

**WOULD CAIN PLEAD GUILTY
TO THE MURDER OF ABEL?
ON THE HISTORICAL TRANSFORMATION
OF THE ENGLISH
AND AMERICAN TRIAL MODEL
AS A SOURCE OF PLEA BARGAINING**

ANDRZEJ LEWNA*

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ABSTRACT

The article presents a historical-legal analysis of the evolution of the Anglo-Welsh and American criminal process in the context of those elements of both models that determined that it was the common law legal culture that developed the phenomenon of plea bargaining. The results of British research are presented, showing that the shape of the criminal procedure of England and Wales, as late as the turn of the eighteenth and nineteenth centuries, differed significantly from the now-familiar purely adversarial model, characterised by the high involvement of professional representatives of the parties, the inactivity of the defendant and the passivity of the court in the course of the trial. As pointed out, it was the adversarial transformation of English procedure observed in particular since the early nineteenth century, affecting the decline in the previous effectiveness of the jury trial, that led to the development of plea bargaining. The different origins of consensual procedural institutions in the United States of America, as compared with the system of England and Wales, are also discussed.

Keywords: consensualism, adversarialism, plea bargaining, criminal trial

* MA, LL.M., Department of Criminal Law and Criminology, Faculty of Law and Administration, University of Gdańsk (Poland), e-mail: andrzej.lewna@ug.edu.pl, ORCID: 0000-0003-0757-4894



INTRODUCTORY REMARKS

The historical origins of consensual modes of settling criminal cases can be traced to the institution of negotiation concerning the defendant's confession – plea bargaining – developed in the legal systems of Anglo-Saxon countries. This phenomenon is defined in the literature on the subject as an exchange of mutual concessions between the accused and the criminal justice authorities, in which the accused is offered certain concessions regarding their criminal responsibility in exchange for a confession of guilt, and these concessions may relate, in particular, to the type and level of punishment imposed by the court or requested by the prosecutor, the legal classification of the alleged act, or other circumstances relevant to the course of the proceedings.¹ Although in today's practice of the administration of justice in a number of common law jurisdictions the dominance of negotiations understood in this way as the primary tool for resolving the vast majority of criminal cases is clearly evident,² identifying the historical and social conditions underlying the widespread acceptance of consensualism within this category of legal systems remains a subject of discussion in legal scholarship. Indeed, the extent to which plea bargaining came to prevail in the American criminal process at one time prompted one of the leading early scholars of the phenomenon, D.J. Newman, to express the highly illustrative opinion that inspired the title of this study, and which is worth quoting here in full:

'Plea agreements are not new; in all probability such bargaining has gone on as long as there have been criminal courts. (...) It wouldn't surprise many knowledgeable court observers to learn that Cain had pleaded to a lesser charge after having murdered Abel.'³

The view pointing to the inextricable link between the phenomenon of negotiated settlements and the evolution of the American justice system from its very beginnings has also been reflected in the case law there, best exemplified by the opinion of Judge C. Clark, expressed in the decision of the United States Court of Appeals for the Fifth Circuit of 4 April 1974 in *Bryan v. United States*, which pointed out: 'Plea bargains have accompanied the entire history of this nation's criminal jurisprudence. For most of this journey they have been unseen, if not secreted (...)'⁴ In fact, however, an analysis regarding the results of scientific research into the history of the transformation of the English and American criminal process leads to conclusions significantly different from the popular beliefs cited above, as in the two jurisdictions under consideration here it is possible to observe signs of the rapid development of plea bargaining no earlier than the second half of the nineteenth century.⁵

¹ A.W. Alschuler, 'Plea Bargaining and its History', *Columbia Law Review*, 1979, Vol. 79, No. 1, p. 3. See also G.N. Herman, *Plea Bargaining*, New York, 2012, p. 1.

² A. Ashworth, M. Redmayne, *The Criminal Process*, Oxford–New York, 2010, pp. 293–295.

³ See D.J. Newman, 'Reshape the Deal', *Trial*, 1973, Vol. 9, No. 3, p. 11, quoted in A.W. Alschuler, 'Plea Bargaining and...', op. cit., p. 2.

⁴ See *Bryan v. United States*, 492 F.2d 775, 780 (5th Cir. 1974).

