The following is an edited version of a speech delivered on June 2 at the State University in Albany to the Research Coordination Network on Understanding Guilty Pleas.

I offer these comments as a lawyer and teacher who has practiced and thought about plea bargaining for more than 30 years. There was a day when I could run a regression analysis but that time is long gone.

I will convey my thoughts about plea bargaining by telling you three stories.

The first story dates to 1970, well before I began practicing law. That year, the U.S. Supreme Court decided Baldwin v. New York. Prior to Baldwin, under Section 40 of the New York Criminal Code, defendants charged with class A misdemeanants in New York City (that is to say, crimes for which the maximum term of imprisonment was one year) were tried either to one or three judges. Class A misdemeanants had no jury trial right. In Baldwin, the Supreme Court declared that Section 40 was unconstitutional: if the authorized sentence of imprisonment was more than six months, a defendant had a constitutional right to a jury trial.

As scholars, you may be asking yourself what happened in New York City after Baldwin? In 1971 the student authors of the Columbia Journal of Law and Social Problems asked themselves that question. To answer it, they compared data from the six months before Baldwin and the six months after Baldwin. Here is what they learned:

In the six months before Baldwin, 27.6 percent of non-dismissed cases were tried to either one judge or three judges, a defendant had his choice. Two to four cases could be tried a day. By comparison, in the six months after Baldwin, the trial rate fell to 16.3 percent, and the vast majority of those trials were still non-jury. Most defendants who went to trial waived their new right to a jury trial. Indeed in the six months after Baldwin only 63 cases (2.5 percent of the non-dismissed cases) were tried to a jury. The average jury trial took between 2½ and 3 days to complete.

What occurred after Baldwin was more plea bargaining. Sentences for those who pleaded guilty were reduced to make pleading guilty more attractive. In the six months prior to Baldwin, 25 percent of sentenced offenders received less than 60 days; in the six months after Baldwin, the number increased to 41 percent. Sentences of more than 60 days were reduced in proportion.

That is my first story, and I will return later to its implications.

My second story involves the Rockefeller drug laws. Here is a gaining story.

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What happened after Baldwin was even more plea bargaining. The first story involves the Rockefeller drug laws, which, as everyone knows, were exceedingly harsh as written. The punishment for selling two ounces of heroin or cocaine was a minimum of 15 years’ to life imprisonment. That meant a minimum of 15 years before the defendant was eligible for parole.

But what happened in practice? In practice, unless you were a drug kingpin or a recidivist, you were offered a plea bargain typically to 2 to 6 years’ imprisonment, sometimes 1 to 3 years, and, if there were mitigating circumstances (such as the offender’s young age) probation. If you were sentenced to 2 to 6 years, you were likely to be eligible for shock incarceration (New York’s boot camp program) and released in 10 months.

So there it is: go to trial and lose, and you receive at least 15 years; plea bargain and, factoring in shock, you receive no more than one year. I tell my students that under the Rockefeller drug laws, the second most serious crime one could commit was selling drugs. The first was going to trial.

Take the case of Angela Thompson, who in 1989 at age 17 was arrested for selling 2.34 ounces of cocaine to an undercover officer in Harlem. Angela opted for trial and was convicted and sentenced to 15 years to life imprisonment, the minimum term. The New York Court of Appeals upheld that sentence, one that the trial judge said had “brought [her] to literally tears,” over a challenge that it constituted cruel and unusual punishment. What was cruel but not unusual was that the plea offer to Angela was three years’ imprisonment.

In 1997, in his first year in office, Governor George Pataki granted Angela clemency. New York’s experience under the Rockefeller drug laws is my second plea bargaining story.

My third story involves my time as chief of the Criminal Division in the Southern District U.S. Attorney’s Office. My first stint at that office was in the early 1980s. We did very little charge bargaining or sentencing bargaining. What we did might be called judge bargaining. If you agreed to plead guilty, you could, within limits, choose the judge who would sentence you. And, the difference in judges, and their sentencing philosophies, mattered.

In the late 1990s, I returned to the U.S. Attorney’s Office as a senior supervisor. The sentencing guidelines were now in effect, and my third story comes from that era. It involves three defendants who accepted bribes to permit customers to dump debris for free at the city’s landfill on Staten Island. Under the sentencing guidelines, the key variable was the loss of revenue to the city, and, because the three defendants had schemed together, each defendant
was responsible for the losses that occurred, not only on his watch, but on his co-defendants’ as well.

That is to say, lost revenue equaled the number of trucks that the three defendants had permitted to dump for free (which we could estimate) times the fee that should have been paid per truck. If you did the math, the resultant sentence was 10 years’ imprisonment.

Not surprisingly, defense counsel came to see me seeking leniency. Their clients, they correctly noted, were low-level city workers—gate keepers—each of whom had made no more than $100,000 on the scheme. Ten years seemed too harsh. I agreed and announced that we would hold each defendant responsible only for the losses that occurred when he was on duty. We would close our eyes to their conspiratorial agreement. To use the language of the guidelines, the relevant conduct would be each defendant’s own conduct.

