records. This variable was then cross-tabulated with the three cluster categories, using only guilty plea cases, to produce Table 6.

Generally, the matches were consonant with what might be expected: a moderately high association existed between criminal record and cluster placement. More important is the fact that the classification of defendants was not grossly distorted by unreasonable decision rules. For instance, 65% of the probation cluster comprised first offenders, while only 10% of the defendants had serious criminal histories. The low cluster has fairly equal representations of each set of defendants, suggesting that other factors (aggravating or mitigating circumstances, bargaining positions, victim-defendant

TABLE 6
COMPOSITION OF SENTENCE CATEGORIES BY DEFENDANT'S PRIOR
RECORD (GUILTY PLEA CASES ONLY)

SENTENCING CLUSTER	NO PRIOR RECORD	MODERATE CRIMINAL RECORD	SERIOUS CRIMINAL RECORD
PROBATION CLUSTER	65.0 (1431)	25.0 (550)	10.0 (220)
LOW CLUSTER	31.0 (104)	33.1 (111)	35.8 (120)
HIGH CLUSTER	11.0 (8)	35.6 (26)	53.4 (39)

relationship, etc.) may affect placement in this grouping. These defendants had neither the least serious nor the worst criminal records. Therefore, there may have been some ambiguity concerning the appropriateness of their sentences and more room for disagreement. No such uncertainty exists with regard to the high cluster group, because it is almost a mirror image of the probation cluster. This third cluster is dominated by more serious offenders; 53.4% of the defendants had extensive criminal histories. Only 11% were first offenders.

VI. CONCLUSIONS

The data analyzed here—which represent approximately nine system-years of dispositions in nine very different mid-sized counties—suggest that a rather high level of order prevailed in the informal process through which most felony cases are resolved. Important changes in charges (primary charge reductions) occurred in only about 15% of the guilty plea cases, and almost 80% of those who pleaded guilty received a sentence that fell within a handful of tightly defined clusters. We will not be drawn into a discussion of how much consistency, or inconsistency, must exist to support one view of the guilty plea process or another. Such a debate can have no resolution, and reality does not fit nicely into either/or categories. The data presented clearly suggest that the concessions model adherents must clarify their views and empirically support allegations of widespread manipulation and disparities. While such events undoubtedly occur in some cases, and may even characterize some systems, this Article suggests they are not inherent attributes of the guilty plea process.

More important than a debate over models is a discussion of some of the methodological and substantive insights yielded by this

analysis. On a methodological level the analysis here underscores the utility and importance of using measures of output to anchor and direct observations of processes which are difficult to quantify. Preconceptions can bias field observations; participant reports of their activities stress the unusual and downplay the routine. These factors undoubtedly account for the long-standing dominance of the concessions perspective in the study of courts, but the problems extend into a wide variety of other social and political settings. Linking the important features of a process to certain patterns of outcomes can yield insights into those processes. At the same time, if the analysis is done in a comparative setting, such an approach can be useful in sensitizing researchers to the contextual factors that affect the nature of the process and its outcomes.

On a substantive level our quantitative findings—when coupled with insights culled from a large body of qualitative data generated from hundreds of hours of field interviews and observations—indicate something about the high level of consistency, or order, revealed in our measures of charge changes and sentence clusters. Both the qualitative and the quantitative data suggest a system of bureaucratic justice. It is a justice premised not on strict adherence to due process ideals, or committed to the refined, individualized treatment of individuals; nor is it wedded to the swift and severe punishment of defendants based upon some conception of “just desserts.” Indeed, it is a justice not firmly committed to any consistent ideology, but rather one premised on strict adherence to a bureaucratic routine grounded in relatively pragmatic concerns.

That routine in a given county is the result of an adjustment to an amalgam of contextual and environmental factors.²⁵ Some common threads to these routines do exist across counties. They include the desire to create and project publicly an image of fidelity to the rule of law and the public trust, to minimize the uncertainty which accompanies the widespread use of exceptions and concessions, and to conserve the resources needed to treat every case as if it were unique. Because this order is not premised upon due process ideals, it is consistent with the existence of a trial tariff which punishes defendants who request “unreasonable” trials. At the same time, however, uniform treatment of plea cases is fairly consis-

²⁵ The factors include resource constraints, such as jail capacity and programmatic limitations, prosecutorial policies and practices, political expectations of the local community, longstanding court community traditions, and other factors which are beyond the scope of this discussion. For more information on these considerations see P. NARDULLI, R. FLEMMING, & J. EISENSTEIN, *supra* note 5, at chs. 5 & 9.

tent across various classes of defendants.²⁶ Indeed, because bureaucratic justice is not committed to refined, individualized treatment of offenders, it probably entails fewer disparities than many observers desire. Bureaucratic justice is equally frustrating to law and order proponents who would isolate potentially habitual offenders early in their careers and treat them as exceptions deserving of harsh treatment. Thus, from many ideological perspectives unequals may be treated equally to a greater degree than desired.

This image of bureaucratic justice suggests a guilty plea process in which discretionary actions are governed by fairly rigid adherence to informal norms and procedures designed to pigeonhole defendants into a few rough groupings with as few exceptions as possible. Exceptions require work, create uncertainty, and breed more exceptions. The order which prevails can be critiqued from a number of perspectives, but it does minimize the role of manipulation and disparity. While we may desire an order which goes beyond the mere muting of pernicious influences, more enlightened guidelines are not likely to emerge in the near future. Nor can we really expect more of our criminal courts at the present time. Several reasons mandate this conclusion.

First, the adversarial legal system is designed to produce principles of law and enunciation of rights only in contested matters; uncontested matters are the law's orphans. When differences in important questions of law and procedure emerge in contested matters they rise to the top of the legal system where they are debated, considered, and resolved by prominent, knowledgeable jurists and scholars. Eventually an informed, considered resolution to the question is formulated and the resolution is disseminated broadly. Uncontested matters are normally resolved within specific court communities in a manner that satisfies the affected parties, and/or with references to some accepted local practice or tradition. These issues and resolutions never enter the broader legal arena. Therefore, no process is activated that would lead to wide consideration or dissemination. This limits the amount and type of information that practitioners can use to guide and structure their actions.

Second, most of the issues arising in uncontested matters fall within the purview of the actors' discretion. This further militates against the establishment of highly specific, widely followed guidelines prescribing how discretion is to be exercised. The highly decentralized American system of criminal justice has evolved so that it vests important discretionary matters in the hands of officials who

²⁶ *Id.* at ch. 8.

are locally accountable. The fear of criminal prosecution as a tool of oppression wielded by some central authority has deep roots in American history. While such fear is perhaps less justified today, the system has facilitated the establishment of largely autonomous court communities operating within broadly defined guidelines that are permitted, even expected, to develop their own mores.

Finally, we cannot expect local courts to meet higher, more enlightened standards in the performance of discretionary tasks in uncontested matters, because their mission is so undefined and their technology is so uncertain that we have few concrete standards by which to measure the desirability of different approaches. If we knew what a just disposition was, or who was potentially a habitual offender, or how to rehabilitate defendants, or even if we wanted to rehabilitate them, then perhaps enlightened methods prescribing how to achieve those ends could be promulgated and implemented on a wide scale. Until these and other matters are resolved, we are not justified in demanding too much of criminal courts with respect to how they govern their discretionary decisions in uncontested matters. The most we can expect at the moment is that the criminal courts not exercise the power vested in them in an oppressive manner and that they apply established norms in a consistent manner.