⁵ L.M. Friedman, 'Plea Bargaining in Historical Perspective', *Law & Society Review*, 1979, Vol. 13, No. 2, pp. 256–258.

The purpose of this paper is to present the historical-legal evolution of the Anglo-Welsh and American process in the context of those elements of both models that led common law legal culture to develop the phenomenon of plea bargaining. With such a stated goal in mind, the following sections of the paper will first present the results of a number of British studies indicating that the origins of the practice of plea bargaining in this jurisdiction can be traced back to changes in the Anglo-Welsh process dating back to the eighteenth century, which contributed to the decline in the earlier effectiveness of the jury. The third part of the paper will synthesise the different (compared to the system of England and Wales) origins of plea bargaining in the United States of America. The final, fourth part of the paper will be devoted to those special structural features of the trial in the indicated common law jurisdictions which, while distinguishing these trial models from the inquisitorial systems of continental Europe, at the same time predisposed them to the development of elaborate consensual instruments.

THE EVOLUTION OF SETTLEMENT NEGOTIATION IN THE ANGLO-WELSH SYSTEM

Referring to the research problem cited above, J.H. Langbein points out that the fundamental reason for the development of the practice of plea bargaining in common law systems seems to be related to the profound changes observed from the turn of the eighteenth and nineteenth centuries in the Anglo-American model of criminal trial, affecting the decline in the earlier effectiveness of the jury-based procedure.⁶ The cited author points out that analysis of sources dating back to the first half of the eighteenth century in England and Wales allows the conclusion that the British criminal trial of that time was characterised by speed and procedural efficiency, which in later periods proved unattainable without the use of consensual constructions. The efficiency of jury trials is illustrated extremely clearly by materials concerning the practice of the Central Criminal Court in London (*Old Bailey*), according to which, in the realities of the criminal courts of the English capital during the period under consideration, panels of jurors were capable of hearing from start to finish as many as a dozen to twenty felony cases in a single day's session.⁷ Provincial Courts of Assize operated with similar efficiency.⁸

The efficiency of criminal procedure thus described was due, as the literature indicates, to several factors. The first, and apparently the most significant, was the limited involvement of professional representatives of the parties in the course of the proceedings. With the exception of a handful of cases concerning crimes of treason (for which the possibility for the accused to exercise the right to representation was

⁶ J.H. Langbein, 'Understanding the Short History of Plea Bargaining', *Law & Society Review*, 1979, Vol. 13, p. 262.

⁷ J.H. Langbein, 'The Criminal Trial Before the Lawyers', *The University of Chicago Law Review*, 1978, Vol. 45, No. 2, pp. 277-284.

⁸ J.M. Beattie, 'Crime and the Courts in Surrey: 1736-1753', in: Cockburn J.S. (ed.), *Crime in England, 1550-1800*, Princeton, 1977, p. 165.

already regulated by the Treason Trials Act 1696),⁹ the accused appeared in proceedings concerning more serious offences (felonies) without defence counsel. The prosecution was formally allowed to appoint an attorney, but in practice in cases of common crimes this happened extremely rarely.¹⁰ The procedural role attributed to the public prosecutor in the later period was in the vast majority of cases carried out in person by the victim or another prosecution witness (the complainant), sometimes with only limited legal assistance in this regard, most often by a constable or magistrate.¹¹ The moderate degree of professionalisation of the trial consequently eliminated a number of potentially time-consuming and costly elements from the process, among which the procedures for the exclusion of individual juror candidates at the request of the parties (according to contemporary terms: challenges to jurors and jurors asked to stand by) seem to be particularly important.¹² In the period preceding the transformation of the English procedural model of the nineteenth century, the power to demand the exclusion of a juror from hearing a case, although formally vested in the parties, in reality remained a dead institution. Langbein, cited earlier, analysing the surviving sources on the practice of criminal justice at London's *Old Bailey* in the first half of the eighteenth century, even points out that the same panels of a dozen or so jurors were often called upon to hear a whole series of cases over the course of several days of court sessions, giving rise to the peculiar practice of delivering verdicts either immediately after the close of a given trial, without going to deliberation (at the bench), or *en bloc* for a whole group of cases at the end of the day's session.¹³