Weeks later, the defense lawyers returned. They had recalculated the guidelines, and the sentence was now four years. Four years, they argued, was still too harsh. I was again sympathetic, and announced that I had ignored one salient fact. Had the customers been required to pay full freight, they may well have dumped fewer loads; they may have disposed of their debris elsewhere. Demand curves, after all, slope downward.

The defense counsel were pleased with my insight, but perplexed. How could one estimate how many fewer truck-loads would have been dumped had the customers been required to pay the full price? What one needed to know, I pointed out, was the elasticity of demand, and I happened to know it. The elasticity of demand was whatever it took to get to a two-year sentence. Defense counsel thought that was fair, and our plea bargaining ended.

I will talk more later about the implications of my third story, but this much should be clear: the world I returned to in the 1990s, unlike the one I left in the 1980s, was one in which prosecutors, through fact bargaining, did much of the sentencing.

Which brings me to the implications of my three stories. There are two. First, one of the reasons we plea bargain so many cases is that our procedures for trying cases have become so complex. If the Warren Court set out to create the best criminal justice system, but it forgot that the best can be the enemy of the good.

This point was made many years ago in a brilliant article by John Langbein, a legal historian who now teaches at Yale Law School. The article is entitled “Torture and Plea Bargaining.” Let me summarize it briefly. Langbein first asked why torture was a routine feature of criminal procedure in medieval Europe. The answer, he concluded, could be found in rules of proof that required either the testimony of two eyewitnesses or a confession to convict an accused. Circumstantial evidence, no matter how strong, would not do. Here is how Langbein describes what occurred:

The Europeans learned in due course [that] [t]hey had constructed a system of proof that could as a practical matter be effective only in cases involving overt crime or repentant criminals. Because society cannot long tolerate [such] a legal system, ... something had to be done. ... The two-eyewitness rule was hard to compromise or evade, but the confession rule seemed to invite the subterfuge that in fact resulted....

Having set the level of proof too high, the Europeans resorted to torture—judicially supervised torture—to extract confessions and achieve tolerable results.

What does this account of medieval torture have to do with modern plea bargaining? Langbein’s thesis is that jury trials have become so complicated and time consuming that they are unworkable as a routine dispositive procedure. Having set an unrealistic level of safeguard, we, too, have come to resort to coercion to make the system work. Permit me to read from Langbein once more:

To be sure, our means are much politer; we use no rack, no thumb-screw, no Spanish boot to mash his legs. But like the Europeans of distant centuries ... we make it terribly costly for an accused to claim his right to the constitutional safeguard of trial. We threaten him with a materially increased sanction if he avails himself of his right and is thereafter convicted. ... There is, of course, a difference between having your limbs crushed if you refuse to confess, or suffering some extra years of imprisonment if you refuse to confess, but the difference is of degree, not kind. Plea bargaining, like torture, is coercive.

This portrait may be overdrawn, but Langbein’s fundamental point is not: if procedural rules are too exacting, ways will be found to circumvent them.

The second implication of my three stories is that plea bargaining now dominates our criminal justice system because the ability of prosecutors to coerce guilty pleas has increased so dramatically.

The literature talks of Plea Bargaining in the Shadow of Trials—the notion is that plea bargaining is merely bargaining about the odds of winning (or losing) at trial. But we have armed prosecutors with tools—Rockefeller drug laws, three-strikes-and-you’re-out provisions, mandatory minimums that are mandatory only if prosecutors choose to invoke them—that have made the shadows disappear. Now only the brave or fool-hardy go to trial. The “trial penalty” in this country has grown. No criminal law practitioner would tell you differently.

All of this matters because trials (a good number of trials) are essential to the health of our criminal justice system. Trials reduce the power of prosecutors by sharing it with judges and jurors. Trials keep police officers honest by exposing their conduct to scrutiny. Trials discourage perjury and the risk of mistaken identifications and thereby protect the innocent. And trials allow the public to see that justice is done. The comedian Lenny Bruce, who was no stranger to the criminal justice system, once quipped that in the halls of justice, justice is done in the halls. He meant that as a condemnation.

I mentioned earlier about the law review article written in the aftermath of Baldwin v. New York. It is an important study because it looks at the effect of a significant change in criminal procedure on the trial rate. But, in a profound way, it misses the point. It concludes that Baldwin “resulted in only a negligible additional burden on the criminal court system” in New York City—that “[c]ontrary to the prognostications of impending inundation,” the system adjusted. Indeed “only a relatively miniscule number of defendants ... fully avail[ed] themselves of the [trial] right.”

But that should not be a cause for celebration. The system will always adjust. Make the trial process more time-consuming and the trial penalty (or, if you prefer, the plea bargain discount) will increase. Life will go on. There will just be fewer trials.

One last word: if I am correct that we need trials to have a healthy criminal justice system, then it is critical to ask: are there jurisdictions in which significantly more cases are tried than our tragically low national average? And if so, why? Are procedures there more streamlined? Do prosecutors have less ability to coerce bargains? Are defendants less risk averse? Do prosecutors have different norms?

Almost 20 years ago in the Journal of Criminal Law and Criminology, Douglas Smith wrote that “plea bargaining ... vari[es] substantially across different jurisdictions, and we need to know more about factors which may contribute to this inter-jurisdictional variation.”

That observation remains true today.

Paul Shechtman is a partner at Zuckerman Spaeder.