Another element pointed out in the English literature which influenced the remarkable, – from the perspective of later times – efficiency of the trial by jury until the end of the eighteenth century was the active role of the accused himself in the course of the proceedings. If one takes into account the circumstance that the accused is, in most cases, the person on trial, whose testimony is often the most relevant source of information for establishing the facts of the case, the procedural conditions forcing this subject to adopt a posture of involvement in the evidentiary proceedings significantly increased the speed and improved the efficiency of fact-finding. During the nineteenth century, when the evolution of the British procedural model towards expanding its adversarial nature led to the formulation of the principle of privilege against self-incrimination in a form similar to the modern one, the exercise of the defendant's right to remain silent and his reliance on the assistance of professional representation gradually became an important way of implementing the defence strategy in practice.¹⁴ However, in the period before defence attorneys were allowed to actively participate in the trial, adopting such an attitude was, while theoretically possible, of little practical utility: the accused was effectively the

⁹ Treason Trials Act 1696, 7 & 8 Wil. 3, c. 3 (1696).

¹⁰ J.M. Beattie, 'Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries', *Law and History Review*, 1991, Vol. 9, No. 2, p. 221.

¹¹ J.H. Langbein, 'Understanding the Short History...', *op. cit.*, p. 263.

¹² J. Sprack, *A Practical Approach to Criminal Procedure*, Oxford, 2008, pp. 296–300.

¹³ J.H. Langbein, 'The Criminal Trial Before...', *op. cit.*, pp. 279–280; See also J.M. Beattie, 'Crime and the Courts...', *op. cit.*, p. 174.

¹⁴ D. Lemmings, 'Criminal Trial Procedure in Eighteenth-Century England: The Impact of Lawyers', *The Journal of Legal History*, 2005, Vol. 26, No. 1, p. 75.

only participant in the proceedings capable of countering the prosecution's claims by testifying and presenting his own evidence.¹⁵ In addition, as already pointed out by C.T. McCormick, the unambiguous formulation under the precedent law of England and Wales of the rules governing the distribution of the burden of proof in criminal proceedings and the standard of proof beyond reasonable doubt actually occurred no earlier than the last decade of the eighteenth century.¹⁶ Thus, although in the sources from the earlier period it is possible to see traces of the gradual evolution of jurisprudence towards the formation of the principle of *in dubio pro reo*, the lack of precision in this regard was certainly another element of pressure on the accused, forcing him to take an active part in the evidentiary proceedings.¹⁷ Writing in the context under discussion about the eighteenth-century practice of the criminal courts of the English county of Surrey, J.M. Beattie pointed out:

'If any assumption was made in court about the prisoner himself, it was not that he was innocent until the case against him was proved beyond a reasonable doubt, but that if he was innocent he ought to be able to demonstrate it for the jury by the quality and character of his reply to the prosecutor's evidence. That put emphasis on the prisoner's active role. He was very much in the position of having to prove that the prosecutor was mistaken'.¹⁸

It seems legitimate to conclude that the way in which the aforementioned elements of the British procedural model were shaped, structurally oriented towards the use of the defendant's deposition as the primary source of evidence, significantly contributed to increasing the efficiency of the criminal justice system based on the jury trial procedure, thereby eliminating the need for legal practice to seek alternative solutions, which were to become plea agreements in the future.

When analysing the Anglo-Welsh model of criminal procedure in the historical period preceding the evolution of plea bargaining, it is also necessary to mention the proactive position of the court in the course of the trial, which differed from its current form. For, as indicated in the literature on the subject, as late as the early nineteenth century British criminal justice practice differed significantly from the clear-cut separation of the procedural functions of the court and the jury which is characteristic of later times in common law countries, where the role of the latter is to decide on the basis of the evidence by issuing a verdict on guilt, while the role of the court is reduced to directing the course of the proceedings, deciding on questions of law and on matters of punishment (sentencing).¹⁹ During the period under

¹⁵ J.H. Langbein, 'The Historical Origins of the Privilege Against Self-Incrimination at Common Law', *Michigan Law Review*, 1994, Vol. 92, No. 5, pp. 1048–1049; regarding the absence in the Anglo-Saxon procedural model of a separate means of evidence in the form of an accused's explanation and the procedural position of the accused stepping into the role of a defence witness, see also H. Kuczyńska, *Analiza porównawcza modelu rozprawy głównej. Między kontradiktoryjnością a inkwizycyjnością*, Warszawa, 2022, pp. 297–302.

¹⁶ C.T. McCormick, *Handbook of the Law of Evidence*, St. Paul, 1972, p. 799.

¹⁷ J.H. Langbein, 'The Historical Origins...', op. cit., p. 1056.

¹⁸ See J.M. Beattie, *Crime and the Courts in England, 1660–1800*, Princeton, 1986, p. 341, quoted in J.H. Langbein, 'The Historical Origins...', op. cit., p. 1057.

¹⁹ J. Sprack, 'A Practical Approach...', op. cit., p. 11; see also K. Girdwoyń, 'Angielski proces karny', in: Hofmański P., Kruszyński P. (eds), *System prawa karnego procesowego. Proces karny –*

consideration here, the court had broad powers enabling it to intervene actively in the evidentiary proceedings at trial, including the right actively to cross-examine prosecution and defence witnesses; moreover, extant sources also indicate the widespread practice among judges of directly communicating to members of the jury their own observations on the evaluation of particular evidence and their recommendations for a verdict.²⁰ Thus, despite the principle of jurors' decision-making autonomy, formally protected by the law of precedent since the second half of the 17th century,²¹ in reality it was the court that remained the dominant body in evidentiary matters, which weakened the position of the parties and prevented the development of consensual mechanisms.

Modern English criminal trial is characterised by a high degree of complexity in the formal rules of evidence, which determine the categories of evidence that cannot be introduced at trial, and therefore significantly limit the possibility of establishing the material truth in the proceedings. As indicated in the literature, the rules in question which exclude the use of certain evidence can be divided into three main groups.²² The first concerns evidence that was obtained illegally or the use of which in the proceedings would make the trial unreliable (sec. 78(1) Police and Criminal Evidence Act 1984).²³ The second group of exclusionary rules restricts the possibility of indirect evidence at trial, including in particular so-called hearsay evidence, that is, evidence from a witness other than that given to the court in a given proceeding. The third, on the other hand, refers to evidence of circumstances related to the defendant's character, in particular concerning the history of criminal behaviour on his part (evidence of bad character).²⁴ Under the conditions of the adversarial model of proceedings involving a jury or lay magistrates, the existence of the above-mentioned formal rules of evidence is recognised by English criminal procedural doctrine as an important safeguard, serving to rationalise the decisions of non-professional actors and to protect the rights of the accused.²⁵ However, in the context of the conditions underlying the development of the practice of procedural agreements in common law systems, it is important to note the circumstance that the entrenchment of those evidentiary limitations within the framework of

rozwiązania modelowe w ujęciu prawnoporównawczym, Vol. II, Warszawa, 2014, pp. 721–722; see also H. Kuczyńska, 'Sąd "jednolity" i sąd "podzielony". Rola ławy przysięgłych w świetle prawa porównawczego', in: Szumiło-Kulczycka D. (ed.), *W pogoni za rzetelnym procesem karnym. Księga dedykowana Profesorowi Stanisławowi Waltosowi*, Warszawa, 2022, pp. 276–279.

²⁰ J.H. Langbein, 'Understanding the Short History...', op. cit., p. 264.

²¹ As to the historical context for the formulation of this principle, see S. Stern, 'Between Local Knowledge and National Politics: Debating Rationales for Jury Nullification After Bushell's Case', *Yale Law Journal*, 2002, Vol. 111, No. 7.

²² J.R. Spencer, 'The English System', in: Delmas-Marty M., Spencer J.R. (eds), *European Criminal Procedures*, Cambridge–New York, 2005, p. 162.

²³ Police and Criminal Evidence Act 1984, UK Public General Acts 1984 c. 60.

²⁴ However, see the exceptions set out in sec. 101–108 *Criminal Justice Act 2003*, c. 44; see also in more detail: H. Kuczyńska, 'Model reguł dopuszczalności dowodów w państwach anglosaskich na przykładzie Wielkiej Brytanii', in: Olszewski R., Świecki D., Kasiński J., Misztal P., Rydz-Sybilak K., Małolepszy A. (eds), *Artes serviunt vitae sapientia imperat. Proces karny sensu largo: rzeczywistość i wyzwania. Księga jubileuszowa Profesora Tomasza Grzegorzycyka z okazji 70. urodzin*, Warszawa–Łódź, 2019, pp. 630–635.

²⁵ H. Kuczyńska, *Analiza porównawcza modelu...*, op. cit., pp. 408–409.

the British model of criminal procedure is itself a product of historical evolution, having its origins in transformations of the process that began gradually only in the late eighteenth century and continued throughout the nineteenth century.²⁶ In the earlier period, the court's aforementioned strong evidentiary position, coupled with the limited involvement of professional lawyers in the proceedings, actually led to the development of a mechanism separate from the system of evidentiary prohibitions, for reviewing jury decisions based on the judge's authoritative directions. A study of materials from English trials of the mid-eighteenth century reveals the relatively extensive use of hearsay evidence in these proceedings; the introduction into the trial of evidence classified according to contemporary concepts as evidence of bad character also does not seem to have raised significant doubts about its admissibility.²⁷ Given the circumstance that in current Anglo-American procedural practice it is the restrictions on the admissibility of evidence that, from the perspective of the prosecution, provide a significant incentive to negotiate with the defence on the terms of voluntary surrender, the development of the system of formal rules of evidence in question can be linked to the development of criminal procedural agreements.

The indicated characteristics of the British criminal process from the period before its adversarial transformation consequently led to a situation in which the question of guilt in a relatively small proportion of cases became the subject of genuine contestation on the part of the accused. In most cases, arraignment typically followed the offender being caught in the act of committing a crime or a situation in which, for other reasons, the accused did not have a credible line of defence. To the extent that the criminal trial performed a function in such cases that went beyond formalising the inevitable attribution of criminal responsibility, this function was primarily manifested in the sphere of deciding on the amount of punishment to be imposed.²⁸ In conditions in which the criminal justice system was not burdened with significant costs associated with the duration of proceedings, as well as the focus of the trial in its essential part on the sentencing aspect, there was, in turn, no significant pressure to develop mechanisms through which the participants could communicate and reach agreed resolutions.

The situation began to change with the introduction into the British procedural model of solutions allowing broader participation of defence counsel in the trial than before, which, however, as indicated in the literature on the subject, was the result of gradual and long-lasting changes. Disregarding the admission of professional representation of the accused in cases of crimes of high treason mentioned in the preceding paragraphs of this section, the participation of defence counsel in cases

²⁶ R.N. Jonakait, 'The Origins of the Confrontation Clause: An Alternative History', *Rutgers Law Journal*, 1995, Vol. 27, No. 1, pp. 87–90; see also T.P. Gallanis, 'The Rise of Modern Evidence Law', *Iowa Law Review*, 1999, Vol. 84, pp. 532–538.

²⁷ J.H. Langbein, 'The Criminal Trial Before...', op. cit., pp. 301–306; see also: R.N. Jonakait, 'The Origins of the Confrontation...', op. cit., p. 90.

²⁸ R.N. Jonakait, 'The Rise of the American Adversary System: America before England', *Widener Law Review*, 2009, Vol. 14, No. 2, p. 325; see also J.H. Langbein, *The Origins of Adversary Criminal Trial*, Oxford–New York, 2003, p. 59.

of other categories of crimes first appeared in English procedure around the 1830s, not so much through statutory regulation as through trial practice.²⁹ In this regard, it should be emphasised that originally the powers of defence counsel were limited to participation in the examination and cross-examination of prosecution and defence witnesses, while not including the right to present to the jury or the court submissions on the outcome of the proceedings. In view of the above, the actual exercise of the defendant's right to formal defence remained a relatively rare phenomenon until the late 1780s, when it began to become more widespread, ultimately providing the impetus for legislative changes introduced by the Prisoners' Counsel Act 1836.³⁰ This Act was the first in the criminal procedural system of England and Wales explicitly to allow the use of defence counsel in all categories of cases and abolished previous restrictions on procedural actions taken by professional representatives, thus undeniably representing a milestone in the evolution of the British process towards the adoption of a fully adversarial structure.³¹ As noted in this context in English criminal procedural law academia, the indicated transformations consequently led to the gradual dominance of professional representatives of the parties in the adjudicative phase of the trial, while also bringing about a fundamental change in the overall paradigm of criminal procedure. The earlier model of trial, the central element of which was to provide the accused himself with the opportunity to respond to the accusation formulated against him by presenting his position and actively participating in the evidentiary proceedings (this model was at one time vividly described by Langbein as an 'accused speaks' trial), was replaced by a model based on a different axiological basis, in which the purpose of the trial is, in the first place, to subject the prosecution's case to verification by the defence (to use the wording of the aforementioned author – 'testing the prosecution' trial).³² This evolution has been accompanied by a number of transformations concerning the more detailed aspects of the proceedings, among which the most significant seem to be the reduction of the activity of the trial court, a significant increase in the formalism of the evidentiary proceedings at trial, the introduction of strict regulations concerning evidentiary prohibitions (rules of evidence), which are a product of the increased involvement of the parties in challenging the admissibility of certain categories of evidence, and, finally, the transfer of the centre of gravity of the judicial proceedings from the stage of deciding punishment to the stage of deciding the guilt of the accused. As a result, the English–Welsh procedure, based on the institution of the jury, gradually lost its previous qualities of speed and efficiency, paving the way for the development of instruments aimed at improving procedural economy, most notably the phenomenon of plea bargaining.

²⁹ J.H. Langbein, 'The Historical Origins...', op. cit., p. 1068; see also A. Watson, *Speaking in Court: Developments in Court Advocacy from the Seventeenth to the Twenty-First Century*, Sheffield, 2019, pp. 54–63.

³⁰ Prisoners' Counsel Act 1836, 6 & 7 Will. 4, c.14 (1836).

³¹ C.C. Griffiths, 'The Prisoners' Counsel Act 1836: Doctrine, Advocacy and the Criminal Trial', *Law, Crime and History*, 2014, No. 2, article number 3; see also A. Watson, 'Speaking in Court...', op. cit., pp. 64–69.

³² J.H. Langbein, 'The Historical Origins...', op. cit., pp. 1048–1049.

EVOLUTION OF SETTLEMENT NEGOTIATIONS IN THE US SYSTEM

In contrast to the criminal procedural system of England and Wales, the solutions adopted in the field of criminal procedure in the United States of America were characterised by the adaptation of the adversarial model from the very beginnings of American statehood, thus preceding the legal evolution of the former colonial metropolis in this respect by at least several decades. As R.N. Jonakait notes, the right to the assistance of counsel (which constitutes the structural basis for the development of the trial model in question) found normative expression not only in the content of the Sixth Amendment to the United States Constitution, but also earlier, in the period of the enactment of the Declaration of Independence, in the texts of the state constitutions of twelve of the thirteen founding states of the Union.³³ What seems equally important in the context of the systemic underpinnings of the practice of plea bargaining, is that the US trial model in its early form was already characterised by another innovation in relation to the British system from which it derived, namely the development of an institutionalised public prosecution. For, as indicated in the preceding passages of this paper, while in the Anglo-Welsh process as late as the turn of the eighteenth century the prosecution function was still primarily carried out by the victim himself, in the United States separate prosecutorial offices existed in all parts of the country as early as the War of Independence.³⁴

Thus, it seems legitimate to conclude that the structural characteristics of American criminal procedure to some extent predisposed the criminal justice system there to the relatively early development of the practice of procedural agreements. What is noteworthy, however, is that the study of available historical sources does not provide a basis for observing the development of the mechanisms in question on a broader scale until the second half of the nineteenth century. As pointed out in this context by A.W. Alschuler, the hypothesis that the practice in question was prevalent in the American system of criminal procedure from the very beginning of its functioning is contradicted by the surviving historical data on the structure of pleas – that is, the statements of defendants admitting or contesting responsibility for the alleged crime. The cited author, conducting in this regard a comparative analysis of a number of studies of judicial practice in the states of Massachusetts and New York from the first half of the nineteenth century, found that during the period in question in the jurisdictions concerned the percentage of criminal proceedings concluded by way of admissions of guilt by the accused was relatively small compared to later times, accounting annually for approximately a dozen to 25% of all cases resolved by conviction.³⁵ Also, M.E. Vogel's study of archival materials concerning the practice of the Boston Police Court from 1830–1860 indicates the relatively limited prevalence of guilty pleas at the beginning of the analysed period, but with a steady upward trend in subsequent decades. By way of illustration, it can be pointed out that while out of the 1,855 cases of the said court considered by

³³ R.N. Jonakait, 'The Origins of the Confrontation...', *op. cit.*, p. 94.

³⁴ R.N. Jonakait, 'The Rise of the American...', *op. cit.*, p. 328.

³⁵ A.W. Alschuler, 'Plea Bargaining and...', *op. cit.*, p. 10 and literature cited therein.

the author from 1830 only 10.2% ended with the defendant's declaration of guilt, by 1840 this share had already reached 16.8% of the total number of cases, and in 1850 it reached 33%, increasing further in the following years.³⁶

American literature also draws attention to the widespread reluctance on the part of the courts to accept guilty pleas entered at trial as late as the first half of the nineteenth century, even noting in this regard the practice of actively encouraging defendants to make use of their right to counsel and the presumption of innocence by filing pleas of not guilty.³⁷ This situation began to change gradually in the period following the end of the Civil War in the United States, when the criminal justice system there gradually became increasingly dependent on the growing number of guilty pleas, and court practice began to diverge sharply from the constitutionally guaranteed model of trial by jury.³⁸ The development of plea bargaining, in an earlier period remaining invisible to the general public as the domain of professional actors in criminal proceedings, was first clearly recognised by studies of judicial practice conducted in a number of local municipal and state jurisdictions over the course of the 1920s, already showing the unequivocal dominance of convictions based on guilty pleas, and the accompanying practice of negotiated settlements between the parties to the proceedings – a finding vividly summarised at one time by R. Moley in the statement that: 'The public has learned how much the spirit of bidding has come to dominate the justice process.'³⁹ However, despite the initially declaratively critical attitude of both the doctrine and the administration of justice to the phenomenon in question, the practice of extensive use of procedural agreements in the US system not only persisted in the following decades of the 20th century, but became entrenched. Thus, wishing to synthesise the reasons underlying the dominance of plea bargaining in the American criminal process, the following should be pointed out:

1. The development of substantive criminal law associated with the progressive criminalisation of new categories of behaviour, not always met with widespread public support (an example of which, indicated in the literature as a factor influencing the significant development of the phenomenon of criminal procedural agreements in the United States of America, was the introduction of Prohibition in this country in 1919–1933).⁴⁰
2. Related to the increasing criminalisation, the growth of the institutional structures of law enforcement and the prosecution service, combined with their professionalisation, which led to the development of case selection mechanisms,

³⁶ M.E. Vogel, *Coercion to Compromise. Plea Bargaining, the Courts and the Making of Political Authority*, Oxford–New York, 2007, pp. 96–97.

³⁷ A.W. Alschuler, 'Plea Bargaining and...', op. cit., p. 5.

³⁸ G. Fisher, *Plea Bargaining's Triumph. A History of Plea Bargaining in America*, Stanford, 2003, pp. 6–8.

³⁹ 'The public learned how much the spirit of an auction had come to dominate the process of justice'; see R. Moley, 'The Vanishing Jury', *Southern California Law Review*, 1928, Vol. 2, No. 2, p. 114.

⁴⁰ M.M. Feeley, 'Perspectives on Plea Bargaining', *Law & Society Review*, 1979, Vol. 13, No. 2, p. 201; see also J.F. Padgett, 'Plea Bargaining and Prohibition in the Federal Courts, 1908–1934', *Law & Society Review*, 1990, Vol. 24, No. 2.

as a result of which an ever smaller percentage of proceedings were conducted through a full jury trial.⁴¹

3. The gradual increase in the formalism of the trial, particularly evidentiary proceedings, resulting in an increase in operating cost of the justice system and the emergence of the problem of excessive length of traditional trial proceedings.⁴²
4. The development of the system of constitutional procedural safeguards for the accused, particularly during the period of the United States Supreme Court under Justice E. Warren, resulting in the strengthening of the defence's procedural position and the imposition of additional duties on law enforcement in the pre-trial phase.⁴³

SPECIAL CHARACTERISTICS OF CRIMINAL PROCEDURAL SYSTEMS OF COMMON LAW COUNTRIES AS A DECISIVE ELEMENT IN THE DEVELOPMENT OF PLEA BARGAINING

Finally, it is appropriate to address briefly the question of why the essential response of the legal systems of common law countries to the evolutionary changes in the criminal justice system outlined in the preceding sections of this chapter took the form of criminal procedural agreements. This is because there is no doubt that the vast majority of the phenomena discussed here – from the professionalisation of the process, through the growth of criminalisation and the expansion of the structures of law enforcement, to the development of the system of procedural guarantees – are universal phenomena which, in a similar historical period, can also be observed within the systems of continental Europe, but which did not lead there to such a significant dominance of consensual instruments in criminal proceedings. What, then, were the peculiarities of the Anglo-American model that determined that it was the common law legal culture that developed the institution of plea bargaining? In particular, the considerations of Langbein, who, in search of an answer to the question posed in this way, draws attention to several categories of factors, seem interesting in this context. The first is, of course, the central role of the defendant's plea, that is, his statement of guilt, as fundamentally shaping the subsequent course of the proceedings. In a system in which, historically since the earliest times, the defendant's declaration of acceptance of his responsibility meant that he waived his right to a trial, thus opening the way for the adjudicating court to issue a guilty verdict and decide on punishment without the essential part of the evidentiary proceedings,⁴⁴ such a construction of the defendant's procedural position provided a significant impetus for legal practice to develop instruments encouraging confessions as part of negotiations with the prosecution,⁴⁵

⁴¹ L.M. Friedman, 'Plea Bargaining in Historical...', op. cit., p. 257.

⁴² A.W. Alschuler, 'Plea Bargaining and...', op. cit., p. 42.

⁴³ T. Marzec, *Instytucja plea bargainingu w amerykańskim postępowaniu karnym – między ekonomią a sprawiedliwością*, Toruń, 2018, pp. 126–127.

⁴⁴ A. Ashworth, M. Redmayne, 'The Criminal Process...', op. cit., p. 291.

⁴⁵ As to the distinction in the Anglo-Saxon procedural model between the defendant's acknowledgment of responsibility (guilty plea) and confession, see H. Kuczyńska, 'Pozycja

in contrast to the inquisitorial model of continental Europe, in which the defendant's explanations and statements on the issue of responsibility constitute only one item of evidence among those obtained in the course of the trial, which, while undoubtedly relevant, is nevertheless subject to evaluation by the court on an equal footing with other categories of evidence.⁴⁶ Another element of significance for the development of the practice of plea bargaining in the criminal procedural systems of England and Wales and the United States of America was the traditional attachment of those legal systems to trial by jury,⁴⁷ combined with significant resistance to replacing this model of procedure with a bench trial model, i.e. a process in which the power to decide on factual findings and the application of the law is concentrated in the hands of a court of professional or mixed judges. The right to a trial by jury, established in the British system in the period following the fall of the Stuart dynasty and transposed to the United States, where it found constitutional legitimacy, has historically been treated in the literature as an important safeguard for the protection of the rights of the accused, and this view prevented the evolution towards approaches more akin to the continental model, also in the period when the adversarial transformation of the Anglo-American process deprived the jury of its earlier effectiveness.⁴⁸ Finally, in the context of the Anglo-American system itself, another factor important for the development of consensual modes seems to have been the strong tradition of private prosecution mentioned earlier, fostering a conception of the trial as a dispute between equal actors with authority to dispose of its subject matter – and thus to resolve the conflict arising from the commission of a crime by agreement.⁴⁹ The indicated elements, as a consequence, led to the formation in the procedural orders of the United States of America and England and Wales of the phenomenon of negotiated settlement in its current form, which is far more extensive than in the countries of continental Europe. In conclusion, it should be stated that, contrary to the popular beliefs sometimes expressed in the literature on the subject, which treat the Anglo-American model of criminal process as characterised by the adoption of a strictly adversarial structure from its historical dawn, such a picture of this process has a much shorter pedigree, as does plea bargaining itself.

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⁴⁶ J.H. Langbein, 'Understanding the Short History...', op. cit., pp. 267–268.

⁴⁷ P. Darbyshire, 'The Lamp That Shows That Freedom Lives – Is it Worth the Candle?', *Criminal Law Review*, 1991, No. 10.

⁴⁸ J.H. Langbein, 'Understanding the Short History...', op. cit., pp. 269–270.

⁴⁹ Ibidem, p. 266.

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